CHAPTER XVII

OF OFFENCES AGAINST PROPERTY

Of Theft

378. **Theft.**- Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1.-A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.-A moving effected by the same act which effects the severance may be a theft.

Explanation 3.-A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by seprating it from any other thing, as well as by actually moving it.

Explanation 4.-A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.-The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a cercain direction, in order that he may dishonestly take the treasure. As soon as the bullock begings to move, A has committed theft of the treasure.

(d) A being Z's servant, and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it. A commits theft.

(g) A finds a ring lying on the high-road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the

intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonstly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly ; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives a valuable property, which A knows to belong to her husbad Z, and to be such property as she has not authoity from Z to give. If A takes the property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

379. **Punishment for theft.**-Whoever commits theft shall be punished with imprisonment of either descrption for a term which may extend to three years, or with fine, or with both.

Synopsis

1. What is theft.
2. Dishonest intention.
3. "Out of possession of any person".
4. Moves that thing in order to such taking.
5. Consent.
6. Temporary removal of property.
7. Bonafide claim of right.
8. Theft of fish.
9. Theft of cattle.
10. Theft of trees.
11. Theft of crops.
12. Removal of property by owner.
13. Joint possession.
14. Question of title.
15. Servant assisting or obeying his master.
16. Servant taking away master's goods.
17. Evidence and proof.
18. Legal presumption from possession of stolen article.
19. Stolen articles recovered but not produced before court.
20. Stolen property recovered from joint possession.
21. Restoration of stolen article.
22. Punishment.
23. Charge.

1. **What is theft**.- Theft, accordng to the definition give in section 378 of the Penal Code, consists of : (i) moving movable property of a person out of his possession without his consent, (ii) the moving being in order to the taking of the property with a dishonest intention, thus, (a) the absence of the person's consent at the time of moving, and (b) the presence of dishonest intention in so taking and at the time, are the essential ingredients of the offence of theft (PLD 1957 SC (Ind) 317= AIR 1957 SC 369 (377). The permanent deprivation of the owner is not an ingredient of the offence of theft as defined in section 378 of the Penal Code though this may be an important ingredient in English Law. Under section 378 of the Penal Code all that is necessary to constitute the offence of theft, is the dishonestly taking of any movable property out of the possession of any person without that person's consent (PLD 1959 Azad J & K 35). The offence of theft consists of two essential parts one comprises certain objective facts and the other relates to a subjective state. The first part consists of the act of removal of a moveable property out of the possession of another without his consent and the other is a mental act, namely, dishonest intention (Shahjahan Mia Vs. The State, 27 DLR (SC) 161). The section may be disected into its component parts thus : a person will be guilty of the offence of theft, (1) if he intends to cause a wrongful gain or a wrongful loss by unlawful means of property to which the person gaining is not legally entitled or to which the person losing is legally entitled, as the case may be; (2) the said intention to act dishonestly is in respect of moveable property; (3) the said property shall be taken out of the possession of another person without his consent; and (4) he shall move that property in order to such taking (Pyarelal Vs. State of Rajsthan, AIR 1963 SC 1094 (1097 and 1098).

The disputed hut was in the jimma of the complainant. The petitioners forcibly removed the same and took it away in spite of the compolainant's protest. Such taking of property from the possession of the jimadar constitutes offence under section 279 Penal Code (Idris Vs. State (1991) 43 DLR 245= 1990 BLD 352). In Ram ratan Vs. State of Bihar (AIR 1965 SC 926 (73), the Court held that when a person seized cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gave out that he was taking them to the cattle pound committed no offence, however, mistaken he might be about his right to that land or crop; that the remedy of the owner of the cattle so seized was to take action under section 20 of the Cattle Trespass Act and that the owner had no right to reduce the cattle by force. The question in that case arose whether illegal seizure of cattle amounted to theft (Dayal vs. Emperor, AIR 1943 Oudh 280, cited in AIR 1965 SC 926 (931).

In a case where the complainant alleges that the accused persons had caused wrongful loss to her, she has to prove that the loss was of proeprty to which she was legally entitled. It is not enough if she proves mere possession of the property (Dhananjoy Sen Mahesh Chandra Sen Vs. Smt. Chandra Bashi Sen, wife of Mahim Chandra sen (1961) 2 CrLJ 435 (436).

The taking out of the Harvard aircraft by the appellant for the unauthorised flight gives the appellant the temporary use of the aircraft for his own purpose and temporarily deprives the owner of the aircraft, viz, the Government, of its legitimate use for its purposes, i.e. the use of this Harvard aircraft for the Indian Air Force Squardon that day. Such use being unauthorised and against all the regulations of aircraft-flying, is clearly a gain or loss by unlawful means. The true position, however, in a case of this kind is that all the circumstances of the unauthorised fight justify the conclusion both as to the absence of consent and as to the unlawfulness of the means by which there has been a temporary gain or loss by the use of the aircraft

(K.N Mehra Vs. State of Rajasthan, AIR 1957 SC 369 (372, 373) = 1957 SCA 364 = 1957 SCJ 386=1957 CrLJ 552). There can be no theft where there is no dishonesty. Since the definition of theft requires that the moving of the property is to be in order to such taking, "such" meaning "intending to take dishonestly", the very moving out must be with the dishonest intention (K.M. Mehra Vs. State of Rajashtan, AIR 1957 SC 369(372) = 1957 SCC 364 = 1957 CrLJ 552).

The essential element of theft is that movable property should have been moved out of possession of any person without his consent (Vishwanath Takara Vs. State AIR 1979 SC 1825).

2. **Dishonest intention.**- Dishonest intention must be present at time of taking of property. Mere taking away something honestly on a bona fide belief of right one day and then appropriating the same the next day even dishonestly may not amount to thieving (1982) 34 DLR 59). A person can be said to have dishonest intention if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. The gain or loss contempolated need not be a total aquisition or a total deprivation but it is enough if it is a temporary retention or a temporary keeping out (AIR 1957 SC 369). Therefore the prosecutor in order to prove dishonest intention of the accused can prove either wrongful gain to the accused or wrongful loss to the owner of the property or both (1961 (1) Cr. LJ 685). It has been held that taking out of aircraft, viz, the Government of its legitimate use for its opurposes. Such use being unauthorised and against all regulations of aircraft flying is a gain or loss by unlawful means (AIR 1957 SC 369). Where the accused manifestly took away bamboos with the intention of causing wrongful loss to the proprietors who were entitled to them (AIR 1931 Pat 337) or where a person, whether he is the owner or a stranger, removes cattle from the pound where they are secured, without opaying the legitimate fee, he has undoubtedly the dishonest intention of saving himself the fee, and his act amounts to theft (AIR 1931 Mad 18).

Wrongful gain to the thief is not necessary, loss caused to the owner by removal of stolen, articles is enough to sustain conviction for an offence of theft (1967 CrLJ 1053=AIR 1967 Raj 190). The complainant bought some fish from a local dealer. The accused snatched the fish from the complainants hand at the same time taking all the fishes of the local dealer. When the complainant protested, the accused, together with others, surrounded him and threatened to assault him. The local dealer was a new comer and the accused who was the matter of purchase from the fisherman. It was held that the accused clearly was guilty of offence under section 379 (AIR 1943 Cal 73=43 CrLJ 886).

Removal of property under attachment amounts to theft provided the removal is accompanied with dishonest intention (1958 crLJ 1430 Raj=1952 CrLJ 396). A person acts dishonestly if he temporarily dispossesses another of his property (AIR 1963 SC 1094).

3. **"Out of possession of any person".**- The word 'possession' contempaltes possession of that character of which a thing is capable, depending upon the degree, of control exercised or power to exercise in respect of movable property. The stress is laid not on the actual physical possession of the movable property but on the control and the power to deal with that property. In each case, the degree of control and the powers exercissable vary with that the type and nature of the movable property situate in different places under different circumstances. There is no universal rule that is applicable to conclude whether a person was or was not in possession of a movable property within the meaning of section 378, as it depends

upon the facts of each case. The silver forks in the hands of the guest at a dinner are still considered to be in the possession of the host. If the silver forks are pledged with a pawn-broker, the cease to be in the possession of the owner but they are considered to be in the possession of the pawn broker who has the legal custody and control (1968) 1 Andh LT 254).

A person in leaving the cycle temporarily outside the market with a view to come back and take it does not abandon or loses it. The cycle cannot be said to have been out of his possession, at any time, and consequently dishonest removal of it out of his possession would amount to theft and not mere criminal misappropriation (1954 CrLJ 542).

In the absence of proof of transfer or of abandonment by him of his possession and in the absence of any loss which takes away his right to possession a person may not lose his possession of an article simply because he keeps the thing at a public place. Once it is made out that the concrete slabs were put on the water channel by the respondent, unless it is proved that he has abondoned possession thereof, or that the ownership or possession passed to the PWD the slabs continued to belong to the respondent and in his possession. Therefore a dishonest removal thereof by another without his consent would amount to theft (1982 CrLJ 309) Ker).

The property, which is the subject matter of a theft, should be in possession of someone else than the person charged with theft (PLD 1967 Lah 65). Where the goods were not removed from the possession of another person, no offence is said to have been committed. Thus where goods were given in the custody of a truck driver A, and he took with him another truck driver C and allowed him to drive the truck. On the way C told the agent of the owner of the owner of goods to bring a packet of cigarettes. When he alighted from the truck, C drove off. It was held that no offence under section 379 was committed because the goods were in the possession of A and they continued to be in his poossession even when A and C drove off. The position would have been different if goods had been in the custody of the servant of the owner because in that case both A and C would have been guilty under section 379 (PLD 1961 Dhaka 171 DB). Where a tenant removed trees from the land in his possession, his landlord cannot complain that he was guilty of an offence under section 379 (PLD 1967 Lah 65).

Merely giving a movable property to another for safe keeping for a short time does not mean that the owner has lost possession of the thing. Therefore if the owner A has tied his she calf in the courtyard of his neighbour B, in the interest of opubic peace, and subsequently B removes it from there, he is guilty of theft of the property of A (AIR 1929 Pat 429). Similarly if a person extracts one of the papers from a file in possession of another, which the person extracting has been allowed to inspect, he is guilty of theft (AIR 1925 Lah 327).

In certain cases the real owner may also be guilty of theft of his own property. If the property alleged to have been stolen was removed from the possession of one person who may not even be the rightful owner of the same but having a right to hold the same against the owner, there would be theft (1982) 34 DLR 59=PLD 1960 Lah 149=PLR 1960 (2) WP 608).

4. **Moves that thing in order to such taking.**- The offence of theft is completed when there is a dishonest moving of the property even though the property is detached from that to which it is secured. But for moving the property the offence of theft is not compoleted, though it may still be an attempt. The section does not require that the thing stolen should be moved to any place or to any extent, or indeed that it should have been permanently displaced. If the thief moves the goods

even an inch from the palce where they lay, the offence would be compolete even though he may then leave them alone. Even when a single motion towards changing the place or position of in any manner or towards the carrying, conveying, drawing, pushing or the like from one place to another or impelling, shifting of the subject matter of theft is brought home to the accused, the offence of transportation (moving) is complete. This moving must necessarily be with intent to take dishonestly or must be connected with that intention or otherwise there may be moving but no theft (AIR 1958 Mad 476). Moving may even be indirect. Thus though a man may not cut grass from another person's land yet he may send his cattle to graze on the land. In the latter case also, he is guilty of an offence under section 379 (AIR 1942 Mad 724).

5. **Consent.**- Where things are moved with the consent of the owner the offence of theft is not committed. If crops from attached land are removed with the consent of the judgment debtor, the person removing the crops is not guilty under section 379 (AIR 1935 All 214). Even where the consent of the owner is not taken, the mere taking without consent does not prove dishonesty and therefore in such a case a charge of theft under section 379 of the Penal Code is not sustainable (PLD 1960 Dhaka 64=(1959) 11 DLR 387).

Consent may be express or implied. Where the facts show that the complainant had impliedly given consent to the taking of a thing no offence under section 379 is committed. Thus where a person was charged with theft i.e. the removal of a box belonging to himself from the possession of the station master ofthe railway administration and causing wrongful gain to himself in the form of compensation for the loss of the box, the conviction for theft could not be sustained for the reason that the accused removed the box with the implied consent of the station master when he paid for certain excess charges on it (AIR 1916 All 89). But where the taking is done stealthily and there is nothing to show that the implied consent was in fact given, no presumption as to consent can be raised (AIR 1955 NUC (Raj) 4646).

Moving of property from the complainant without his consent is theft (1961) 2 CrLJ 453). The taking of property moved with a view to obtain possession amounts to theft (13 CrLJ 131). Even where consent from the person in possession is obtained by deceit it will not amount to theft (1960 CrLJ 1646).

6. **Temporary removal of property.**- To commit theft one need not take movable property permanently out of the possession of another with the intention not to return it to him. It would satisfy the definition if he took any movable property out of the possession of another person though he intended to return it later on (AIR 1963 SC 1094=(1963) 2 CrLJ 178). Therefore if dishonest intention, absence of consent, and the moving are established, the offence is complete, however temporary may have been the proposed retention of goods (PLD 1963 Lah 384; AIR 1957 SC 369 = 25 Cal 416 (DB).

Where the accused temporarily removed a file from his office and, after it had been perused by another, and some papers has been substituted in it, brought it back to the office, he was guilty of theft (AIR 1963 SC 1094). The accused snatched some books from a boy as he was coming out of school and told the boy that he would return the books if he came to his house. It was found that the object of the accused was to get the boy into his house and commit an unlawful offence upon him. It was held that under the law, theft may be committed even where there is no intention to deprive the owner of the property permanently (12 CrLJ 580=8 ALJ 1237).

A contractor for payment of grazing dues seized an animal of the complainant although the latter had already paid the dues. The contractor subsequently

attempted to return the animal to the complainant who refused to take it back. The accused was held guilty as the complainant has caused a wrongful loss although the contractor did not intend to deprive the complainant permanently of the animal (42 CrLJ 625=AIR 1941 Lah 221).

7. **Bona fide claim of right.**- Where bonafide claim of right exists, it can be a good defence to a prosecution for theft (Arjuna Rana Vs. Akbar Tanty and orthers 1989(2) Crimes 459 (Ori); AIR 1965 Mad 483). A plea of *bona fide* claim has always a reference to the existence of an honest belief on the mind of the accused that he has a legal right to the property he takes. A claim of right is said to be bona fide when there is either a legal right or appearance of a legal right on colour of a legal right. Colour of legal right means a fair pretence of a right or a *bona fide* claim of right however weak (1974) 1 CWR 271).

If the claim is not made in good faith but is mre colour or pretence to obtain or keep possession of such property it will not be available as a defence (1974) 1 CWR 271 = 27 CrLJ 448). Existence of a bonafide right is sufficient defence in a theft case (AIR 1962 SC 586; AIR 1965 SC 585). Even though the claim is made under a mistake notion of law or unfounded in law yet the act of removal done in enforcing such claim would be saved from being theft provided the accused honestly believes in such claim and further believes that the property taken by him is his and that he has a right to take the same. It is always a question of fact, when such a plea is raised, whether such a belief exists or not. Mere existence of right, appearance or colour of a legal right in the facts and circumstances of a particular case would not exonerate the accused. He must claim such a right and the claim must be *bonafide* (1969 Out LT 889=17 CrLJ 456=AIR 1917 Cal 684). When a person seizes cattle on the ground that they were tresspassing on his land and causing damage to his crop or produce and gives out that he is taking them to the pound, he commits no offence of theft however mistaken he may be about his right to that land or crop (AIR 1965 SC 926).

Removal of property on a bona fide claim of right, though unfounded in law and fact, does not constitute theft, but such a claim must not be a colourable one. Whether the claim is bona fide or not has to be determined upon the facts and circumstances of each case. (PLD 1965 Dhaka 315). An act does not amount to theft, unless there be not only no legal right but no appearance of colour of a legal right. By the expression colour of a legal right is meant not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however weak (AIR 1965 SC 585; AIR 1962 SC 586). When the accused sets up the defence that he had a claim to the property which he took away from the compolainant, the prosecution must establish dishonest intention to show that this so called claim was not made in good faith, but as only a cloak to conceal the dishonest intention and that the accused himself knew that there was no substance in the claim. Theft can be established only by proof of dishonest intention and not by proof of illegality. The case against the accused was that they removed jack fruits, etc. from the ail of the complainant. The complainant, however, failed to prove that the disputed ail was in his possession and that the accused removed the jack fruits etc. with dishonest intention. It was held that the offence of theft was not proved. (AIR 1965 Tri. 42).

Dishonest intention cannot be said to be present when the property is removed in assertion of a bona fide claim of right though unfounded in law and fact. Again if the claim is asserted in the presence of the complainant and the property is removed in his presence, it cannot be said that the property is not removed in the assertion of a bonafide claim of right. It is, no doubt, true that a mere colourable pretence to obtain and keep possession of the property does not negative dishonest

intention but the question whether the removal of property was in assertion of a bonafide claim of right must be determined upon all the circumstances of the case and a court cannot convict unless it holds that the claim is a mere pretence. (AIR 1953 Madh B. 79). It must however be noted that thefts are not always committed secretly and a bonafide claim cannot be inferred from the fact that petitioners acted openly while cutting timber not owned by them (AIR 1934 Pat 491;36 CrLJ 120).

Where there is a bonafide dispute as to title to a tank between the accused and the complainant, the accused cannot be convicted for taking fish from the tank (1936 Mad W.N. 986). Similarly a conviction for theft of grass cannot stand if ther is a dispute between the complainant and the accused as to the ownership of the land on which the grass grew (14 CrLJ 659 Lah). Where P had in his possession 40 baskets of paddy out of which S was entitled, under a decree of civil court, to 35 baskets and S took the 35 baskets of paddy out of P's possession without his consent, it was held that the act he was entitled by law to do so, he could not be convicted of theft (AIR 1949 All 180). Where an automobile corporation sold a truck to the buyer under a hire opurchase agreement. On default the payment of an instalment towards the price of the truck, the corporation, in exercise of default clause contained in the agreement, had the truck removed by its Inspector from out of the possession of the buyer. The buyer lodged a complaint of theft of truck against the Inspector and one of the partners of the corporation. In his complaint the buyer alleged that he had paid the full price of the truck and obtained a receipt from the partner. It was held that the title to the truck being in dispute, there could not conviction for theft (AIR 1964 All 433). Where the accused caught and removed fish on their claim of right to the tank and to the fish therein which had been upheld by the civil Court. They could not be held guilty of theft (AIR 1962 Tri 25). Where attachment made in execution of a decree of the court was set aside when claim of a third party was allowed. The decree holder could not be convicted of theft because he acted bona fide on the decree of the Court (AIR 1941 Mad 799).

Where the accused at the time of taking the bullock had a *bona fide* belief that they had a right to demand and take away another bullock from the complainant replacement of the one first sold by the complainant to them and the accused made this belief known to the complainant at the very time it was held that the claim of the deceased to the bullock could not be held to be a mere pretence and through it might have been unfounded in law or fact, that by itself was not sufficient to infer the conclusion that they had dishonest intention in taking the bullock (AIR 1953 MB 79 = ILR 1953 MB 35; 1983 CrLJ 600).

An act does not amount to theft, unless there be only no legal right but no appearance or claim of a legal right. By expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim but a bonafide claim, however weak (1972 MLJ (Cr) 248=(1962) 1 CrLJ 518 SC). Where the accused removed bricks from Khandhar without paying part of amount of auction money which was a condition precedent for visiting contingent title in him to the Khandhar, it was held that the accused was guilty of theft, as the fact that the accused acted in excercise of *bona fide* claim if right was not estblished (1969 All WR (HC) 531 = 1969 All Cr 346).

Mere assertion of *bona fide* claim is not enough. There must be facts or evidence in order to make out the said claim. Where there is clear plea and evidence of *bona fide* title, the prosecution should be dismissed and complainant left to civil remedy. Criminal case should also be thrown out when there is doubt regarding the *bona fide* claim (1953 CrLJ 1035=AIR 1953 Mad 516). The assertion of a claim of right must be sufficient to create a reasonable doubt that the property which is the

subject matter of theft may not belong to or be in the possession of the complainant (AIR 1958 Mad 476=1958 CrLJ 1198).

The accused removed fish from a tank in spite of the protest by the complainant. At no time was the complainant in undisputed possession of the tank. He was said to have got into possession when the dispute was pending in the Civil Court between his vendor and the lessor of the accused. The civil Court had subsequently declared the title of the lessor of the accused in the tank. It was held that the case of the fish in the tank could not be taken separately from the ownership of the tank. The accused caught and removed the fish on their claim of right to the tank and to the fish therein which had been upheld by the civil court. It could not, therefore, be said that dishonest intention had been proved agianst the accused (1962) 1 CrLJ 766 = AIR 1962 Tri 25).

Where the accused were agitating for possession of land however weak or slandar the right might have been, the fact that they were litigating for it showed that they had believed bona fide that they had the right (Md Siraj Ali Vs. State 1985 CrLJ 91 Gau).

Where a Civil Court held that a certain property with standing crops belonged to the complainant and not the accused and two weeks thereafter the accused cut the crop on the said property it can not be said that the plea of the accused was *bona fide* (Venkatkishenrao Vs. State AIR 1951 Hyd 78).

Where there is clear case of bonafide claim of title the criminal case must be dismissed and the parties should refer to a civil suit. Where the case relates to theft of crop the answer will depend upon as to who raised the crop and whether the claim of the accused is made in good faith (Sheik Ahmed vs. State, AIR 1956 Mys 49=1956 CrLJ 902).

In Chandikumar Das Karmaker Vs. Abanidhar, AIR 1965 SC 585=1964 SCD 2871= (1964) 1 SCJ 419 the following propositions in relation to bonafide claim bearing on the offence of theft was laid down :

(i) offence of theft is not complete without existence of the dishonest intenton known as *animus furandi* in the person who removes any moveable property out of the possessions of another without the latters consent; (ii) the intention is dishonest when the accused intends to cause wrongful gain to himself and wrongful loss to the other; (iii) where an act of taking is done under a claim of right made in good faith and such a claim is a reasonable one, it does not amount to theft; (iv) Even though the claim is made under a misaken notion of law, yet the act of removal done in enforcing such claim would be saved from being 'theft', provided the accused honestly believes in such claim and further believes that the property taken by him is his and that he has a right to take the same; (v) It will always be a question of fact, when such a plea is raised by the accused, whethr such belief exists or not. Thus a plea of bona fide claim of right has always a reference to existence of an honest belief in the mind of the accused that he has a legal right to the property he takes. a claim of right is said to be bonafide when there is either a legal right or appearance of a legal right. Colour of legal right has been explained to mean a fair pretence of a right or a *bonafide* claim of right, however weak.

It is a settled view of law that the existence of a *bona fide* right is a sufficient defence to a prosecution for theft and an act does not amount to theft if there is an appearance or colour of a legal right. The colour of a legal right means not a false pretence but a fair pretence, not a complete absence of claim but a bona fide claim, however, weak. This test was applied in Chandi Kumar Vs. Abani Dhar (AIR 1965 SC 585), which was also a case of catching fish from a tank in which the parties had set

up rival claim (Sukumar Mudi Vs. Satish Chandra Hazra, 1989 C. cr. LR 225(226, 227 Cal); Sangsi Apparao Vs. Boddepalli, AIR 1962 SC 586 and Chandi Kumar Vs. Abanidhar AIR 1965 SC 585 relied on).

There is nothing unreasonable in the view taken by the Sessions Judge that as the accused persons had removed the paddy crop in exercise of their bonafide claim of right they are entitled to an acquittal of the charge under sections 379/34, Penal Code (Arjuna Rana Vs. Akbar Tanty, 1989 (2) Crimes 459 (461) Ori.) Where property is removed in exercise of bonafide claim of right, accused is entitled to acquittal (Arjuna Rana Vs. Akbar Tanty 1989 (2) crimes 459 (461) Ori).

8. **Theft of fish**.- Fish in their free state are regarded as ferae nature but they are said to be in possession of a person who has possession of any expanse of water such as a tank, where they live out from where they cannot escape. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any bonafide claim of right (AIR 1965 SC 585=(1965) 1 CrLJ 496). Taking of fish from a pond which overlaps the land of the accused is not theft (1989 C. CrLR 194 (196) Cal).As long as water flows in and out of the pond, thereby enabling fish to enter and leave it, the fish are free and in a state of nature; and so no more belong to the owner of the pond than a bird that of settles on a tree in a person's garden belongs to that person; but when once the water has fallen to such a level that fish cannot leave it, then they are trapped and concequently, in the possession of the owner of the pond. That being so, any person who takes fish from that pond without the owners consent without intention to cause him loss, necessarily commits theft (AIR 1943 Mad 34=(1942) 2 MLJ 556=1942 MWN 728= 44 CrLJ 173). Removal of fish from a public river is not theft (17 DLR 211= PLR 1964 Dhaka 1098; 13 CrLJ 22 DB).

The catching of fish in a tidal and navigable river without taking the permission of the licensee of the fishery from the government, does not amount to theft as the fish cannot be said to be in the possession of the licencee. In a tidal and navigable river the fish can always escape and go wherever they like; they can always come from and go into the sea; they are in a state of ferae naturae, i.e. in a state of nature. The licensee or lessee of the fishery from the Government has nothing more than a right to catch fish in a particular area (AIR 1950 Ori. 106=ILR (1949) 1 Cut 740=51 CrLJ 885 DB).

Therefore removal of fish from a tank which overflows and thus gets connected with the flowing streams and makes it possible for the free ingress and egress of fish from it is not theft (Idris Ali Vs. State, 17 DLR 211=PLR 1964 Dhaka 1098).

9. **Theft of cattle**.- The taking away of the cattle which have not trespassed and caused damage to the crops, to the cattle, pound, without the consent of the owner would amount theft even though the person taking them may not have the intention of having any wrongful gain to himself (1965) 1 CrLJ 476=1964 Raj LW 627=(1963) 1 CrLJ 308 Ori). When a person seized cattle on the ground that they were trespassing on his land and causing damage to his crop or produce and gives out that he was taking them to the pound, he commits no offence of theft, however mistaken he may be about his right to that land or crop (1965) 2 CrLJ 18=AIR 1965 SC 926).

Where a person, whether he is the owner or a stranger, removes cattle from the pound where they are secured, without paying the legitimate fee, he has undoubtedly the dishonest intention of saving himself the fee, and his act amounts to theft (AIR 1931 Mad 18 = 1930 MWN 529 = 32 CrLJ 354).

In a case of alleged theft of sheep, the accused showed receipt of heir purpose at the stage when the charges were framed. In an appeal against acquittal, it was contended that the defence had sprung a surprise on prosecution which should have been shown at the time of ivnestigation (1984) 1 Crimes 613).

10. **Theft of trees.**- Generally a tenant of residential premises is not entitled to cut trees growing in the compound of the premises. If he cuts and appropriates them to his own use he would be guilty under section 379 of the Penal Code (1957 All LJ 917). The offence of theft is an offence against possession and when the tenant too is in possession cuts down a tree standing on the land and removes the wood thereof, no offence of theft is committed (1964 Ker LT 774 = AIR 1985 Pat 472 = 37 CrLJ 91).

Where a tenant *bona fide* believing that he is entitled to the trees planted by him on the holding removes them, he cannot be convicted of theft (8 CrLJ 275). Where a tenant took some wood from the forest of the landlord for manufacturing ploughs in good faith thinking that they had a right to do so by usage. It was held, that the element of dishonesty was wanting and there was no theft (1 Weir 411).

Where the co-sharers had by mutual arrangement divided the land although there had been no formal division by metes and bounds. The accused co-sharers encroached on the land in possession of the others and took away trees growing thereon. It was held that in such cases the exclusive possession and not actual division by metes and bounds is the deciding factor. Therefore, the accused were guilty of an offence under sections 379 and 447, Penal Code (Aftabuddin Vs. State 17 DLR 479).

The complainant alleged that the accused had cut trees from his land situated adjoining to the land of the accused who countered it by asserting that tree cut stood on his land. The trial Court did not record a specific finding as to from where the timber (30 wodden plants) were obtained with the result that the trial Court ordered its restoration to the accused. No appeal from the judgment of the Court in the case of theft was preferred but its release in favour of the complainants was challenged. The direction was that the timber should be returned to the complainant. In a petition under section 482, Cr. P.C. it was contended that the findings ont he subject is not specific and as such there could be no departure from the rules of restoration of movable property to the party from whom it was recovered. Held, no special reasons existed for the departure from the rules (1984) 1 Crimes 39).

Where the question of the right of a raiyat of the estate to take firewood from a jungle outside the boundaries of his village was a vexed one and that jungle kar on the rent of the raiyats was in vogue for a generation, the accused could not be considered to have acted dishonestly and not in pursuance of a bona fide claim of right and conviction for theft was illegal (AIR 1931 Pat 99). Where the pourchaser at an auction sale of trees belonging to Municipality removed them before the auction was confirmed. It was held that removal was in the bona fide belief that the accused could remove them as pourchaser at auction sale and therefore he could not be convicted under this section (27 CrLJ 1313 Lah).

11. **Theft of crops.**- If a person in assertion of a bonafide title accruing before the attachment, remove the crops, he cannot be said to be acting dishonestly or fraudulently (AIR 1935 All 214=1935 ALJ 63 = 1935 AWR 59 = 36 CrLJ 340). It is sufficient in a case of theft of crops to constitute an offence under section 379, that the complainants owed the crops and it is immaterial that he had no title to cultivate the fields (AIR 1921 All 158 = 19 ALJ 961= 23 CrLJ 402). In case where the alleged theft consists in removal of crops grown on the land if the accused claims an interest

in that land, that will not be a sufficient defence for him. He can only have good defence if he can show that the crop belongs to him (Fakira Uraon Vs. Gandura, 1961 BLJR 541).

The accused having been a trespasser on the land at the time the paddy was grown, he had no right to go upon the land after the complainant had obtained possession under a decree of court and removed the paddy. Consequently when the paddy was cut, accused had no right to remove it and there was no bonafide dispute. The acucsed was therefore guilty of theft (AIR 1919 Cal 588=23 CWN 385 = 20 CrLJ 38).

One S obtained rent decree against R and put his holding to sale and purchased it himself and obtianed delivery of possession. But in the meantime before the purchase of the holding by S.R had instituted a civil suit to have the rent decree set aside as obtained by fraud. Pending this suit, R with his companions dug up potatoes from the holding and removed them. Subsequently the rent decree was set aside and the sale to S was no longer valid. It was held that, in the circumstances of the case, R could not be held to have any dishonest intention when he removed the crops while he was contending that the rent decree and the sale under which his holding was supposed to have passed on to S was not binding on him as having been obtained by fraud and he could not be held guilty under section 379 (42 CrLJ 339).

Before convicting a man of theft of crops on some land, it is necessary to find out who was in actual possession on that date. A mere order for delivery of possession is not conclusive (AIR 1917 Mad 898). Where the accused is declared to be in possession of the crops in a prior criminal case between the same parties he cannot be held guilty under section 379, if he removes them from the land, before the previous case is decided against him in appeal (AIR 1923 Pat 532). Where the compolainant's possession of land was recent and after his purchase of the land there was trouble between him and the accused, who claimed it since shortly after the record of rights, it could not be held that the claim of the accused to present poossession on the date when he got the crop on such land cut and removed was mala fide and he could not be convicted under section 379 (AIR 1944 Pat 274). The mere interference at one occasion with the possession of the comoplainant by the accused would ot be sufficient to give him a right to remove the crop, it was for the civil court to determine the rights of the parties and that the accused had not committed an offence within the meaning of section 378 (38 CrLJ 223 Pat).

In cases where the alleged theft consists in the removal of crops grown on land, the most vital question to be investigated is as to which of the parties had grown the corps and a decision on this point will in a majority of cases enable the court to come to a definite conclusion as to whether the claim of the accused is made in good faith or is a mere pretence. Where the accused have been in possession of land and they have been cultivating and enjoying the land whether with or without title, he cannot be charged with an offence under section 379 for removal of crops from the land (PLD 1968 Dhaka 78). But it cannot be laid down as a universla rule that in every case where A removes crops grown by B, A necessarily commits an offence under section 379. But where a person is not in actual possession of the land for a number of years and knows that the land is in possession of another person and that other person has grown the standing crops onthe land and still removes the crops, he cannot contend that he removed them under a bona fide claim of right (AIR 1929 Pat 86). In such a case it is immaterial whether the complainant has or has not a good title to the cultivation of the field in question (AIR 1921 All 158). Conversely in the absence of evidence of possession, where it is found that crops which are the subject matter of an alleged theft were raised and grown by

the accused, it cannot be said that the removal of the crops by him was a dishonest act and he cannot be convicted of theft, merely because title to the land on which the crops were raised is found to be in another (AIR 1947 Pat 74). But if a person trespasses on land in the possession of another and sows paddy on it, that does not entitle him to property in the paddy that results from the sowing; and if the person in possession reaps and removes such paddy he does not thereby commit theft (4 CrLJ 465).

To prove the charge of theft, the prosecution must prove beyond the reasonable doubt that the crop standing on the disuted fields were grown by the complainant (1963) 1 CrLJ 826=1963 All WR (Sup) 34 = 1963 all Cr R 138). Where a person damages and removes unripe crops of another, he is not guilty of an offence under section 379 but he can be convicted under section 427 for mischief (1968 PCrLJ 972 = 1969 PCrLJ 359=20 DLR 428). If any labourer enters the land of his master and reaps the crops raised by his master without the latters consent or knowledge he is guilty of the offence of theft. If he pleads innocence he must himself take a defence that the entered the land, but did not know that the complainant master had grown the crops (1975) 41 CLT 135).

A prohibitory order was issued by a Magistrate in a proceeding under section 144, Cr. P.C. in respect of land in dispute restraining both the parties from going upon it. One party against the order entered upon the land and harvested the crops. The other party filed a complaint of theft. It was held that the complaint could not be said to be in possession of the land in view of the porohibitory order and therefore the charge of theft was not maintainable (1970 CrLJ 484= AIR 1970 Pat 102).

12. **Removal of property by owner**.- A person, who removes cattle from a pound where they are secured, without paying the legitimate fee, has the dishonest intention of saving himself the fee and is guilty of theft; it makes no difference whether the man who so removed is the owner himself or stranger (AIR 1931 Mad 18=1930 mwn 529=32 CrLJ 354).

Where an owner removes his property dishonestly from another, he would be guilty of theft. Where S filed a certain document in a civil court and subsequently on one occasion S snatched away that document from his lawyer's had and ran away with it. despite the fact that the document orginally belonged to S, a prima facie offence of theft was made out (1968 PCrLJ 866=1968 SCMR 434).

13. **Joint possession.**- A joint cultivator removing crops jointly cultivated cannot be convicted of theft, as he must be deemed to have been in possession of the property (10 ALJ 527=14 CrLJ 3=1970 ALL WR (HC) 178 = 1970 All Cr R 118). Where there are several joint owners in joint possession, and any one of them dishonestly takes exclusive possession, he will be guilty of theft (14 CrLJ 3).

When the co-sharers had by mutual arrangement divided the land although there had been no formal division by metes and bounds. The accused co-sharer encroached on the land in his possession of the others and took away trees growing thereon. It was held, that in such cases the exclusive possession and not actual division by metes and bounds is the deciding factor. Therefore, the accused was held guilty of an offence under section 379 and 447 Penal Code (17 DLR 479).

If there is no evidence of conversion of joint property to exclusive possession by the accused his mere removal of the property from one palce to another would not amount to theft (AIR 1953 Mad 516). Therefore a joint owner removing an animal in joint possession with another (AIR 1927 Lah 650) or a joint cultivator removing crops jointly cultivated cannot be convicted of theft, as he must be deemed

to have been in possession of the property (14 CrLJ 3 (All). Where a charge against the accused was that he had removed bamboo crop from the field and the accused pleaded joint possession of disputed land. The trial court convicted the accused under section 379 after summarily rejecting oral evidence and documents in support of joint possession of the accused, stating that the question of the accused being co-sharers is not to be looked into within the scope of this case. It was held that non-consideration of such evidence had seriously prejudiced the defence, and conviction of the accused was set aside 1969 PCr. LJ 312; 20 DLR 303).

A co-sharer in possession of joint property has the undoubted right to remove movable property in his possession and also in the possession of other co-sharers from one spot of the joint land to another spot of the same land. When some co-sharers in execution of a decree against one of them took possession through court and utilized some of the old materials of huts belonging to the co-sharers which had been blown away and built a hut on the same land; it was held that they were not guilty under section 379, there being no dishonesty on their part or any wrongful loss to other co-sharers (AIR 1936 Cal 261=37 CrLJ 747).

Where a co-parcener forcibly removed the joint property and more than five persons participated in the commission of offence, it was held that they were liable under section 395, Penal Code (ILR 1970 Bom 1). A co-owner of movable property with another, if his share is defined, can be guilty of theft, if he is found to remove the joint property without even an implied consent of the co-owner, with a view to cause wrongful loss to the co-owner and consequently wrongful gain to himself or anybody else (1966 crLJ 856).

Where the accused who were joint owners with the complainant cut some bamboo from the land and took it away, they were not held guilty of theft as they had acted on the basis of their joint ownership of the bamboo clump (Bauli Panigrahi Vs. State (1970 CrLJ 1704 Ori). A joint cultivator removing crops jointly cultivated can not be convicted of theft as he must be deemed to have been in possession of the property (14 CrLJ 3; 1970 All Cr Rep 118). A co-owner of a movable property with another can be guilty of theft if his share has been defined (1966 CrLJ 855).

14. **Question of title.**- The offence of theft is an offence against possession and not against title (1975) 41 CLT 35). The question in whom title to the land vests is foreign to the offence of theft (1974) 40 CLT 1059). For proving an offence under section 379, Penal Code, it is not necessary that the person who files the complaint should establish that he was the owner of the property (1977 ACC 243). In a trial under section 379, Penal Code, it is not the duty of the criminal Court to examine the complicated question of title (1963 cut LT 425).

In a case of alleged theft of sheep, the accused showed receipt of their purchase at the stage when the charges were framed. In an appeal against acquittal, it was contended that the defence had sugna surprise on prosecution which should have been shown at the time of investigation (1984) 1 Crimes 613).

15. **Servant assisting or obeying his master.**-A person who cuts paddy crop as a labourer under the direction of somebody else cannot be said to have remove the property with any dishonest intention from the possession of another, as to convict him under section 379 Penal Code (Sukchand Harjan and Ors. Vs. State of Orissa and Another 1988 (3) Crimes 48 (Ori). A servant may well be in a stronger position that his master because a servant might, in certain circumstances, honestly believe that his master was the owner of certain property whereas the master might well know that he was not. A servant should not be held guilty of the offence of theft when what he did was at his masters binding unless it should have been shown that he

participated in his masters knowledge of the dishonest nature at the acts (AIR 1940 Pat 588=41 CrLJ 509=1965 Cut LJ 601=15 CWN 414 = 12 CrLJ 7=AIR 1943 Oudh 444).

Where accused, a servant of co-accused, knew perfectly well that his master was removing the goods of complainant without even a pretence of right and yet he assisted him in doing, so, it was held that the servant clearly acted dishonestly and was guilty of theft (AIR 1926 Pat 36=90 IC 439=26 CrLJ 1559).

A person plucking jack fruits in ordinance to the order of his employer from the trees standing on a plot the right to share in the proceeds of which is desired to be asserted through the agent, is not guilty of theft, as no criminal dishonesty is proved (AIR 1917 Cal 98 = 38 IC 318=18 CrLJ 286).

16. **Servant taking away master's goods**.- The accused was employed by the complainant on wages. His wages for several months were due from the complainant and so he took away 15 Baras worth Rs. 16 belonging to the complainant and refused to give them back until his wages had been paid. It was held the technically the offence of theft was committed (AIR 1927 All 470=28 CrLJ 531). Where a servant wrongfully holds or removes property of his master, he is guilty of an offence under this section. Where the driver of a truck held it adversely to its owner with intent to sell it or for removing it somewhere, he was guilty of theft, as well as breach of trust (PLD 1968 Dhaka 229=(1967)29 DLR 68 DB).

17. **Evidence and proof**.- In the absence of an express finding regarding dishonest intention, conviction of an accused under section 379 cannot be maintained (Syed Idris Vs. The State, 24 DLR 101; 11 DLR 387). The accused charged with stealing cash from a fellow passenger, gave a false name and number when was first charged and the actual coins lost were found upon him and they were secreted and separated from his other cash. It was held that under the circumstances there could not be any reasonable doubt as to his guilt (2 MLT 498 = 7 CrLJ 218).

Where a person is found in possession of stolen property shortly after it was stolen, the Court may presume that he is thief under section 114, Illustration (a) Evidence Act. The presumption, however, is not to be made invariably. The circumstances of each case have to be considered for arriving at the conclusion as to whether the person found in possession of stolen property soon after the theft should or should not be considered to be the thief. The mere fact that there was no direct evidence establishing that the accused had stolen the property will not necessarily warrnat the expunging of the charge without going into the evidence (AIR 1934 All 455=35 CrLJ 1092).

To attract the provisions of section 379 Penal Code, the prosecution must establish the fact that the thing in question was dishonestly taken out of the possession of the person to whom it belonged without his consent. There being no evidence to the aforesaid effect and the only evidence being that the two witnesses saw the thing taking out by the accused person, even if their evidence is believed that would not constitute the offence of theft (Madadev Barik Vs. State of Orissa, 1989 East Cr. C 20 (21,22) Ori.).

Comission of theft is an individual act and there must be clear evidence in respect of each individual accused. For the same reason the Court is also required to consider the evidence against all the accused separately and record its findings (Abdul Mannan Vs. State 44 DLR (AD) (1992) 60).

In the present case it is not known where the oxen were removed from the possession of Ram Das during his lifetime. May be that they were removed after his

death, the benefit of any missing link in the chain constituting a criminal case has to go to the accused. It would be difficult to hold the two accused guilty of theft or even receivers of stolen property by resort to section 114, Illustration (a) of the Evidence Act. More appropriate Penal section to be applied to the facts found proved would be section 403 Penal Code (Guman Vs. State of MP 1989 CrLJ 1425 (1427) MP).

The admitted position is this that the disputed tank overlaps the land of the complainant and covers a portion of the land comprised in plot No. 518 belonging to the accused Narayan Das, who has already been acquitted by the trial Judge. There is no evidene that there is any barrier of embankment demarcating the lands of the complainant and of the accused. The fact is proved that the pond has overlapped and covered a portion of the land belonging to the accused Narayan Das. If Narayan Das was given a benefit of acquittal by the trial Judge, the question is why the same benefit should not be extended to the other accused who were engaged by Narayan Das and who took away the fishes at the instance of Narayan Das. It is clear from the evidence and from the defence that the accused Narayan Das accerted his right or a colour of title in respect of the portion of the pond which is covered by his own land (Gobordhan Datta Vs. Subhas Chandra 1989 CrRL 194 (196) Cal).

To secure conviction against more persons than one on the ground that all such persons were in joint possession of the stolen property, it must be proved that the stolen property was either in the physical possession of each one of the accused or else that it was in the possession, physical or contructive, of one or more of them on behalf of, and to the knowledge of, the other accused person and that each one of them intended to possess it for their joint use and to the exclusion of persons other than themselves (AIR 1929 Sind 9=29 CrLJ 924). The mere fact that an accused person point out the place in which the stolen property is concealed does not give rise to any presumption under section 114, Evidene Act, or justify his conviction for the offence of receiving stolen property still less for the offence of theft (AIR 1938 Bom 463=40 Bom LJ 927=40 CrLJ 48; AIR 1984 Nag 54; 35 CrLJ 581; AIR 1929 Lah 438=26 CrLJ 257).

Onus of proof, in a criminal case, is always on the prosecution. Complainant claims possession of the disputed vehicle through purchase from the accused. Evidence does not show that the complainant acquired right and title to the vehicle. Such possession by the complainant is not recognisable in law. Taking away the vehicle out of such possession without consent does not constitute an offence of theft. Findings when not based on evidence but on conjecture is liable to be set aside (Syed Ali Vs. The State, 26 DLR 392).

The burden first rests on the prosecution to prove that the amount seized from the accused formed part of the property stolen. It is only after the initial burden has been discharged by the prosecution that there is burden cast on the accused to explain as to how he came to possess the cash and the jewels (1971 CrLJ 1675). It is not necessary for the prosecution to prove that the physical act of lifting the stolen property was committed by an offender himself. It is sufficient if it is established by evidence or circumstances that he shared the intention of committing theft (1957 CrLJ 1060 All).Where the accused took upon himself the entire responsibility of cropping nuts no over act need be proved against him to justify conviction under section 379 (1972 MLJ 248 Cr).

Where there was rioting followed by theft and the Court convicted all the accused of offences under both heads without finding each accused guilty of theft on evidence against him; it was held that the Court should have found that each of the individual accused committed the offence of theft, inasmuch as each act of removal is an offence by itself (PLD 1959 Dhaka 139 = 10 DLR 518).Where the complainant as

well as prosecution witnesses make inconsistent statement which create a doubt as to the truth of the prosecution story, benefit of the doubt should be given to the accused (1982 PCrLJ 609). Where the witnesses are friendly towards the complainant and there are contradictions in their evidence, the benefit of the doubt, should be given to the accused (NLR 1981 CrLJ 136).

Where prosecution case is supported by evidence but a prosecution witness falsely introduces some contraditions, he should be ignored and the accused convicted (1968 PCrLJ 1911). Where the witnesses of the prosecution are lambardar and chowkidar of the village who are merely chance witnesses having been shown to be present conveniently at the place suited to the prosecution. They cannot be believed and the accused must be acquitted (NLR 1980 Cr. 27).

The ordinary rule that *mens rea* may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable, saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right. By the epxression 'colour of a legal right' is meant not a false pretence but a fair pretence, not a complete absence of claim but *bona fide* claim, however weak, if there be in the prisoner any fair pretence of property or right or if it be brought into doubt, the Court will direct an acquittal (Chandekumar Vs. Abanichar, AIR 1965 SC 585=(1964) 1 CrLJ 496=(1964) SCJJ 319, Anandi Sahu Vs. Narendra Naik, AIR 1969 Ori 70(72-73).

The trial Court had before it clear evidence of the witness, examined in the case, who proved the fact that the disputed land was cultivated by the complainant's men who also reaped the paddy sheaves and kept them in the khala of certain person, from where it was removed by the accused. It was also proved in the trial Court that the plea of the accused regarding their previous bhang cultivation of the land for a long span of years was not borne out by any acceptable material before the Magistrate and the accused had themselves admitted the fact of removal of paddy sheaves by them. It was held that there was no reason why the criminal Court should shirk its duty to decide the case on the material before it, and leave the matter to be decided by Civil Court (1959 CrLJ 212=AIR 1959 Ori 19).

18. Legal presumption from possession of stolen article.- Section 114 of the Evidence Act provides as mentioned in illustration (a), that a person who is in poossession of stolen goods soon after the theft is either the theif or has received the goods knowing them to be stolen, unless he can account for his possession (Hazari Vs. Emperor, AIR 1930 Oudh 353 (356); State Vs. Dulal Huzra, 1987 CrLJ 857 Cal).

The possession of stolen property recently after the commission of theft is *prima facie* evidence that the possessor is either the thief or the receiver, according to other circumstnces, when there is no acceptable explanation from the accused regarding the possession (Viramal Mulchand vs. State, AIR 1974 SC 334 = 1974 CrLJ 277). Recovery of tainted money led to the inferene of guilt where even according to the accused the money did not belong to him and he never claimed that it had come from any other source (Man Singh Vs. State, AIR 1973 SC 910=1973 CrLJ 383). If a person is found near about the place of commission of theft immediately before or after the commission of the crime and is subsequently found to be in possession of stolen property of which he fails to give any satisfactory explanation, the presumption may be drawn that he was a thief. Thus where the accused was found in recent and unexplained possession of stolen property it was presumed that he had committed the murders and the robbery (Baiju Vs. State 1978 SCC (Cri) 142).

Orinarily if a persons is found in possession of stolen goods within a couple of weeks of the theft, the presumption should be raised that he is a thief, but if the goods are found in his possession, say, after about a month it would be safe to presume that he is a receiver of the stolen property (PLD 1973 AJ&K 7).

As a rule the mere possession of stolen property by itself, is not sufficient to prove participation in the offence of theft. The onus will still be upon the prosecution to prove by evidence direct or circumstantial that the possession of such property, was also connected with the actual offence of theft. Where that is not done he can be convicted only under section 411, Penal Code (PLD 1978 Lah 1087=PLJ 1978 CrC 385). However the burden to prove that the property seized from the accused is stolen property lies on the prosecution. Only this burden is discharged can the accused be asked to explain his possession of the seized articles (Sathian Vs. State, 1971 CrLJ 1635 Mad). If the explanation given is one which the Court might think reasonable to be true, then the accused is entitled to acquittal even though the Court may not be convinced of its truth. This is for the reason that the prosecution would then have failed in its duty to bring home the guilt of the accused beyond reasonable doubt. Inference under illustration (a) of section 114, Evidence Act should never be reached unless it is a necessary inference from the circumstances of the given case, which can not be explained on any other hypothesis save that of the guilt of the accused (Mohammad Enayetullah vs. State (1976) 1 SCC 828).

Where within 17 days of the theft the accused was found in possession of large number of stolen articles shows that he was himself the thief and not the receiver of stolen goods. The case is not one wherein one or two or a very few of the stolen articles were found in possession of the accused. On the contrary the bulk of the articles were recovered from him. The number and nature of stolen articles (i.e. gold and silver ornaments) recovered soon after the incident from the accused raised the presumption that the accused had committed the theft (Ayodhya Singh vs. State 1972 CrLJ 1696 (SC). No presumption of theft or dishonest reception of stolen property was drawn when the recovery was two years after the occurrence (Chandmal Vs. State (1976) 1 SCC 621).

If there is other evidence to connect an accused with the crime itself, however small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. If the gap is too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger if the discovery of the booty of the crime is immediately after the crime (Shivappa Vs. State AIR 1971 SC 196 = 1971 CrLJ 260). Reovery of part of the chain from karrigotta paramba, belonging to some one else, pursuant to the information given by the accused was held to be sufficient to establish that the informant committed the theft (State of Kerala Vs. K. Chekooty, AIR 1967 Ker 197 (198).

On recovery of booty from the accused within three days after the occurrence of the dacoity, three presumptions are possible :

(1) That the accused took part in the dacoity; (2) that he received stolen goods knowing that the goods were stolen in the commission of dacoity; and (3) that the accused received the goods knowing them to have been stolen. In the instant case the accused was a cloth merchant and no cash money or jewellery was found in his possession. Only some stolen cloth was recovered from his possession. On the facts of the case the only legetimate presumption would be that he knew that the goods were stolen but he did not know that they were stolen in a dacoity (Sheonath Vs. State, AIR 1971 SC 196 = 1971 CrLJ 260).

Pursuant to information given by the accused, a stolen thing was found buried in some other poerson's land. The place and manner of concealment led to the concusion that the place of concealment could be known only to him who concealed it and in these circumstances , in the absence of any explanation by the accused as to how he came to know about the concealment, except a bare denial of his information statement, it was fare to assume that he had committed theft of the thing (Chekkootty Vs. State AIR 1967 Ker 197 = 1967 CrLJ 1332).

Presumption of murder.— Unexplained possession of jewels of the murdered can be evidence under section 114 of the Evidence Act, not only regarding theft but also regarding murder if the possession could not reasonbly be got without committing the mruder or where murder and robbery of the jewels are proved to have been integral parts of the same transaction. But, before any such presumption can be drawn, the primary thing to be proved is that the acucsed had no satisfactory explanation to offer for his possession of such jewels (Sundarlal Vs. State AIR 1954 SC 28 = 1954 CrLJ 257; Tulsiram Vs. State AIR 1954 SC 1; Sunny Vs. State AIR 1955 (NOC) sc 5807; 1978 CdrLJ (NOC) 80 Raj). It is well settled that in cases where robbery and murder are so connected as to form parts of one transaction the recent and unexplained possession of the stolen property would not only be presumptive evidence against the accused on the charge of robbery but also on the charge of murder (AIR 1978 SC 522 (526).

When a person is found in possession of the moveable property of a deceased and it is not ascertainable whether he removed the same from his possession during his life time, the offence committed will fall under section 403 (Guman Vs. State of MP 1989 CrLJ 1425 (1427) MP).

Recent and unexplained possession of stolen articles can well be taken to be presumptive evidence of the charge of murder as well (AIR 1956 SC 400; 1956 SCR 191; 1956 CrLJ 790). It has been held that the preusmption of being the murderer is invoked if the court is satisfied that the possession of the property could not have been transferred from the deceased to the accused except by former being murdered. The preusmption would be particularly applicable when there is a satisfactory proof that the ornaments were actually worn by the deceased immediately before the murder (AIR 1965 Orissa 33).

In a Rajasthan case of State Vs. Mohan Lal (AIR 1958 Raj 338), soon after the murder a huge quantity of jewellery belonging to the deceased was found in the possession of the accused and the Court's view was that the accused in the circumstances must explain how he came by the property of the deceased and since the explanation furnished by the accused was found to be palpably false the Court held that in view of the surrounding circumstnces of the case correct conclusion could only be that not merely the accused was guilty of receiving the stolen property but that he was the murderer.

On recovery of ornaments of the deceased on the same day of murder, the verdict that he was the murderer was upheld (Sundarlal vs. State 1954 CrLJ 257). Deceased was robbed and murdered and accused found in possession of the robbed property three days after the incident. The circumstances would suggest that the accused was not merely a thief or receivr of stolen property, but was guilty of murder (Washim Khan Vs. State AIR 1956 SC 400 = 1956 CrLJ 790; AIR 1956 SC 549). Of course, the courts are generally reluctant to poresume from the mere recovery from the possession of the accused person of the stolen property that he is guilty of a graver offence unless there are besides the possession of property some additional

evidence (Nagappa vs. State AIR 1980 SC 1753 = 1980 CrLJ 1270. Mere possession of property belonging to deceased is not sufficient to convict for theft or murder (Diraviam v. State 1989 Cr LJ (NOC) 63 (Mad).

The accused on recoveries at his instance, was found to be in possession of stolen articles belongign to the deceased. Besides, the evidence showed that the accused was in the house of the deceased on the night of the murder. The accused had concealed a blood stained crobar. On these circumstances the accused were found quitly of the offence of mruder and theft (Ponnuswami Vs. State 1975 CrLJ 509 (Mad); State vs. Baba Yoseph, 1971 CrLJ 296 (Bom).

Section 114 provides that the Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and private and public business, in their relation to facts of the particular case. When the explanation offered appears reasonably true, and which is consistant with innocence, although does not appear to be true beyond doubt, the accused is entitled to be acquitted inasmuch as the prosecution would be deemed to have failed to discharge the duty by establishing beyond reasonable doubt the guilt of the accused (Satnarain Vs. State AIR 1972 SC 1561 = 1972 CrLJ 1048).

Where the appellant was convicted of robbing three drums of chemicals and the conviction was based on the accused statement made under section 27, Evidence Act, which showed that the accused knew where the drums robbed on the alleged date were kept conviction was reversed and it was said that from the statement it could be either inferred that the accused had kept the drums at the palce of discovery or that he only knew where the drums were kept. As the second hypothesis was compatible with the innocence of the accused he was entitled to benefit of doubt (Mohammed Inayatullah Khan Vs. State 1976 SCC (Cri) 199).

19. Stolen articles recovered but not produced before Court - Effect.- when the stolen articles were recovered but not produced before the Court, it was held that, that was a fault on the part of prosecution, but the accused is not to be acquitted on this technical ground (1978 All cr R 22). Recovered stolen cycle neither actually produced in court during trial nor shown to recovery witnesses. It was held that stolen property not having been proved properly, prosecution was vitiated (1976 PCrLJ 1063).

20. Stolen property recovered from joint possession.- Where a stolen trunk was recovered from a house occupied jointly by a father and his son and the father was acquitted whereas the son was convicted under section 411. It was held that the joint possession of the house cast a doubt on the exclusive possession of the son. The son was also acquitted (1972 SCMR 28). Recovery made at paintation of several accused jointly, held, not admissible in evidence (1976 P. Cr. LJ 1462).

21. Restoration of stolen article.- It is an ordinary rule of law that when an accused is acquitted of a charge of theft and the property found with him is not found to be the subject of theft he is entitled to recover that propoerty (1967 crLJ 1639 = AIR 1967 Guj 268), but where the property is found to be the subject of theft and an acquittal is due to incomplete evidence, proeprty will not be delivered to him (AIR 1927 Cal 61= 28 CrLJ 59).

In normal circumstances of acquittal or discharge, the property would be returned to the person from whom it was seized, but where the accused neither claimed the property nor were there grounds to hold that the property could belong to them and the question of ownership was not gone into in the judgment and decided one way or the other, and the order, of discharge was based on inadequacy of the evidence, it was unreasonable to return the stolen property to the accused

persons. The best course in that case was to direct the persons from whom the property was seized to establish their title ina civil Court (1970 P CrLJ 1242 Lah).

Where a eprson accused of theft is aquitted and claims the property seized from him by the police as his own alleged to have been stolen, it should be returned to him in the absence of special reaosns to the contrary. The question whether he or another is entitled to the property is one to be decided, by the civil Court and the criminal Court should not enter into this (34 crLJ 586=56 Mad 654).

In the case of acquittal when no offence is proved in respect of the case property, a criminal Court should normally restore the property to the person from whose possession was taken unless there exists some special reasons justifying a departure from this procedure. Such special reasons would be where the persons acquitted does not claim the property as his specifically or when the evidence on record shows that the property could not have belonged to the accused from whose possession it had been recovered or there is unimpeachable evidence to show that it belongs to the complainant only (1985) 1 Crimes 39 (HP).

22. Punishment.- In a case of simple theft without any aggravating circumstnce one year's R.I. would be adequate (1971 Mad LW cr 162). The lapse of a youngman of 23 years coming presumably from a good family simply because of starvation, or may be due to the economic mal-adjustments in the present day society, committing a theft of cash from a certain office, and at the first approach of the police making a clean breast of everything and making over almost all the money should deserve a much more lenient treatment in the matter of punishment (2 Sau LR 138). Where the accused had remained confined in jail for about one year and 9 months after conviction and prior to that in custody for 9 months. Sentence of imprisonment already undergone was sufficient to meet the ends of justice (1982 PCrLJ 172).

Where theft was committed by cutting maize crop of complainant. accused suffered agony of trial for 11 years. As parties had compromised the matter, sentence was reduced to one already undergone (1988 P CrLJ 118=NLR 1988 CrLJ 127). It may be made plain to young man who steals cattle that if they are not going to prison, they will have at least to pay a heavy fine. The fine must be such as to make it clear that cattle lifting is not profitable (AIR 1939 Sind 339; 41 CrLJ 187).

When an accused has committed the offnece of theft from a Railway train, The sentence should be of a deterrent nature, especially, where the accused had already been convicted of theft and had been repeatedly bound over for good behaviour (14 Bom LR 504 = 13 CrLJ 531). Family life is ordinarily an insurance against a career of crime. The sentence of a young accused having wife and three children was reudced to the period already undergone but sentence of fine was maintained (AIR 1980 SC 636 = 1680 CrLJ 444). It is not easy to detect picking of pockets which has become rampant and sentence of 6 months R.I. is not excessive (AIR 1957 All 678).

23. Charge.- The charge should run as follows :-

I (name and office of the Magistrate) hereby charge you (name of the accused) as follows :-

That you, on or about the ..... day of....., at ....., committed theft of (specify the things) by taking it out of the possession of K, and thereby committed an offence punishable under section 379 of the Penal Code and within my cognisance.

And I hereby direct that you be tried by this Court on the said charge.

In a charge under this section it must be stated that property belonged to the complainant and that it was taken out of the possession of the complainant (PLD 1952 Bal. 59 = 53 cal WN (1DR) 48 (DB). Where a charge under section 379 of the

Penal Code, stated that the accused committed theft of paddy belonging to the complainant, but it was not stated in the charge nor found, that the paddy was taken out of the possession of the complainant, conviction under section 379 of the Code could not stand (9 DLR 71 (DB).

Section 379 read with section 34.- To bring home a charge under section 379/34, it is not necessary for the prosecution to prove that the physical act of lifting the stolen property was committed by an offender himself. It is sufficient if it is established by evidence or circumstances that he shared the intention of committing theft with the actual thief. If a stolen article, almost at the very moment when it is stolen is handed over by the thief to a companion who was with him at the time of the commission of the offence, the proper infernee to be drawn from this circumstances is that the second person was in concert with him and not that he merely received the stolen property (Ganga Vs. State, AIR 1957 All 678 (680) = 1957 CrLJ 1060).

In a case where a group of persons detain a person carrying some articles and engage themselves in negotiation with him and another group suddenly appears at the scEne and remove the articles while the first group remains silent spectators, the natural offence is that the group which detained the person and the group which removed the articles are members of a gang acting in furtherance of a common intention (Thankappan Vs. State of Kerala, AIR 1969 Ker 29 = 1968 Ker LT 500 (503).

Compromise.- Appeal on special leave pending before the Appellate Division against conviction when a petition was moved for permission to compromise the dispute between the complainant and the accused (the parties being interrelated). Compromise petition allowed as law encourage compromise. We have no hesitation in allowing the composition and as a result this composition shall have the effect of acquittal of the accused (Abdus Sattar Vs. The State (1986) 38 DLR 38 (AD); 1985 BCR 454 (AD); 1988 PCrLJ 118).

380. Theft in dwelling house, etc.-Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or use for the custody of property, shall be punished withe imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Comments

Where the accused had got possession of the building through a Court of law. It was held that after having got delivery of the property through the Court, the accused must have honestly believed that he had an undoubted right to use the property as he liked. In pulling down the shed, he cannot be said to have committed theft under section 380 (AIR 1961 Kar 28 (DB).

The mere fact that certain medicinal ampoules marked with the government hospital identity marks were found in a chemist's shop is not sufficient to convict the owner of the shop under section 380 or section 411, unless it is established that the ampoules of that particular batch were found missing or stolen from the Hospital stores (AIR 1960 MP 395=1960 CrLJ 1620; (1983) 35 DLR 408).

Where recovery of stolen money is not made at the instance of the accused or in his presence and the house from which recovery is made is also occupied by other people, the accused cannot be convicted on the basis of the recovery (NLR 1984 CrLJ 202; PLD 1984 SC (AJ&K) 29). Where offence under section 380 is poroved by reliable witnesses, the mere non-production of seizure list and alamat before the

Court does not prejudice the accused, and his conviction may be upheld (1983) 35 DLR 408).

If the accused gives an explanation as to how he came in possession of the stolen articles, which explanation may poossible be true, the onus still lies on the prosecution to prove the guilt of the accused. The prosecution must show that the explanation is false. It should not merely rest content by asking the Court to draw a presumption under section 114 of the Evidence Act (AIR 1950 Mad 778).

Where the recoveries of stolen articles had been made from places which were accessible to all and sundry, the fact that they had been discovered at the instnace of the accused, cannot be regarded as the conclusive proof that he was in possession of these articles or had burried them there. It was held that, in this view of the matter, conviction under section 380 could not be sustained (1965 All LT 264).

In absence of anything to justify presumption of graver offence, preusmption should be lesser offence (1971 All Cr R 409). Where there was no evidence whatsoever that the accused had committed theft of clothes from inside the hosue, merely because some clothes were lying outside at a time when the accused was caught inside the house, it could not be assumed that he was the author of the crime of theft of clothes from the dwelling house (1984 crLJ 828 (Ori.).

Charges were framed against the accused and two others for the theft alleged by the complainant from his house. The charge was challenged. Held, charges would be groundless unless incriminating material is placed on record. If they effected the liberty of a person the High Court could quash them at an initial stage where the statement under secction 161, Cr. P.C. supported the defence case, FIR was not a substantive piece of evidence and could be only used to contradict or corroborate the prosecution case (1985) 2 Crimes 240 Man).

Where the roof had been used by the informant for the purpose of storage of a stock of chillies the theft to a portion of the chillies from the roof of the house is a theft in dwelling house so as to attract the operation of section 380 of the Code (Satho Tanti Vs. State of Bihar, 1974 CrLJ 76(77).

The accused a domestic servant of the deceased being engaged on slight provocation, murdered the deceased at 9 p.m. Thereafter he started thinking and weeping and went on doing so up to 4 a.m. After that he broke boxes and started packing up stolen property in a trunk. It was held that the murder could not be said to have any connection with the theft and that the offence fell under section 380 and not section 392 (Sant Ramv. State AIR 1963 HP 105 (110) = 1963 CrLJ 1665).

Sentence passed in a lump without specifying as to what is the sentence under each of the sections i.e. 448/380 of the Penal Code is only an irregularity and not an illegality and it does not affect the competence of the learned Magistrate to pass the order of conviction and sentence (Haider Ali Khan Vs. The State (1994) 14 BLD 270).

Charge.- The charge should run thus :

"I (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows :

"That on or about the ..... day of ..... at ..... you committed theft of ..... (mention the property stolen) in a building (or tent or vessel) used as a human - dwelling (or for the custody of property) and thereby committed an offence punishable under section 380 of the Penal Code, and within my cognizance.

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

381. Theft by clerk or servant of property in possession of master.-Whoever being a clerk or servent, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

382. Theft preparation made for causing death, hurt or restraint in order to the committing of the theft.-Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of Property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) A commits theft on property in Z's possession ; and while committing this theft, he has a loaded pistol under his garment having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(b) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Of Extortion

383. Extortion.-Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in [1][fear to give donation or subscription of any kind or to deliver] to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(a) A threatens to publish a defamatory label concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion.

(c) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B and bond binding Z under a penalty to deliver certain produce to B, thereby induces Z to sign and deliver the bond. A has committed extortion.

(d) A, by putting Z in fear of prievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

384. Punishment for extortion.-Whoever commits extortion shall be punished with imprisonment of either descripting for a term which may extend to three years, or with fine, or with both.

1. Substituted by Act XV. of 1991, for "fear to deliver" (w.e.f. 24-12-90).

Synopsis

(Sections 383 and 384)

1. Definition and ingredients of extortion.
2. Put any person in fear of injury.
3. Delivery of property or valuable security.
4. Cheating and extortion.
5. Extortion and robbery.
6. Extortion and illegal gratification.
7. Extortion and criminal intimidation.
8. Conviction and sentence.

1. Definition and ingredients of extortion.- Section 383 defines the offence of extortion and section 384 provides punishment for extortion. The person charged under section 383 must have intentionally put the victim in fear of injury either to himself or some other person and by doing so he must dishonestly induce that victim to deliver either to the extortioner himself or to any other person either property or valuable security or something which may be convertible into valuable security. The inducement should proceed from the person charged and it should result in creating such fear in the mind of the victim as to make him give the property or the valuable security, etc., as the case may be (Ali Bux Vs. State 1950 CrLJ 711 (712).

Extortion, as defined in section 383, Penal Code, includes putting any person in fear of injury and covers section 385, Penal Code, which is a less serious offence punishable only, with two years imprisonment as against three years imprisonment for an offence under section 384 (AIR 1941 Sind 36=193 IC 454= 42 crLJ 360).

An offence of extortion is not committed unless he will to deliver the property is endengered by the fear which should have proceded from the extortioner anteceedent to the delivery (1950 ALJ 711). One of the necessary ingredients of the offence of extortion is that the victim must be induced to deliver to any person any property or valuable security, etc. That is to say, the delivery of the property must be with consent which has been obtained by putting the person in fear of any injury. In contrast to theft in extortion there is an element of consent, of course, obtained by putting the victim in fear of injury. In extortion the will of the victim has to be overpowered by putting him in fear of injury. Forcible taking any property will not come under this definition. It has to be shown that the person was induced to part with the property by putting him in fear of injury (1969 BLJR 539 (540).

To constitute the offence of extortion there must be inducement which should proceed from the person charged and it should result in creating such fear in the mind of the victim as to make him give property or valuable security, etc., as the case may be (1950 ALJ 711). The chief element in the offence of extortion is that the inducement must be dishonest. It is not sufficient that there should be wrongful loss caused to an individual in fear of injury. The accused must have the intention that wrongful loss should be caused (AIR 1950 Nag 214).

Where the object is merely to realise debts which were admittedly due, the second ingredient of the offence namely, 'dishonestly' is not established and the act does not amount to extortion (AIR 1942 Lah 253=43 CrLJ 849). The accused principal along with others and with the backing of his students succeeded in creating an atmosphere in which the complainant and his brother and another member of the ad hoc governing body was threatened to execute a document to the effect that the suspension order was illegal and that the same was unconditional. It was held that the element of extortion was laking (1971 CrLJ 708=1970 Assam LR 101).

2. Put any person in fear of injury.- Putting a person in fear of being continued in custody, of being reported against and delivered to the police and thereby inducing him to pay a sum of money as the condition for his release amount to the

offence of extortion as defined in section 383 (Bhagwan Din Vs. Emperor AIR 1929 All 935(936); ILR 53 All 203); but mere holding out a threat to report the matter to the authority concerned unless a certain sum of money was paid constitutes no 'injury' within the meaning of section 44 read with section 43, Penal Code (Laxmi Dhar Vs. Rex, AIR 1951 Ajmeer 64(2) (65); Vendatappa Vs. Julleyya, AIR 1919 Mad 954; ILR 42 Mad 615 FB).

The acceptance of money by a police constable based on the threat that if he does not pay he will be arrested, *prima facie* covers the provisions of section 384, Penal Code, 1860 (Bheru Singh and others Vs. State of rajasthan and another 1988 (3) Crimes 81 (Raj).

A mere demand, however illegal and dishonestly made, is not necessarily extortionate, unless the demandant uses fear as a weapon of persuation and inducement to secure delivery of the property (Mangal Singh Vs. Rex AIR 1949 All 599 (603); Ali Bux, 1950 ALJ 711).

Section 383 of the Penal Code requires that a person need not necesarily be put in fear of physical injury. A terror (or threat) of a criminal charge, whether true or false, amounts to fear of injury, and the act of putting a person in terror of a criminal charge amounts to an offence of extortion under section 383, Penal Code (AIR 1952 Pat 379). When picketing is associated with boycotting and when the boycotting is apt to proceed from ostracism to active annoyance and when the active annoyance has been known in many cases to culminate in bodily injury, a man who is threatened with picketing and knows that picketing can be of such a nature, is put in fear of injury within the meaning of section 383 of the Penal Code (AIR 1922 All 529). Where certain cartmen had paid toll legally leviable on empty carts. The accused realised toll from them on leaving the town as if they had come laden. The accused obtained money by causing unlawful detention and fear of further detention; and hence he was guilty under section (383 1 Weir 411 DB). Similarly the threat held but by the accused that he would not release the cattle belonging to the complainant and taken away by the accused without his consent, unless he was paid some money for their release, does amount to extortion inasmuch as he did put him in fear of injury to his property, namely the cattle as he must have felt that his cattle would remain with the accused so long as the money was not paid to him. This would be sufficient injury within the meaning of section 344 of the Penal Code (AIR 1924 All 197).

3. Delivery of property or valuable security.- The word 'property' occurring in section 383 of the Penal Code must be taken to mean both movable and immovable property and not movable property only (AIR 1951 Hyd 91).

The essence of the offence of extortion is in the actual delivery of possession of the property by the person put in fear and the offence is not comoplete before such delivery (AIR 1955 Sau 42). Thus where a person peacefully obtains possession of goods from another without any threat or force, no offence of extortion is committed with regard to the goods but when he subsequently obtains by threat his signature upon a receipt showing that he sold away the goods to the culprit, the offence of extortion is thereby committed (AIR 1949 All 599).

Valuable security in this section means any document which is prima facie or aparently a valuable security though it may not prove to be so in fact. Thus where certain persons forcibly took a minor boy to a place where, after being beaten, the boy was forcibly made to execute a promissory note. It was held, that the document was a valuable security within the meaning of section 383 read with section 30 and that it was immaterial that it might subsequently be held to be of no effect against the executant. (AIR 1933 Pat 601).

For offence of extortion it is necessary that delivery should be of a valuable security. Where the accused did not take any valuable security from the victim, but the latter was assaulted by the accused and his thumb impression forcibly taken upon a blank piece of paper, the offence of extortion cannot be said to have been established. The offence is no more than use of criminal force or an assault punishable under section 352 of the Penal Code nor does the offence amount to robbery in the absence of proof that papers were taken from the victim's possession (AIR 1941 Pat 129).

4. Cheating and extortion.- Although there is much in common between extortion and cheating they are not two aspects of one and the same offence (AIR 1925 Bom 346). To amount to the offence of extortion, property must be obtained by intentionally putting a person in fear of injury to that person, and thereby dishonestly inducing him to part with propoerty. A head constable who on the strength of a hukum nama, issued for collecting certain statistics, got money from various merchants, is guilty of the offence of cheating and not extortion (4 Suth W.R. (Cr.) 5 DB).

5. Extortion and robbery.- In case of extortion the victim is induced to deliver the property by creating in him fear of injury but in the case of robbery force is used to take property, the victim does not himself delivery the property under a threat. Thus where the person threatened does not deliver property to the person threatening but only keeps quiet while the miscreants carry away the property (5 Suth, W.R. (Cr.) 19 DB), or where the accused snatch the property from the possession of the complainant and escapes with it in spite of the latter's attempt to retake it from him, the offence committed is one of robbery and not of extortion (1950 All L.J 711).

6. Extortion and illegal gratification.- It is quite conceivable that a public servant may commit extortion by compelling a person put in fear to part with property. But whether the evidence makes out a charge of extortion or one under section 161 of the Penal Code is a question to be decided upon the facts of each case (AIR 1956 Cal 116). Money obtained by police by threat of a criminal charge and of wrongful confinement amounts to the offence of extortion under section 383 of the Penal Code though the money was not brought to their own use but was empoloyed in bolstering up a charge of offering bribe to the police the stratagem having been used to prove their honesty to their superior officers (PLD 1956 Kar 273).

7. Extortion and criminal intimidation.- The charge framed against the appellant in effect said that the appellant committed criminal intimidation by threatending X and his daughter with injury to their reputation by publication of indecent photographs of the daughter, with intent to cause alarm to them. The evidence disclosed that the real intention of the appellant was not so much to cause alarm ony as to force X to pay "hush money". The appellant was convicted under section 506 of the Penal Code. It was held that a particular act in some of its aspects may come within the definition of one offence and in another aspect within the definition of another offence, and that there were obvious differences between the offence of extortion as defined in section 383 and the offence of criminal intimidation as defined in section 503. The accused was guilty of the offence of criminal intimidation (AIR 1960 SC 154).

8. Conviction and sentence.— Where it is clear from the evidence and also from the FIR that when the appellants surrounded the victim and his party, they extorted a sum of Rs. 300 as price for sparing them and that this amount was paid to the appellants, it was held that the conviction under section 384/149 Penal Code, was justified (Vishnu Shiv Ram Bhoir Vs. State of Maharashtra 1979 CrLJ 1305 (1305).

Though a large number of factors fall for consideration in determining the appropriate sentence, the broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crime does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be neither too harsh nor too lenient (Ram Narain Vs. State of Uttar Pradesh, AIR 1973 SC 2200 (2203) = 1973 CCrLJ 1187).

Before a person can be said to put any person in fear of any injury to that person it must appear that he has held out some threat to do or omit to do what he is legally bound to do in the future. If all that a man does is to promise to do a thing which he is not legally bound to do and says that if money is not paid to him he would not do that thing such act would not amount to an offence extortion (Nayak R S Vs. Antulay A R 1986 SCC (Cri) 256=1986 CrLJ 1922 SC).

Where the complainant alleged that respondents with show of force took her left thumb impressions on blank plain papers to convert the papers into valuable security, and yet instead of immediately reporting the matter to the police and attempting to recover the signed papers she made a complaint before Court, it was held that it was highly unlikely that such an incident had taken place (Charuprava Dei Vs. Duryodhan Mahanty 1983 crLJ 1038 Ori).

The accused by threatening to take the complainant to a thana on a charge of theft put him in fear of injury. It was held that their act amounted to wrongful confinement for the purpose of extorting money from the complainant (Habib Khan (1952) CrLJ 1391).

Where no articles or movables of the victims were looted but money was extorted, the conviction under sections 384/149 was the proper one (Vishnu Shiv Ram Bhor 1979 SCC (Cri) 642; 1979 CrLJ 1305 SC).

Where some vaccinators threatened to cause pain to children while taking lympth from their arms unless they received some money, it was held that they were guilty of this offence (Hari Har (1886) 1 CPLR 24).

385. Putting person in fear of injury in order to commit extortion.- Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to *[fourteen years and shall not be less than five years], or with fine, or with both.

386. Extortion by putting a person in fear of death or grievous hurt.- Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

387. Putting person in fear of death or of grievous hurt in order to commit extortion.-Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment [1][for life and shall not be less than seven years], and shall also be liable to fine.

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*. Substituted ibid., for "two years".

1. Substituted by Act XV of 1991, s. 4, for "of either description for a term which may extend to seven years" (w. e. f. 24-12-90).

388. Extortion by threat of accusation of an offence punishable with death or [2][imprisonment for life], etc.-Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit any offence punishable with death, or with [3][iprisonment for life], or with imprisonment for a term which may extend to ten years, or with having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be one punishable under section 377 of this Code, may be punished with [3][imprisonment for life].

389. Putting person in fear of accusation of offence, in order to commit extortion.-Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punsihable with death or with [4][imprisonment] for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be punishable under section 377 of this Code, may be punished with [4][imprisonment] for life

Comments

There ought to be some visible overt act which may reflect the natural and normal inference that the wrong doer had, in fact, put a person in fear of death or of grievous hurt. In the absence of any apparent overt act leading towards the act of extortion and thus putting any person in fear of death or of grievous hurt it cannot be said to be an offence committed for extrotion by threat. Without any visible sign of physical act, simple use of words is not enought to constitute that offence in the absence of any physical act on the part of the petitioner and also any such material which may indicate that, as a matter of fact the petitioner had practised extortion by threat of fear of death and hurt, the offence was not constituted. To illustrate, if any person is confronted by any wrong doer armed with dagger or pistol and there after he made some utterances demanding some money, that can be said to be an act of extortion, but in a broad day light within the hearing of every one having some financial relationship, if demand for money is made by uttering some threat that cannot be said to be an act of extortion as contemplated under this section (Ramjee Singh v. State 1987 Cri LJ 137 (Pat).

The accused was convicted of abduction and extortion. He appealed against the sentence, the question was whether there were any extenuating circumstances. It was found that accused took active part in abducting and torturing victim and demanding ransom. The Court found that there was no ground for reducing sentence (Ranchhod v. State 1979 Cri LJ (NOC) 169 (SC); = AIR 1979 SC 1493).

Of Robbery and Dacoity

390. Robbery.-In all robbery there is either theft or extortion.

When theft is robbery.-Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to

2. Substituted by Ordinance No. XLI of 1985, for "transportation".
3. Substituted ibid., for "transportation for life".
4. Substutited ibid., for "transportation".

carry away property obtained by the theft, the offender, for that end, voluntarily causes or attemps to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery.-Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.-The offender is said to be present if he is sufficiently near to put the other person in fear of intsant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) A holds Z down and frudnulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore commintted robbery.

(b) A meets Z on the high-road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z deliver his purse. Z, in consequence, delivers his purse. Here A has extored the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(d) A obtains property from Z by saying- "Your child is in the hads of my gang, and will be put to death unless you send us ten thousand 1[Taka]. This is extortion, and punishable as such : but it is not robbery, unless Z is put in fear of the instant death of his child.

391. Dacoity.-When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

392. Punishment for robbery.-Whoever commits robbery shall be punished with rigorous imprionment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment my be extended to fourteen years.

Synopsis

1. When theft is robbery ?
2. When extortion amounts to robbery ?
3. Evidence and proof.
4. Conviction on evidence of sole witness.
5. Murder and robbery committed in the course of same transaction.
6. Punishment.

1. When theft is robbery ? Theft amounts to "robbery", if in order to the commiting of the theft, or in committing the theft, or in carrying away or attempting

to carry away property obtained by the theft the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restrain (Himmatsingh Shivsingh v. State of Gujarat, (1962) 2 Cr. LJ. 415 (416).

Where robbery as an aggravated form of theft is alleged, proof of theft is essential for convicting a person for robbery (AIR 1945 Sind 38 DB). Dishonest intention is a sine qua non of the offence of robbery. Therefore where some persons including some burqa clad women went witha civil court peon to obtain possession of a property at 3 p.m. it would be incorrect to say that they had any dishonest intention to commit theft and therefore they could not be convicted of the offence of robbery (1970 PCrLJ 49). Where books of account were illegally seized by an Inspector of Central Excise, and the owner forcibly recovered them. It was held that since the owner continued to be in legal possession, he committed no offence under section 392 in recovering the books (AIR 1965 All 543). If theft is proved, it will becoem robbery only if in the committing of theft or in roder to the committing of theft or carrying away or attempting to carry away property obtained by theft, force is used. Where, therefore, no force or show of force is found to have been used in committing of theft, etc. the accused cannot be found guilty of the offence of robbery (AIR 1955 All 128). Where the victim is assaulted by the accused and his thumb impression is forcibly taken upon a blank piece of paper, the offence does not amount to robbery in the absence of proof that the papers were taken from the victim's possession (AIR 1941 Kar 129). There should be use of force at attempt to use force for the purpose of committing theft or in carrying away or attempting to carry away property obtained by theft. Mere fact that the assault and the theft took place in the same transaction is not enough. The assault must be made to facilitate commission of theft (1969 BLJR 539 (542).

Where theft is committed and it is accompanied by causing of hurt or fear of instant hurt, the offence falls under section 390 (PLD 1963 Lah 384). Where the accused instead of inducing his victim to delivery certain impoortant documents, snatched them away from the possession of the complainant and escaped with them in spite of the latter's attempt to retake them from the accused; his conviction for extortion was not justified as the facts attracted the provisions of section 390 (1950 All LJ 711). The accused forcibly detained a mule belonging to the complainant in order to put pressure upon him to pay his dues. When the latter's servant happened to go to the shop of the accused with the mule, the accused gave him slaps and forcibly detained the mule; the offence of the accused did amount to theft and as force was used an offence under this section was committed (AIR 1955 NUC (HP) 4302). Where a policeman on duty took a wayfarer aside at night and relieved him of his money, his plain intention was to overpower him to make him part with some money. Therefore the offence proved against him was not simple theft but robbery (PLD 1966 (WP) Lah 379).

2. When Extortion amounts to robbery.- Where the accused extracted his remuneration as a village barber before it became due from the malguzar by putting him in instant fear of hurt, he was held guilty of extortion (AIR 1950 Nag 214).

Restraint : Restraint implies abridgement of the liberty of a person against his will. Where he is deprived of his will power by sleep or otherwise, he cannot, while in that condition, be subject to any restraint (AIR 1928 Lah 445). It is not necessary that the extortion should follow immediately upon restraint in order to constitute robbery, provided that there is fear of restraint at the time (AIR 1927 Mad 307).

Where the accused were armed and were removing crops from the land of complainant, on protest from the complainant, they threatened that in case the

complainant attempted to enter the land in future he would be done to death and chased him with lathis it could not be said that the offence of robbery was out (Abdul Rashid v. Nausher Ali 1979 Cri LJ 1158 (Cal).

Where the victim offers no resistance against the dispossession, dispossession without the victim's consent will not be robbery even if hurt is caused voluntarily (Devassia Joseph v. State 1982 Cri LJ 714 (ker).

Where a person, in snatching a nose-ring, wounded the woman in the nostril and caused her blood to flow (Teekai Bheer (1866) 5 WR (Cr) 95), thus offence was committed. Where the accused slapped the victim after dispossessing him of his watch in order to silence him an offence under S. 390 was made out (Harish Chandra v. Sate 1976 SCC (Cri) 300).

To consitute extortion it is not enough that the wrongdoer has done his part, it must produce the result also. If it fails to produce the requisite effect, the act would remain only in the state of attempt. In all robbery there is either theft or extortion, is in the immediate presence of the person put in fear of instant death, or of insant hurt, or of instant wrongful restraint. The inter-relation between extortion and robbery arises when there is coerced delivery of property to another. Extortion and robbery are akin to each other and the difference between them is reduced to one of degree, e. g. when A threatens B through telephone saying "unless you send the money demanded, you will be killed", it is extortion, if B consents to send the amount. But if A goes to B's room with a weapon and tells him that he would be killed unless the money is given and if B consents to give money pursuant there to the offence of extortion snowballs into robbery. When extortionis committed in the immediate presence of the victim, extortion is robbery because of the fear of instant hurt or instant wrongful restraint caused there by. So, an attempt to commit extortion, it certain situation, will amount to attempt to commit robbery. In case the extortion attempted was in the immediate presence of the victim, the weapon used by the offender was so lethal as to put the victim in fear of instant death or at lesst instant grievous hurt. Therefore, the acts proved in this case do not amount to attempt to commit robbery (Mani v. State of Kerala 1989 (1) Crimes 732 (735) (Ker).

If theft is already committed and violence is used to help an offender to escape, theft is not robbery. When two views are possible that violence was used either to help removal of stolen article or to enable an offender to escape after comission of theft, view favourable to the accused should be accepted (AIR 1966 Pat 456 1966 Cr LJ 1474). Where one accused slapped complainant to enable other accused to take away the complainant's watch, it was held that the offence fell under section 390 (AIR1976 SC 1430 = 1976 Cr LJ 1168; 1976 Cr LR (SC)176 = 1976 UJ (SC) 371).

Where the accused caused knife injuries on the victim which enabled him to remove the ear rings of the victim and the keys from the string of Salwar she was wearing, the case, fell, not under Section 394 but under Section 392 read with Section 397 and sentence could not less than seven years and could extend up to 10 years under section 392 (1984 Cr LJ (NOC) 103 (Delhi).

Section 392 cannot be "said to be a residuary possession of law embracing robbery in general minus the robbery having an element of voluntarily causing hurt contemplated under Section 394 because of that were so, then in the residuary matter under Section 392 even that robbery would be covered which entails the element of voluntarily causing or attempting to cause death to any person but the robbery involving the element of death could not be intended to be covered by Section 392 awarding a lesser punishment of 10 years while the much less serious element of "voluntarily causing hurt" of robbery is covered under Section 394 awarding higher pungher punishment (1984 ALJ (NOC) 103 (Delhi).

3. Evidence and proof.- It is not open to a Court to base a conviction under Section 392, on insufficient evidence coupled with the mere fact that the accused in his statement admitted to have taken the property from the complainant for some other purpose, which was not believed by the Court. In the darkness of night, accused were alleged to have robbed the complainants of Rs. 50 which one of the complainants had on his person. The prosecution evidence was insufficient by itself to justify conviction. But the accused, while being examined under Section 342, Criminal Procedure code, 1898 admitted receiving Rs. 50 by way of fine, to hush up a criminal offence committed by one of the complainants. This admission, though not believed by the Court, was taken into consideration while convicting the accused. It was held that the evidence was insufficient by itself to justify the conviction of the accused (AIR 1929 Sind 255 = 30 Cr LJ 1135).

"Recent and unexplaind possession of the stolen property while it would be presumptive evidence against the accused of fobberty, would similarly evidence against him on the charge of murder (AIR 1957 Ker 65; 1957 Cr LJ 751; AIR 1956 SC 400; 1956 SCR 191). Accused may be convicted where he fails to render satisfactory explanation about possession of stolen property (NLR 1988 Cr 584).

Where in a robbery case no test identification was held even though the victim of the offence did not know the accused person and it was on the basis of the identification in Court by the victim who has failed to give any description of the accused in the FIR four month after the incident that the accused was convicted, the conviction was unsustainable (AIR 1983 SC 369; 1983 Cr LJ 689 =1983 Cr LR (SC) 26 = 1983 UJ (SC) 145).

The very act of appellant to carry a country made pistol in his hand to aim the same at the complainant amounts to the use of a lethal weapon for the purpose of committing robery (1985) Cr LC 426; AIR 1975 SC 905). The victim was robbed at knife point but the knives used were such as are usually used to cut vegetables. The contention was that they are not deadly weapons. Held, knives are not deadly weapons per se but its design or manner of its use was however not likely to cause death. Conviction was restricted to an offence under Section 392 Penal Code, and sentence was reduced to 4 years (1984) 1 Crimes 883; (1984) 1 Crimes 155).

A deadly weqpon is a thing designed to cause death, for instance, a gun, a bomb, a rifle, a sword or even a knife. A thing not so designed may also be used as a weapon to cause bodily injury and even death. It will be a question of fact in each case whether the particular weapon which may even be a knife can be said to be a deadly weapon. In the instant case, there is evidence to the effect that the knives which the accused were having were small in sized. They were ordinary vegetable cutting knives. This renders the possibility of those knives being deadly weapons highly doubtful and as such the appellants shall be entitled to benefit thereof (1985 Cr LJ 1621).

Lastly, the question would arise as to whether the appellants are liable tc enhance punishment under Section 397, Penal Code. Needless to say that the said section does not create any substantive offence and it simply prescribes a minimum sentence for the offence of robbery under the aggravating circumstances mentioned therein. While there can be no shadow of doubt that both the appellants carried knives and they miaed the same at their victims, namely, Rajinder Parshad and Krishan Kumar, there is no stisfactory evidence to establish those knives could be termed "deadly weapons as exvisaged under Section 397. Rajinder Parshad and Krishan Kumar have simply stated that both the appellants were carrying a knife each in their hands. However, according to Raj Krishore the knives were described as vegetable cutting knives. The question would, therefore, arise whether in the

absence of anything more the said knives can be said to be deadly weapons (1983 Cr LJ 1621).

Where accused had not caused njuries to complainant in order to commit theft or in committing theft or carrying or attempting to carry away property obtained by theft. Injuries were caused when complainant tried to apprehend appellant after commission of theft his case would not fall under this section (PLJ 1988 Cr. C. 222; 1988 P. Cr. L. J. 617; NLr 1988 Cr. 346; 1988 Law Notes 194). Mereover it is necessary for conviction of the accused that the articles recovered should be indentified as those belonging to the victim of robbery. If that is not done mere recovery of articles is not of much value (1969 P. Cr. LJ. 1317).

Where fact regarding forcible snatching of mares and their subsequent delivery by accused to their owner through prosectuion witness was proved. Coviction and sentence of accused was maintained (1985 P. Cr. LJ. 1750).

It cannot be laid down as a hard and fast rule that identification evidence by itself is an insufficient basis for conviction. The value of identification evidenc must very with the circumstances established in each case. Where a wtiness had no reason to falsely implicate an accused person and he correctly identified him at an identifideation parade, conviction can be based on his testimony (1988 P. Cr. L. J. 1077).

In case of dacoity conviction can be based on identification evidence alone, if it is established that the dacoits continued to plunder the house for a long time, and that there was sufficient light to be able to do so. Where all reasonable possibility of an honest mistake being made by some of the indentifying witnesses has not been eliminated, it would be unsafe to convict on identification evidence alone unless such evidence is corroborated by some circumstances which may indicated that the individual conerned took part in commission of the offence (PLR 1963 Dhaka 331 (DB) ; AIR 1955 NUC (All) 5287).

Where accused was seen by witnesses at Police Station before indentification test. Ratio of dummies mixed up with six culprits was not in accordance with settled principles. Complainant did not give plysical features of accused persons in FIR. Evidence of identification was discarded (1988 Cr. LJ. 2287).

Abscondence of accused coupled with other circumstances may corroborate prosecution case against him (1988 SCMR 1841).

In Paras v. State (1978 Cr. LJ. 634(635) All); See also Mohd. Abdul Hafeez v. State of A. P. 1983 Cr. LJ 689 (690) AIR 1983 SC 367), the accused was prosecuted under Sec. 392, Penal Code, The name of the accused did not find place in FIR. Evidence of the identifying witnesses was not worthy of reliance because as accused was shown to the witnesses at Kotwali. On the material present on the record it could not be held as proved that the money received from the possession of the accused was the same money which was looted. It was held that the prosecution did not succeed in proving its case against the accused beyond reasonable doubt.

The first information report was not the product of spontaneity. It was not the first reaction of the witness to the incident and, therefore, the chance of embelishment and improvement in the prosecution case was nor ruled out. The testimony of witness was not corroborated in respect of recovery of ornaments. It was held that the appellants were wrongly convicted for offence under See. 392 (Nenia v. State of Rajasthan, 1980 Cr. C. 208 (211).

Removing of ornaments form the body of the victim after causing his/ her death cannot amount to robbery. Removing oranaments from a dead body cannot be taking

property out of possession of a person by force (Kozhipalliyalil Muhammad 1974 Cri LJ 204 Thavasi, In re 1972 Cri LJ 445 (Mad).

There is no rule of thumb that after the lapse of a long period the witnesses would in no case be able to identify the robbers they had seen in the course of robbery. The Court has to be extremely cautious in apprasing such evidence and the decision in each case must turn on its own special facts. Where the occular witnesses had ample opportunity to notice and mark the special facts. Where the occular witnesses had ample opportunity to notice and mark the special features of the miscreants and they had given some particulars of identity of the culprits in their statements to the police and they were not cross-examined on this point vis-a-vis their police statements, the identity of the appellants as the robbers was established beyond reasonable doubt (jagdish 1985 Cri LJ 1621 (Del).

It is not safe to act on the evidence of a child witness unless immediately available and unless received before any possibility of coaching is eliminated. Though there is no bar to accepting the uncorroborated evidence of a child witness yet prudence requires that the courts ought not to act on it whether sworn or unsworn. Corroboration should be about the factum of crime as also of the reasonable connection of the accused with it. Where there were several infirmities to this effect and the alleged theft of cart and buffallo were not traced to the possession of the accused, accused's conviction relying on the sole testimony of the child witness was illegal and had to be set aside (Munna 1985 Cri LJ 1925 (All).

4. Conviction on evidence of sole witness.- In the case of Yusuf Vs. Appellate Tribunal conviction was based on the testimony of the complainant. Sole reliance had been placed by the special Tribunal as well by the Appellate Tribunal having been convinced with the veracity of the complainant and they had found the case proved and the Supreme Court upheld the sentence imposed under section 392, Penal Code (29 DLR (SC) 211; 1992 BLD (AD) 180).

The requirement for accepting the solitary evidence for the purpose of upholding conviction or basing conviction is, that his evidence must satisfy the minimum requirement of test prescribed in this connection which has not been fulfilled by P. W. 1 and as such is evidence on the point of identification must be held to be untrus'worthy (Yasin Mina v. State of Bihar, 1989 East Cr. C. 53 (56) (Pat.).

In the undemoted case the accused were all in pradah and on their faces being uncovered the one witness identiffied the appellant Shiv charan as the man who put the nozzle under his chin. His testimony in Court identifying the appellant is corroborated by his testimony identification at the parade held by Shri Ashok vasishst. The evidence shows that Allah Baksh, PW 4, went around took his time and indentified all the five accused to be the dacoits. Special leave petition of four other persons mamely Ramesh, Rajinder, Sukhdev and Om praksh have all been dismissed by the Supreme Court and they are serving out their sentences of imprisonment for life on conviction under Secs. 395 and 396 of the Penal Code, 1860. The conviction of the appellant rests on the indentification made by PW 4 Allah Baksh which evidence has been accepted by the High Court and deserves no different view (Shiv Charan v. State of Haryana, 1987 Cr. L. J. 695 (697) (SC) = A. I. R. 1987 S. C. 1).

Where no independent withness was present at the time of recovery, the statement of police dofficials cannot be discarded on the ground that they are policeofficials. But their statements are to be read cautously (Ramcharan and Kaptan v. State v. Rajasthan, 1989 (2) Crimes 465 (466) (Raj).

5. Murder and robbery committed in course of same transaction.-The possession of the property of the deceased with the appellant soon after the

occurrence is a strong circumstance against the appellant. This is a case where murder and robbery are proved to have been integral parts of one and the same transaction. Therefore, it can be reasonably presumed that not only the appellant committed the murder of the deceased but also committed robbery of her gold ornaments which form part of the same transaction, in the absence of satisfactory explaination for the appellant as to how the property was transferred from the deceased to the appellant (Sathyanesan v. State of Kerala (1985 Cr. L. C. 47 (49) (ker).

Merely on the recovery of stolen property of the deceased, found in possession of the accused soon after the murder and in the absence of any evidence that the common intention of both the accused was to commit robbery, the Court is not justified in drawing the inference that the accused are guilty of murder. The possession by the accused of all the property which was the result of robbery, justify an inference that they took part in the robbery (51 Cr LJ 1265; AIR 1950 MB 76).

Once it is established that the accused was accompanied by one more person and had taken the vehicle from Bikaner on a false pretext that he had to go Chineri but had taken it to Delhi for renovating so as to make it unidentifiable, compels to believe that the accused had in his mind from before that they may do away with the driver on the way for removing the car and this is fortified from the injuries which the deceased sustanined in this case. The existence of the blood on seat covers, paidan, mat and clothing of the deceased are available from where the dead body was recovered. All go to show that murder has been committed while the driver was on seat and his dead body has thereafter been taken out and concealed. Thus, it was either the accused or his companion/ companions who were responsible for the murder of deceased. Further, it was a case of sharing the common intention and the accused cannot escape the liability. His subsequent conduct in causing the disappearance of the evidence on record is a further fact which leads to arrive at an irresistible conclusion that he participated in in the crime (Kishore Singh v. State of Rajasthan, 1985 Cr. L. R. 221 (228-29) (Raj).

6. Punishment.— Where the case was not of planned robbery but robbery was committed on the spur of the moment because the temptation could not be resisted, it was held that rigorous imprisonement for three years was sufficient to meet the ends of justice (Jethiya (1955) Cri LJ 1285) = AIR 1955 Panj 147).

In conviction under section 392, Penal Code, 1860, having to various factors such as the passage of time, recovery of almost the entire amount, the time spent in prison before release on bail etc, the ends of justice would be met if the accused persons are fined only (Suryamoorthi & arn. v. Govindaswanmy & ors. 1989 (2) Crimes 265 (SC). The coviction of the accused was altered from section 397 to Section 392. The accused was not a previous offender and he had already spent 4 years in jail. His sentence was reduced to that period already undergone (Md Aslam 1985 Cri LJ 1760 (Pat). However, the court in exercising this discretion cannot discriminate am gst the accused. Thus, where in passing sentence of dacoity some of the accused were sentenced to 10 years rigorous imprisoment and others to 8 years and there was no reason for doing so the Court held that the proper course was to award uniform sentence and the sentence of all the accused was reduced to 7 years (Iachman Ram v. State 1985 Cri LJ 753 (SC).

It was submitted that there is no material on the record that the accused was earlier involved in any other case and therefore, lenient view, of the case should be taken. He had already spent 4 years. Held, sentence is reduced to one already undergone (1985 Cr LJ 1760).

Highway robbery is a very henious offence and law abiding citizens have every right to be protected. Therefore when deciding a case of such nature, the value of the stolen property should not be the criterion whereby the amount of punishment is to be determined (AIR 1942 Oudh 221 1941 OWN 1369; 43 Cr LJ 416).

In cases where the offender is armed with a deadly weapon the legislature has prescribed the minimum sentence of seven years for an attempt to commit robbery, it would not be proper exercise of discretion to inflict a lesser punishment though section 392 allows it if the offender is found guilty of robbery (AIR 1932 Oudh 103 = 33 crLJ 926).

Charge.- The charge should run as follows:-

I (name and office of the Magistrate, etc.) here by charge you (name of the accused) as follows:-

That you, on or about the----day of----, at--, robbed (state the name), and thereby committed and offence punishable under section 392 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

393. Attempt to commit robbery.-Whoever attempts to commit robbery shall be punished with rigorous impisonment for a term which may extend to seven years, and shall also be liable to fine.

394. Voluntarily causing hurt in committing robbery.-If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with [1][imprisonment] for life, or with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope and appliability.
2. Identification of accused.
3. Recovery of stolen property.
4. Evidence and proof.
5. Practice and procedure.
6. Sentence.

1. **Scope and applicability.**—A perusal of Section 394 indicates that violence or hurt must be caused by a person while he is committing or attempting to commit a robbery. The other persons who join him in committing or attempting to commit such robbery are also held guilty of offence. Merely because one person removed the money from the pocket of the complainant does not indicate that it was his solitary act and not connected with the offence in question (1978) 15 ACC 258).

Where a robber does not himself cause grievous hurt or use any deadly weapon, this section and not Section 397 is applicable (13 Cr LJ 42; 1912 MWN 35; 32 MLJ 186). After beating the complainant and his concubine, the accused entered the complanant's house and removed boxes containing cash and oranaments, etc. It was held that the offence was punishable under this section (1965 Cr LJ 1346).

Where four persons armed with deadly weapons fully prepared to commit murder in the event of resistance and two of them actually committed murder before any resistance was offered to them it was held that each of the robbers is equally guilty of the offence of murder (AIR 1925 PC 1 (Foll); (AIR 1926 Lah 63; 26 Cr LJ 1406).

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

For a conviction u/s. 394, Penal Code, it is not necessary to fix up the identity of the particular miscreant who made assault and all the miscreants jointly concerned in the commission of robbery will be liable u/s. 394 of the Code (Mohan Cheri & Ors. v. State of Went Bengal 1992 (1) crimes 899 (900).

Removing ornaments from a dead body is not taking property out of the possession of a person. Where it could not be said that the ears of the victim had been chopped off before her death no conviction can be held under Sec. 394 of the Penal Code (Kozhipalliyalil Muhammad v. State, 1974 Cr LJ 204 (206). Where the accused in committing robbery neither carried any deadly weapon nor caused any grievous hurt to the person robbed; conviction under Section 397 was altered to that under Sction 394 (1986 P. Cr. LJ 43).

2. Identification of accused.-Where the dacoity was committed on a dark night, and the accused were not mamed in the FIR. The identification of accused at the identification parade, was also doubtful. The accused was acquitted (1972 P. Cr. LJ 816 (Lah).

Where the dacoit who fired the fatal shot was identified. The accused was arrested at a short distance from the palce of occurrence with the stolen bullock. There was no evidence to show that the accused took part in the dacoity. He was convicted for theft only (1972 P. Cr. LJ 841 (DB).

3. Recovery of stolen property.- Where the property robbed was recovered from the accused but there was no evidence to show that he had taken part in the robbery. It was held that in the absence of his indentification as one to the robbers present at the time of occurrence, he could not be fixed with the resposibility of having taken it away forcibly from the complainant. He could be convicted under S. 411 only (1972 P. Cr. LJ. 816 (Lah.).

4. Evidence and proof. - The medical evidence did not prove that the accused died from asphyxiation by throttling, some symptoms favouring that view and some not. The confession was not made before a Magistrate but was only stated to have been made in the village to there villagers whose evidence was of little weight to prove that a confession was made. The evidence of ornaments stolen being found in the house of the accused might be correct, yet the prosecution failed to connect these ornaments with the deceased. It was held that the prosecution had not proved charge against the accused under section 394, Penal Code, and they were entitled to an acquittal (36 Cr LJ 63d6; AIR 1935 ALL 549).

Where the accused belonged to the neighbouring village at a distance of less than a mile from the police quarters and the witnesses who came to identify the accused had seen the accused from behind while escaping and the victim know one of accused from before yet he did not name him in F. I. R. and went to identify him when he fully knew the accused and identification of the two of the accused took place after a gap of four days after the arrest without explaining the cause for delay, it was held that convictin under Section 394 Could not be sustained (AIR 1984 SC 389 = 1983 Cr LJ 434).

5. Practice and procedure.- Section 394 applies where during the course of robbery voluntary hurt is caused. Hence after conviction under Section 394, the accused should not be further convicted under Section 324 (1968 All WR (HC) 889; 1968 All LJ 1037).

When in a charge framed under Section 394 it is mentioned that the accused was in any prejudiced by his conviction under Section 323, Penal Code (1978 (15) ACC 253).

6. Sentence.- The accused a lad of 18 years saw a person putting money in purse, followed him for a furlong away village, injured him and robbed him of his money. It was held that sentence of 5 years R. I. will meet the ends of justice and that the sentence of 10 years R. I. was excessive (1968 All LJ 1037; 1968 ALL Wr (HC) 889).

Charge.- The charge should run as follows:-

I (name and office of the Judge) here by charge you (name of the accused) as follows:-

The you, on or about the ...day of.....,at....., committed (or attempted to commit) (or were jointly with X concerned in committing) (or attempting to commit) robbery of the property of A and that as such you (X) voluntarily caused hurt to A (or) and that you thereby committed an offence punishable under section 394 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

395. Punishment for dacoity.-Whoever commits dacoity shall be punished with [1][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

(section 391 and 395)

1. Scope and applicability.
2. Violence or threat of violence.
3. Conviction of less then five persons.
4. Evidence and proof.
5. Testimony of witnesses.
6. Sole witness.
7. Approver's testimony.
8. Injury on accused.
9. Legal evidence.
10. Recovery of stolen articles.
11. Legal presumption of stolen property.
12. Confession.
13. Identification of dacoits.
14. Refusal to take part in the identification parade-its effect.
15. Identification of stolen property.
16. Non-examination I.O. and its effect.
17. Punishment.
18. Practice and procedure.
19. Charge.

1. Scope and applicability.- When five or more person conjointly commit or attempt to commit theft or extortion, they are said to commit dacoity. In other words, dacoity is either theft or extortion. If no property is carried off, there is no dacoity, but only an offence under Section 402, Penal Code (1944) 45 PLT 163).

Dacoity is perhaps the only offence which the legislature has made punishable at four stages. When five or more persons assemble for the purposes of committing a dacoity, each of them is punishable under Section 402 of the Penal Code merely on the ground of joining the assembly. Another stage is that of preparation, and if any one makes preparation to commit a dacoity, he is punishable under Section 399. The definition of dacoity in section 392 shows that the other two stages namely, the stage of actual commission of robbery, have been treated alike and come within the definition (AIR 1960 Pat 582 = 1960 Cr LJ 1650).

The essence of the offence of dacoity is robbery which is nothing but an aggravated form of theft or extortion (1970 PCrLJ 49). To constitute the offence of dacoity it is necessary that death or hurt or wrongful restraint or fear of such instant evils should be caused by the offenders not only in order to the committing of theft or in committing theft, or in carrying away property obtained by theft but also for that end and that five or more persons should be acting conjointly (AIR 1918 Mad 821). Even an attempted robbery by five or more persons amount to an offence of dacoity and the fact that the dacoits failed to remove any booty is irrelevant (AIR 1957 SC 320).

[1]. Subs. by Ordinance No. XLI of 1985, for "transportation".

Where violence was used by the accused in dispossessing persons from premises and theft was also committed at the same time but the violence had no relation to the commission of theft and the taking of property was an independent matter, it was held that robbery was not committed and as it is involved in the definition of dacoity no dacoity was committed (5 Cal WN 372). Mere prsence of the accused among the raiders who visited a village at night is not sufficient. It is necessary that the accused must be shown to have conjointly committed robbery or aided such commission. Unless actually went to the houses of persons concerned and extorted money or at least aided in extorting the money, they could not be said to be guilty of dacoity (AIR 1962 Manipur 7).

Dacoity starts from the entry of the dacoits into the premises and ends with their departure (1974 An W.R 358; AIR 1951 All 834=52 CrLJ 1514). The transaction of dacoity ended when they took to their heels and that a separate transaction took place when the appellant shot mendiai and that the appellant did not commit an offence under section 376 (shyan Bihari Vs. State AIR 1957 SC 320=1957 CrLJ 417; AIR 1956 SC 116).

Accused while carrying away stolen property and exploding crakers to frighten inmates of house lest they should pursue, can be convicted under Section 395 (AIR 1980 SC 788; 1980 Cr. L. J. 313).

The accused did not actrually take part in the dacoity but was with others before the dacoity and with one of the dacoits to borrow a boat, and during the dacoity and was left in the boat at a place some five or six miles from the places of the dacoity and was told to wait for other dacoits. It was held that the act of the accused did not come within the definition of dacoity as he was not present though he might have been aiding such commission or attempt (26 Cr. L. J. 1146; AIR 1926 Cal 374).

An accused standing in a large crowd which overflowed into a public street and committed robbery in the post office and set fire to it, cannot be said to be actually committing robbery or attempting to commit or aiding in the commission of robbery (AIR 1945 All 385).

For the offence of dacoity, it is not necessary, that the accused should have known their victims previously and should have had some personal grievance against them before they would commit dacoity (AIR 1929 Mad 135).

2. Violence or threat of violence.- In order to sustain a conviction under this section it must be proved that violence has been used by five or more perons for the act of committing theft. The hurt caused must have been for the express purpose of theft, otherwise this section will be inapplicable (AIR 1956 SC 441=1956 CrLJ 822). Where the primary object of the accused was to break into the house and take proeprty and hurt was cuased to facilitate entry and the causing of hurt and taking of goods were parts of the same transaction committed with the object of taking the boxes and taking their contents it was held that htis section applied (AIR 1948 Mad 96=49 CrLJ 36). Theft amount to robbery only if in order to commit theft or in carrying away or attempting to carry away properties obtained by theft the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of wrongful restraint (PLD 1965 Dhaka 92). It follows that theft, to come under this section should be perpetrated by means of either actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that force or menace should be displayed by an overt act (8 CrLJ 143). Where the accused broke open a house and removed material from it after dismantling it and they

chased and threatened to beat the servant of the owner; it was held that the accused were guilty of an offence of dacoity (AIR 1950 All 471). But where there is no evidence of actual or threatened violence by the accused when they committed theft they were guilty of an offence under section 378 only (PLD 1965 Dhaka 92). Where the evidence was that some persons got to the top of the house of another person, got into the house through the skylight and carried away some bags; it was held that that could not obviously be construed as evidence sufficient for sustaining a specific charge of dacoity AIR 1952 Mad 821.

3. Conviction of less than five persons.- Inspite of the acquittal of a number of persons, if it is found as a fact that along with the person convicted under section 395, there were other, unidentified who participated in the offence bringing the total number of particupants to five or more, the conviction of the identified persons though less than five is perfectly correct (1970 Cr LJ 386; 1969 All Cr R. 34).

Where the charge against three convicted persons was that they along with five or six others had taken pert in the commison of a dacoity it cannot be said that the offence was committed by less than five persons and, therefore, the conviction of three cannot stand. The conviction is legal (AIR 1956 SC 441; 1956 Cr LJ 822 ; AIR 1973 SC 760; 1973 Cr LR 38; 1973 Cr KJ 599).

In a case there was evidence that only three persons had gone into the house. The other two persons who were supposed to be standing outside the house were neither named nor identified and who they were was still shrouded in mystery. It was held that the offence will not fall under See. 395, Penal Code, though it does fall within the amibt of the definition of robbery made punishable under Sec. 392, Penal Code, Since in this case the accused were proved to have gone armed with deadly weapons they were liable to be punished under Sec. 392, Penal Code, read with Sec. 397 Penal Code (Mohd. Rafiq v. State, 1984 (10 Crimes 815 (819) (Delhi), See also state of Rajasthanv. v. Gokal Chand, 1984 (1) Crimes 22 (26) Raj).

High Court having come to the conclusion that three out of the six accused were not guilty, should have gone into the question whether there was satsifactory evidence to show that the three remaining accused could be convicted under Section 395, Penal Code, on the charge as framed. In any event three remaining accused could be canvicted of the lessor offence of robbery under section 392, Penal Code, if there was evidence to show that they had committed acts of theft and used violence while committing the theft (AIR 1956 SC 441).

Where seven persons were charged for the offence of dacoity, but the court acquitted four of them for want of evidence, the conviction of the remainint three accused under this section cannot be sustained, when there was nothing to indicate that other persons also took part in the crime (1957 Cr LJ 1227; 1958 Cr LJ 1001; AIR 1958 AP 510 = 1958 Cr LJ 447).

The charge in the instant case was that apart from the named seven or eight persons, there were five or six others who had taken part in the commission of the dacoity. The High Court acquitted a large number of the accused because their identity could not be established. The High Court, however, did not find that the group which committed robbery of F consisted of less than five persons. Held that the circumstance therfore that all, except the three accused, have been acquitted by the High court will not militate against the conviction of those three for dacoity (Gudar Dusadh v. State of Bihar, AIR 1972 SC 952 (961).

In spite of the acquittal of number of persons, if it is found as a fact that along with the perosons covicted under Section 395, there were other unidentified who participated in the offence, bringing the total number of participantsto five or more,

the conviction of the identified persons though less than five is perfectly correct (1970 Cr LJ 386; 1969 All Cr R 34). When five named persons stood tiral being charged of dacoity and three were acquitted, the remaining two persons could not legally be convicted for an offence of dacoity (1973 Cr LJ 599 (SC) and 1956 Cr LJ 822 (SC) and 1982 Cr LJ 487 (Orissa) ;1984 Cr LJ 1407).

The offence of robbery cannot be converted into dacoity where excepting a simple allegation there is no adequate proof that five or more persons have taken part in committing or attempting to commit the crime (AIR 1915 Lah 244). To constitute an offence under section 391, there should be at least five persons involved in the commission of the offence. Therefore the point is whether the number of persons involved is five or more and not whether five or more persons were charged for commission of the offence. When six persons are charged under section 391 and three of them are acquitted, the remaining three cannot be convicted under section 391 (11 CrLJ 249). But where the charge does not definitely state that any specified number of persons were involved in the offence but only a few were charged, it can well be presumed that other people involved were not named as they could not be identified, therefore such a charge is not illegal or bad (PLD 1967 Dhaka 528). On the same principle where five persons were charged with the offence of dacoity and one of them was acquitted and the evidence showed that other persons were also concerned in the dacoity with violence, the offence was complete provided the persons who assisted them would bring up the number to five ore more (1930 Mad WN 1138).

Before an offence under Section 395 can be made out, there must be an assembly of five or more persons. Where out of nine persons made in the first information report who were alleged to have participated in the dacoity only one person was left, he could not be convicted of an offence under this section (Ram Lakhan v. State 1938 Cri LJ 691 (SC); Padmanava Mohapatra v. state 1980 Cri LJ (NOC) 238 (Ori); Nantu v. State Cri LJ (NOC) 118 (Cal).

If out of the persons charged with dacoity some are accquitted and five or less than five are convicted the conviction does not become illegal. The mere fact that the evidence was not sufficient to convict the accused actually charged would not in any way affect the question of the number of persons engaged (Narayan v. State (1946) 47 Cri LJ 822).

Some stolen property was recovered and accused were charged with the offence of dacoity but no sparate statements were recorded from them, instead a joint statement was recorded. Such a statement was held to be inadmissible and no reliance could be placed upon any recoveries alleged to have been made in pursuance of the joint statement. Some of the accused who had filed appeal before the High Court were acquitted of all the charges, there being no reliable evidence connecting the accused to the crime. Though no appeal was preferred by the remaining accused, the High Court set aside their convictions as well in the exercise of its inherent powers under S. 482, Code of Criminal Procedure to prevent miscarriage of justice (Kanuru Yanadi changaiah 1985 Cri LJ 1822 (AP).

Similarly, where the aprellant was tried along with 8 others and whilst the others were acquitted he was convicted for dacoity. It was held that conviction of appellant alone was not sustainable as an assembly of five persons were required for an offence u/s. 395 (Ramlaknan 1983 SCC (Cri) 339; Biswanath 1983 Cri LJ (NOC) 202 (Cal); Mohapatra 1983 Cri LJ (NOC) 238; Purna chandra Sahu 1984 Cri LJ 1407 (Ori); z (Y) amngul Haokip 180 Cri Lj (NOC) 83 (Gau).

Even if the charge does not mention the word 'others' yet if it appears from the evidence that more than five persons had participated in the crime of dacoity, then the charge under section 395, Penal Code, 1860 would not fail merely because some of the accused are acquitted and the resultant number is less than five (Mandar Behera v. State of orissa 1988 (3) Crimes 424 (Ori).

However in an earlier case the Indian Supreme Court has held that where about 14 persons had admittedly taken part in the dacoity and the charge was also framed against eight named persons that they along with six others had taken part in the dacoity the conviction of three persons only is not bad because s. 395 requires only the participation and not the conviction of more than five persons (Saktu v. State 1975 Cri LJ 599 (SC); Ghamandi v. State v. State 1970 Cri Lj 386 (All); ambika v. State 1975 Cri Lj 1686 (Ori) State v. sushanta K Dey 1979 Cri LJ (NOC) 52 (Ori).

Framing of charge under section 395 Penal Code, against less than five persons without in additional saying that five or more were participants in the crime is legally a valid charge if statements and evidence on record disclose that the number of participants was five or more. Even in case of a defective charge trial will not be vitiated unless there was failure of justice. Five or six persons were present in a boat-two out of these got into the complainants boat and forcibly took away his property. On a question whether the other persons in the boat can also be implicated and charged along with the two accused who got into the complainants boat, it is held. One has to remember that the sampan (boat) which was occupied by the aforesaid five or six persons was a public conveyance and one cannot eliminate the possibility of these persons in the sampan being merely co-passangers of the accused persons and not their associates. It cannot therefore be held that they were participants in the crime. In this view of this matter, the conviction under section 395, Penal Code was converted into one under section 392 Penal Code (Hachi Mesh Vs.d The State, 17 DLR 692; 1 DLR 165, 2 DLR 241).

4. Evidence and proof.- In cases of dacoity the evidence generally available is of three categorise viz; (1) the culprits were caught red handed on the spot but this is rare because the culprits go fully around and well prepared whereas the victims are fear stricken: (2) Identification of culprits when they are later arrested during the investigation and (3) discovery of incriminating facts such as looted property weapons etc. Used in the commission of the offence and such other objects. The substantive evidence regarding identification is that which is given by the witnesses in Court during trial. And mere identification of culprits by witnesses in Court has little or no evidentiary value unless he was identified by the witnesses the identification parade held by police during ident ification parade. The identification of the culprit by a witness during the identification parade conducted by the police is not a picce of substantive evidence and cannot be the basis of conviction of itself. But it provides a very good piece of corroborative evidence and greatly enhance the creditability of the evidence of the identification given by the witnesses in Court (1984 Cr LJ 1135 Raj).

It appears from the evidence that the dacoits were apprehended by the police. But the prosecution has not examined the Investigation officer apprehending the dacoits with ornaments. Although examination of the Investigation officer is not a must, but in this case such non-examination has cast a serious doubt about the prosecution case in view of the nature of evidence on record and attending facts and circumstances of the case. The trial Judge, in this case, did not at all notice the contradictions and inconsistencies in the statement of the winesses examined by the prosecution. This sort of treatment of evidence in convicting persons under Session

395 of the Penal Code can hardly be accpted by the appellate court (Abdul Gafur Vs. The State (1988) 40 DLR 475).

There should be a reason for false implication, and when it is established beyond doubt that there was no enmity between the parties, the story regarding false implication becomes highly improbable. In the present case the accused was specifically named in the FIR which was promptly made and he was known to the witnesses and his presence on the spot amongst the dacoits was clearly established by the testimony of the witnesses. This being the situation, a case under Sec. 395, Penal Code, was very well made out (Genda Lal. v. State, 1985 (1) Crimes, 608 (610, 611)All).

Evidence against each accused should be discussed separately (AIR 1924 Rang 67 ; 25 Cr LJ 205). Where the prosectuion witnesses are not quite consistent about the parts that were played by various dacoits, the discrepancies of this kind would point rather to the truth than to the falsity of the prosecution case. Mistakes in observation are likely to be made by the witnesses to a crime of this nature (AIR 1945 All 100; 1945 AWR (HC) 18; 46 Cr. LJ 525 AIR 1972 SC 2478 1972 cr LJ 1704; 1972 SCD 1119). P.W. claims to have recognised the accused persons at the time of occurrence but he did not disclose their names to anybody before arrival of I.O. conviction on such evidence cannot be upheld as the evidence patently suffers from serious infirmities. Conviction under section 395 of the Code cannot sustainable for reason - (a) No clear evidence that there were five or more persons, (b) Delay in lodging FIR (c) Evidence of the house - owner patently suffers from serious infirmities, (d) P.Ws could not identify the accused though they claimed to have recognised them, (e) Unchallenged defence evidence that accused persons were men of good character (Iman Ali Vs. The State, 25 DLR 407).

The occurrence was in the dark night. The witnesses claimed to have indentified the accused because of light of lantern he was holding and that claim had been introduced for the first time in his evidence and he had not spoken about it either in his statement in the course of investigation or in his report. There was no evidence of any co-villagers in support of the version that he was having burning lanterns at the time of occurrence or the culprits had been focussing torchlights. He had not even stated about specific parts ascribed belatedly on the evidence at the trial when he was examined in the course of investigation. It was held that accepting evidence of such sole evidence and basing conviction mainly thereon was wrong (1984 Cr LJ 769 (Ori).

The statement of the accused leading to the discovery of the stolen articles consitutes a very valuable piece of evidence against him in a case of dacoity. In the absence of any reasonable explanation by the accused in such a case, the discovery of the plundered property in consequence of the information furnished by him gives rise to a presumption under Section 114 that he took part in the dacoity and convicts the accused with crime (1957 Cr LJ 328 (SC) = 1957 Cr LJ 481 (SC) And (1963) Cr LJ 8 (SC) Rel on 1984 Cr. LJ. 1135 (Raj.).

Where the articles were recovered from the places accessible to other persons also, it was held that though the accused might be aware of the existence of these articles he may not know the source from which the other members of the family obtained these articles and therefore the accused could not be connected with dacoity (1979 Cr LR (Mah) 81). The fact the articles recovered from the house of the accused as well as from the cattle shed and also from some otherd persons were recovered one month after the dacoity raises doubt the involvement of the accused in the crime(1979 Cr LR (Mah) 81).

Merely standing some where near the place of occurrence of accused a young man and fleeing away after hearing alarm as "dacoits" "dacoits" could not be a circumstance to establish guilt of accused (1982 Cr LJ 572). (Gau).

Accused found inpossession of torch and currency notes. Same not satisfactorily proved as forming part of *corpus delicti*. Victim also failing to identify accused in two identification parades. Accused not liable to be convicted under Section 397 (1982 Cr LJ 818 = AIR 1982 SC 984). Where the person found in possession of stolen property was not named by the eye witnesses or in daying declaration and no witness claimed to have identified him taking part in dacoity, it was held that he could only be convicted under section 411 Penal Code (1969) 2 SCWR 793).

Where it was proved that the accused was one of the dacoits and gave a blow with lathi on the head of a person while committing dacoity, but there was no evidence, to show that the lathi used by him was a deadly weapon, nor was there any evidence to support the view that grievous hurt was caused or attempted to be caused by him, it was held that the conviction of the accused under Section 397, could not be maintained and must be altered into one under Section 395 (AIR 1957 Tripura 48).

Where the charge against three convicted persons was that they along with five or six others had taken part in the commission of a dacoity it cannot be said that the offence was committed by less than five persons and, therefore, the conviction of three cannot stand. The conviction is legal (AIR 1956 SC 441; 1956 Cr LJ 822 ; (AIR 1973 SC 760; 1973 CR LR 38; 1973 Cr LJ 599).

At the time of dacoity at night there was a lantern burning at a man's height in a verandah. The victim was manhandled by the dacoits who must have come every close to the victim so as to be regognised by him. The light was emitted from the burning of phoos near the place of incident on the next day the miscreants were seen distributing the looted property behind a wall which had hole large enough though which the witnesses could clearly see the faces of the accused who fled when detected and threre was also recovery of looted articles on chasing them. Lastly there was a fair identification parade. It was held that there was sufficient evidence to bring home the guilty of the accused. (1975 Cr LJ 345).

Where the person found in possession of stolen property was not named by the eye-wtinesses or in dying declaration and no witness claimed to have identified him taking part in dacoity, it was held that he could only be convicted under Section 411, Penal Code (1969) 2 SCWR 793). Where the witness was neither mentioned in the charge sheet nor did he figure in investigation of the cases; held his appearance deprived the accsued of an opportunity to cross-examine him effectively. Benefit of doubt was awarded to the accused by not relying on his deposition (1977 Cr LR (SC) 294).

It is well settled that the question of *bona fide* claim of right arises only where the accused show to the Court's satisfaction that their belief is reasonable and is based on some documents or title, however, weak it may be. In the instant case, the appellants have not produced a single document to show that the tank belonged to the Government or that there was any iota of evidence to suport their stand that they had any *bona fide* claim to the tank. The appellants sought to fish in the tank by sheer force of arms. Some of the appellants were armed with deadly weapons and actually brandished them and threatened the complainants not to interfere with their fishing in tank. Therefore the case of dacoity was made out (Gedha Raminaidu v. State of Andhra Pradesh, (1980 Cr. LJ. 1477(1478) (SC).

Where the accused caused hurt to their victim before committing theft, it cannot be said that they were guilty of theft only. Thus where the primary object of the accused was not to beat the inmates but was to break into the house, and to take the poroperty and hurt was caused to facilitate entry of the accused into the house to take the property and causing of the hurt and taking of the goods were parts of the same transaction and were committed with the object of removing certain boxes and taking their contents; it was held that the accused were guilty under section (395 AIR 1948 Mad 96).

There is no statutory prohibition against conviction under both section 395 and section 412, Penal Code. But on principle, if a criminal act is only a single act coming within the definition of two distinct offences, there should not be a conviction for both the offences (1956 Andh LT 915). Thus where the accused is convicted under section 395 for committing a dacoity in which the property found in his possession came to him, he cannot be held guilty both under sections 395 and 412 (AIR 1956 All 336). Where certain property stolen in a dacoity was recovered from the houses of the accused at their instance 8 days after the dacoity but the court disbelieved evidence relating to the identification of the accused as those involved in the commission of the dacoity; it would be meaningless to convict the accused both under section 395 and 412 (1958 Andh L.T. 476). Where the accused who was found in possession of stolen property was not guilty of dacoity though he knew that the prop-erty in his possession was stolen property AIR 1956 All 336, or where the accused did not participate in commission of a dacoity but he waited at some distance to take the looted property, he would be guilty under section 412 and not under section 395 (AIR 1955 NUC (Assam) 4911).

In a bank dacoity the accused persons were arrested red-handed near the place of dacoity whilst escaping in car. The first information report was lodged promptly. That the number of the car was not mentioned was considered a minor infirmity. a part of the loot as well as the weapons used in the dacoity were recovered . The testimony of the bank employees was considered reliable. In these circumstances conviction under S. 395 was held made out (State v. Sukhpal Singh 1983 SCC (Cri) 213; Chandan singh v. State 1985 Cri LJ (NOC) 39 (CAl); Subhas Bhattacharya v. State Cri LJ 1807 (Cal).

Where there was proof of a longstanding enmity between the accused and the victims, the husband was killed and the wife sustained injuries, the offence was committed during midnight and there was sufficient noon light and lantern light to enable the victims to identify the accused, and first information report was lodged without delay, it was held that the mere fact that none of the looted property could be recovered was not considered material whislst adjudging the accused guilty (Om Parkash 1983 Cri LJ 831 (sC) = AIR 1983 SC 431).

In Lakshman Prasd v. State of Bihar (AIR 1981, S. C. 1388 (1388, 1389), the complainant was a rich businessamen of the locality and the accused was his next door neighbour having a double storyed house. A dacoity took place in the house of the complainant in the course of which cash and other articles were stolen away. The accused was convicted under Sec. 395 of the Panel Code for having committed dacoity along with others in complainant's house. There was many inherent improbabilities in the prosecution case so far as the participation of the of the accused was concerned. In view of a dispute between complainant and accused there was a clear possibility of the accused having been falsely implicated due to enmity. Intrinsic circumstances spoke volumes against the prosecution case and raised considerable amount of suspicion regarding the complicity of the accused in the dacoity. It was held that conviction and sentence were liable to be set aside.

In a case of dacoity a finding as to the number of persons concerned being five or more is esential (PLD 1967 Dhaka 528; 17 DLR 629; AIR 1925 Lah. 337d (DB). Where the prosecution witnesses were reliable and no enmity was established between prosecution witnesses and the accused and no reason was shown for such witnesses to implicate the accused falsely. The identification of the accused in test identification parade was found to be without any defect or fault, conviction under this section could not be interfered with (1969 P. Cr. L. J. 811).

Where the prosecution evidence suffered from suppression of material facts and was full of embellishments, and the suppression and the extent of embelishment could not be determined. It is unsafe to base any conviction on such evidence (PLD 1965 Dhaka 92; PLR 1965 Dhaka 58 (DB).

Where it was clear from the evidence that some of the accused had been falsely implicated but it was not clear who they were, as where five persons were cited as persons involved in the robbery of a single bullock, but from the nature of the offence it was clear that the most three or four persons could have been involved in the case; all the accused were acquitted (1976 P. Cr. LJ 28).

5. Testimony of witnesses.- A witness behaves in a set of a circumstances cannot be laid down once for all and every case has to be considered in its own particular set of circumstances. In this particular case it is found that during the banking hours dacoits had entered into the bank and caused commotion, confusion, terror and threat to the life was also given and murder was also committed and looting had been done, and so naturally the witnesses who are present, might have become stunned stupefied. In this context the observations of the Supreme Court in the case Ranapratap v. State of Haryana (AIR 1983 SC 682), are relevant to be quoted:

"Every person who witnesses a murder, reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start waitting. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim even going to the exstent of counter-attacking the assailants. Everyone reacts in his own special way. There is no set rule of natural re-action to discard the evidence of witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginatively."

So if due to panic and terror created by murder, looting and threats to life, identifying witnesses have not been in a position to note the special feature, descriptions or identification marks of the particular accused or the specific roles played by them and for that reason if the details have not been given, which ought to have been given, then should the evidence of such witnesses be thrown away in its entirety even if there is the evidence like recovery of looted amount from the possession of the accused and further the indentity of such amount being established as the amount looted in this very dacoity (Rameshish Rai Vs. State of Bihar, 1989 SC cr. R 318 (338).

Before throwing overboard the evidence of partisan and interested witnesses the Court will see whether at the time when the occurrence had taken place it was possible for the prosecution to produce independent outsiders as witnesses and whether the evidence of interested and partisan witnesses stands uncorroborated. Where the event had taken place inside the house and at dead of night, it would be futile to except the prosecution to produce independent outsiders as witnesses (Siya Ram Rai v. State 1973 SCC (Cri) 236 = 1973 Cri LJ 155 (SC). Sushil Kumar Sen v. State 1984 Cri LJ (NOC) 120 (Ori).

Where the presence of eye-witnesses at the place of occurrence was established and recovery of stolen property and crime weapons was proved, and the accused was correctly identified in identification test and foot prints evidence also lent assurance to such identification. The case stood proved against the accused (1979 P. Cr. LJ 137 (DB) (Kar). There is no hard and fast rule that kanown persons would not go to commit dacoity without taking care of concealing their faces. It depends on the emperament of a person. There can be hardened criminals. When a known person is desperate and very much inimical, he can go to commit dacoity without taking the usual precaution of covering his facte (Siya Ram v. State 1973 LJ 155 (SC) = 1973 SCC (Cri) 236).

Although many persons gathered and watched the incident of dacoity, but only one witness, who was inimical towards the accused, was examined to implicate the accused. His evidence under such circumstance could not be accepted (Ram Lakhan v. State AIR 1977 SC 1936 = 1977 Cr LJ 1566). Of course, non-examinationof all those who witnessed the occurrence, by itself, is no ground to discredit the prosecution case (Ramiat v. State AIR 1977 SC 2102 = 1977 Cr LJ 1744). Contradictions in the evidence of prosecution witnesses as to the weapons possessed by the accused do not discredit the testimony of such witnesses. The testimony of an identifying witness is not open to doubt merely because the name of the witness does not appear in the first information report (Bharat Singh v. State 1972 Cri LJ 1704 (SC). Omission to state recognition to the investigating officer amounts to material contradiction (Moslemuddin and others Vs. The State 1 BCR 70).

Where the identity of the dacoits could not be established and witnesses produced were interested parties and also the delay in filing the first information report was not explained the conviction of the accused could not be maintined (Damondar Sahu v. State 1979 Cri LJ (NOC) 31 (Pat).

6. Sole witness.- As a general rule a court can and may act on the uncorroborated testimony of a single witness. However in order to sustain an order of conviction on the basis of the testimony of a solitary witness the evidence must be clear, cogent, convincing and should be of an unimpeachable character (Madan Naik v. State 1983 Cri LJ (NOC) 47 (Ori).

None of witnesses gave any decription of dacoits in their statements or in oral evidence nor gave any identification marks, such as statute of accused or whether they were fat or thin or of fair colour or black colourt. Only one winess identified dacoits after certain days from T. I. Parade. It was held that conviction cannot be based only on identification by single witness (1977) Cr LJ: NOC 80 (Pat) Reversed) AIR 1981 SC 1392).

The occurrence of dacoity took place on a dark and cloudy night. The culprits concealed their identity by painting themselves and used turbans to over their faces. The sole witness claimed to identify the accused. He however failed to explain as to how he was able to identify them on such a dark night. In the basence of corroboration the accused could not be convicted on such testimony (Sidha Dehury v. State 1082 Cri LJ 500 (Ori). Rajkishore Sahu v. State 1983 Cri Lj 1715 (Ori); Wakil Singh v. State 1981 Cri LJ 1074 (SC); Fofur Sheilh v. State 1984 Cri Lj 559) (Cal). But where the miscreants named by the solitary witness were known to him being local men conviction was ordered (Barka Rajwar v. State 1983 Cri LJ 1851 (Cal). Krishna Reddy v. State 1985 Cri LJ (NOC) 107 (Ori).

7. Approver's testimony.-An approver's evidence must satisfy a double test. The evidence must show that he is a reliable witness and that his evidence has received sufficient corroboration (Khagendra Gahan v. State 1982 Cri LJ 487 (Ori). Aprrover's

evidence when is exculpatory and contians intrensic infirmities, no conviction thereon can be sustained (AIR 1982 SC 1227=1982 CrLJ 1579).

Uncorroborated statement of the approver is not sufficient for conviction of the accused (AIR 1923 Lah 385).

Approver identified accused at T. I. Parade. Approver's statement to I. O. bound down later to one made before a Magistrate on oath. Held, evidence to be examined with great care but not to be discarded outright. Held, the witness had identified the appellant in a T. I. Parade. No doubt has been recorded in the course of investigation under Section 164, Cr. P. C. and that he had been bound down to a statement made on oath before the judeicial Magistrate but on this ground his evidence is not to be discarded; although it has to be examined with greate are before its acceptance (1985 Cr LJ 1573).

The appreciation of an approver's evidence has to satisfy a double test. His evidence must show that he is a reliable witness and that is a test which is common to all witnesses. If this test is satisfied the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration. This test is special to the cases of weak or tainted evidence like that of the approver (Sarwan Singh v. State of Punjab, AIR 1957 SC 37; (1957) 58 Cr LJ 1014; State of Bihar v. Srilal, 1960 Pat 459 = (1960) 61 Cr LJ 1360).

As to corroboration however the matter was explained further in case of Major E. G. Barsoy v. State (1961 SC 1762 (1780), and the Supreme Court held that it is not at all meant that the evidence of an approver and the corroborating pices of evidnece should be treated in two different compartments, that is to say, the courts shall have first to consider the evidence of the approver *de hors* the corroborated pieces of evidence and reject it if it comes to the conclusion that his evidence is unreliable, but if it comes to the conclusion that it is reliable then it will have to consider whether that evidnece is corroborated by any other evidence. The Supreme Court held that this would not be the correct way to appreciate the approver's evidence. In fact in most of the cases the said two aspects would be so interconnceted that it would not be possible to give a separate treatment, for as often as not, the reliability of approver's evidence, though not exclusively, would mostly depend upon the corroborative support it derives from other unimpeachable pieces of evidnece.

There can be no doubt that the very fact that the approver has participated in the commission of the offence introduces a serious taint in his evidence and courts are naturally relevant to act on such tainted evidence unless it is corroborated in material particulars by other independent evidence. It would not, however, be right to expect that such independent corroboration should cover the whole of the prosecution case or even all the material particulars of the prosecution case. If such a view is adopted it will render the evidence of the accomplice wholly superflous. On the other hand, it will not be safe to act upon such evidence merely because it is corrobroated in minor particulars or incidental details because in such a case corroboration does not afford the necessary assurance that the main story disclosed by the approver can be reasonably and safely accepted as true. It is well settled that the apprciation of approver's evidence has to satisfy a double test. His evidence must show that he is reliable witness and that is a test which is common to all the witnesses. If this test is satisfied, the second test which still remains to be applied is that the approver's evidence must receive sufficient corroboration (Piara Singh v. State of Punjab, AIR 1969 SC 96 = 1969 Cr LJ 1435 = 1969 SCD 919 = (1969) 2SCJ 378 = (1969) 2 SCA 318 = 1969 MLJ (Cr) 871) O

It is not legally correct to say that before reliance can be placed upon the evidence of the approver it must appear that he is a penitent witness. Whether the evidence of the approver should in any given case be accepted or not will have to be determined by applying the usual tests such as the probaility of the truth of what he had deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether the evidence is merely self - exculapatory and so on and so forth. The Court, has, in addition, to ascertain whether his evidence has been corroborated sufficiently in material particulars. What is necessary to consider is whether applying all these tests the evidence of the approver should be acted upon (State of Andhra Pradesh v. cheemalapati Ganeswara Rao, A. I. R. 1963 S. C. 1850 (1872) = (1962) 2 Cr LJ. 671).

In Lachhi Ram v. State of Punjab (1967) 1 SCR 243 = AIR 1967 SC 792), it was said that the first test of reliability of approver and accomplice evidence was for the Court to be satisfied that there was nothing inherently imporbable in evidence. After that conclusionis reached as to reliability, corroboration is required. The rule as to corroboration is based on the reasoning that there must be sufficinet corrobroative evidence in material particulars to connect the accused with the rime (Seshanna Bhumanna v. State of Maharashtra, 1970 Cr LJ 1158 = 1970 Ker LJ 669 = AIR 1970 SC 1330).

In another case of the Supreme Court in State of Andhra Pradesh Vs. Ganeshwara Rao (AIR 1963 SC 1850 (1872) = (1963) 2 CrLJ 671), it was held that there is no warrant for the view that before reliance can be placed uon the evidence of an approver it must appear that he is a penitent witness. This is not the correct legal position. Section 306, Cr. P.C. itself shows that the motivating factor for an approver to turn, what in England is called "King's evidence" is the hope of pardon and not any noble sentiment like contribution at the evil in which he has participated. Whether the evidence of the approver in any given case be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on and so forth. The court has in addition to ascertain whether his evidence has been corroborated sufficiently in material particulars.

8. Injury on accused.- In a docoity case, accused was recently wounded and unable to give satisfactory explanation of injury. Accused was conveyed to place of hiding. Fact has some corroborative value but is also capable of explanation other than that of his complicity in the particular dacoity (AIR 1934 pesh 53 = 35 Cr LJ 960).

When the accused were arrested more than a week after the date of a dacoity with injuries upon their persons which were testified by medical evidence to be gun shot wounds the fact at best may lead to an inference that they were converned in some transaction but that does not lead to the inference that they were present in the village where dacoity took place on the particular night (AIR 1956 Bom 186 = 1956 Cr LJ 392).

One of the appellant had ill-will with the complainant who was neither robbed nor touched cmplainants's daughter-in-law, was however injured. One of the appellants holding rovolver had fired but fire arm injury is not on record. The appellants R apprehended at spot was not properly identified. Held, prosecution story was doubtful. Where nothing was robbed or touched in the course of alleged dacoity and one of the dacoits apprehended at the spot, was not properly

unidentified, the occurrence has to be viewed with suspicions in the context the conduct of the complainant and the investigation (1984) 2 Crimes 324 (P&H).

9. Legal Evidence.- The prosecution cannot be permitted to rely on such evidence without placing admissible evidence part of the information on the record. The information given by the accused may be such which if scrutinized shows only his remote connection and not the direct connection. In such a situation evidence of the bare fact of information having been given may be admissible but such evidence may cause serious prejudice (1955 Cr LJ 196; AIR 1955 SC 104). Where conviction was based on legal evidence on record, the mere fact that articles seized were not labelled at the time of seizure was held immaterial (1983 Cr LJ 1851 (Cal).

10. Recovery of stolen articles.-Recoveries of some articles concealed at a place which night have been within the knowledge of the petitioner could not, by itself, be sufficient to hold that the petitioner must have been in possession of theose articles as this circumstance would not warrant a conclusion that he was the author of concealment (Nakul Mirdha v. State, 1986 (1) Crimes 199 (200) (Orissa).

When a person is found in possession of property taken in dacoity, the proper inference to be drawn is that he was one fo the dacoits and not that he was a receiver of stolen property (NLR 1983 AC 346). Where a piece of garha cloth stolen in a recently committed dacoity was found in the house of the prisoner only four days aftr the dacoity, it was held to justify the presumption that he took part in the dacoity, though he was not identified (1 Oudh Cas 1). Where it is alleged that the accused produced stolen property but subsequently they denied having done so and alleged that property was foisted on them. The burden is on them to substantiate it. It is not necessary to lead concrete evidence for the purpose of proving it. It is enough if some material is brought on the record, direct or indirect to give rise to an inference that the property was foisted on them. If they do not lead any evidence the presumption that they had produced the property is not rebutted (PLD 1967 Kar 233).

The evidence of recovery of certain articles from the house of the accused in his absence is not sufficient to support his conviction under section 395 when there is no evidence whatsoever to suggest that they were placed in the hosue by him and were in his exclusive possession (Madh. BLJ 1954 HCR 401).

In a case of dacoity recoveries of the stolen articles from some of the accused persons have considerable importance because in appropriate cases if there be not much of time lag, the persons from whom such articles have been recovered can be convicted for commission of dacoity (Bijuli v. State 1985 Cri LJ 1977 (Ori).

Thus were the accused were found in possession of gold ornaments of the deceased soon after the occurrence, and he had no satisfactory explanation for such possession, the presumption was raised that the accused not only committed murder but also robbery of ornaments (Gopalan v. State 1985 Cri LJ (NOC) 3 (Ker); Shivashai Singh v. State 1985 Cri LJ 730 (MP); 1970 SCWR 215).

It is manifest that the evidence furnished by the recovery of various articles at the instance of and on being pointed out by the accused is fully corroborated by the witnesses, in whose presence the recoveriese were made, and all of them have signed the panchayantnamas. Thus, the question of identification completely loses its significance and is of no value at all in judging the question of recovery on which alone the apellants are liable to be convicted under Sec. 195, Penal Code, by applying the presumption warranted by Sec. 114 of the Evidence Act (Lachhman Ram v. State of roissa, (1985) 1 Crimes 611 (612, 613) (SC).

11. Legal presumption from possession of stolen property.- According to illustration (a) of section 114 of the Evidence Act, a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession (AIR 1972 SC 250 (2504). The recent and unexplained possession of the stolen property would preusmptive evidence against a prisoner on a charge of robbery (AIR 1956 SC 400). Possession of stolen property recently after the commission of a theft raises a *prima facie* presumption that the possessor was either the thief or the receiver of stolen property knowing it to be stolen, according to other circumstances of the case (AIR 1934 All 455; AIR 1974 SC 334=1974 CrLJ 277; AIR 1978 SC 522).

The question whether a presumption should be drawn against the accused under illustration (a) of Section 114 is a matter which depends on the evidence and the circumstances of each case. The nature of the recovered articles, the manner of their acquisition by the owner, the nature of evidence about their identification, the manner in which the articles were dealt with by accused, the place and circumstances of their recovery, the length of intervening period and ability or otherwise of the accused to explain the recovery are some of such circumstances (Mohan Lal v. Ajit Singh 1978 Cri LJ 1107 (SC).

Recovery at the instance of the accused soon after the occurrence in the presence of Panches. The factum of recovery of articles at the instance of the accused persons in the presence of police officers and panch witnesses who have deposed to the same, is itself sufficient to bring the case not under the provisions of Section 412, Penal Code, but also under Section 395, Penal Code, with the aid of Section 114 of the Evdence Act because the recoveries were made very soon after the occurrence (1985) 1 Crimes 611; AIR 1985 SC 486 = (1985) 2 SCC 533 SCC (Cr) 263 = 1985 Cr LJ 753).

The circumstances under which one presumption or the other can be drawn under Section 114 of the Evidence Act have not been stated by law. It is necessary always to start with the lesser presumption and draw the higher presumption only when there is some other evidence to show the complicity of the persons in the crime itself (Shivappa v. State 1970 SCC (Cri) 215). Where the accused were covicted on the sole evidence of having in their possession stolen goods which were later indentified to belong to the traders whose goods were looted in a dacoity, it was held that the presumption that they were dacoits themselves was rightly drawn (1970 SC Cr 415 = (1970) 2 SCJ 681 = 1970 SCC (Cr) 215).

Presumption from the recoveries arises against appellant who has not claimed any of the properties nor has he explained how he came in possession of these articles within a few hours of the dacoity and murder. The appellant and 5 others were arrested immediately after the dacoity and murder from near the place of incident. Obviously, they were on the run from the appellant and co accused. Country made pistols were also seized. All these are the persons of Uttar Pradesh and they have not explained as to how they happened to be there with stolen articles. Therefore, an inference could be drawn that the appellant and the five other accused had committed the murder and dacoity from the recovery of the recently stolen articles from them and the same were recovered during the course of the same transaction (1985 Cr LJ 730 (MP) = 1984) 1 Crimes 933 = AIR 1954 SC 28 = 1954 Cr LJ 257).

The accused was convicted for an offence under Section 395, Penal Code, due to recovery of dacoity property soon after the occurrence and it was identified by the owners. The accused were unable to give satisfactory, explanation for being in its

possession. Held, presumption of Illustration (a) to Section 114 of Evidence Act would apply to the accused (1984) 2 Crimes 142 (Orissa).

Where recovery of extorted articles from possession of the accused unmistakably identified the accused was guilty of robbery, convicction of the accused would be justified (1969 PCrLJ 669; 1970 SCWR 215). But where particular of stolen articles were neither given in FIR nor by a prosecution witness. the mere recovery was held to be not sufficient to corroborate prosecution case against the accused beyond reasonable doubt (1969 PCrLJ 1317).

12. Confession.-Conviction recorded on basis of confession which appeared to be voluntary and true was upheld as being based on proper appreciation of evidnece (NIR 1986 SCJ 38). From the confessional statement it transpires that the petitioner is not only a receiver of stolen property, but he assists the gang in committing theft and if such a story is ultimately established in accordanc with law, the petitioner must be found implicated in abetting the offence punishable under Sec. 395 of the Penal Code. Moreover there is some material on record which implicates the petitioner in offences like under Secs. 395 and 412 of the Penal Code (Rajani Kanta Mehta v. State of Orissa 1975 Cr LJ 83 (87) (Orissa): 40 Cut. L. T. 922).

Where a confession is not corroborated by, any other evidence and it is subsequently retracted it would be unsafe to convict the accused on the basis of the confession (AIR 1945 Bom. 484 (Bom). But if the retracted confession is corroborated by the details given in its and by the production of stolen property by the details given in its and by the production of stolen property by the accused, it may be sufficient for conviction of the accused under the Section(PLD 1967 Kar. 233).

13. Identification of dacoits.- Conviction can be based on identification evidence alone if it is established that the dacoits continued to plunder the house for a long time and that during that interval, their victims had full opportunity of noticing their features and that there was sufficient light for them to be able to do so (AIR 1934 Lah 641; 36 Cr LJ 212); PLR 1963 Dhaka 331 (DB).

Evdence of identification of those taking part in dacoities at night is apt to be unreliable (AIR 1941 Bom 146; 43 Bom. LR 157; 42 Cr LJ 519).

Identification evidence by itself is a very insufficient basis for conviction but when it is found that the identification witness have been familiar with the face of the person identified there can be no certainty that the witnesses really saw the accused (AIR 1924 Oudh 295; 25 Cr LJ 1125). Identification evidence is a weak kind of evidence and no conviction can be based upon identification evidence unless corroborated (1979 All Cr. R. 420).

The identification of the accused for the first time at trial is no identiftication at all particularly in view of the fact that the accsued were never known to the eye-witnesses and this identification in the Court was done by them more than three years after incident (Devi Charan v. State 1988 (10 Crimes 458 (Del). There is no rule of thumb that after the lapse of a long period the witnesses would in no case be able to identify the robbers they had seen in the course of robbery. The court has to be extremely cautious in apprasing such evidence and the decision in each case must turn on its own special facts. Where the occular witnesses had ample opportunity to notice and mark the special features of the miscreants and they had given some particulars of identity of the culprits in their statements to the police and they were not cross-examined on this point vis-a-vis their police statements, the dentity of the appellants as the robbers was established beyond reasonable doubt (Jagdish 1985 CrLJ 1621 (Del).

It is also true that the substantive evidence is the statement in Court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding. There may be exception of this rule where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it, without the precaution of an earlier identification proceeding (Vaikuntam chandrappa v. State of A. P. AIR 1960 SC. 1340 ; ILR 1962 A. P. 96).

In the first information report itself it has been mentioned that all dacoits had painted their faces excepting appellant, who had concealed his face by wrapping a gamchha. If that be the position naturally the identification was not possible. In case of a few others, the informant has said that he had identified them by their voices. The identification by voice cannot be said to be sound and acceptable, When all the dacoits had painted their faces, naturally the identification was not possible. The appellants have become entitled to benefit of doubt and acquittal (Nanu Singh v. State, of Bihar, 1985 B. L.J. 316 (317).

In Wakil Singh and others v. State of Bihar (A. I.R. 1981 S. C. 1392) it is held that:-

"In the instant case we may mention that none of the witnesses in their earlier statemnets or in oral evidence gave any description of the dacoits whom they have alleged to have identified in the dacoity, nor did the witnesses give any identification marks viz, ...Stature of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible for us to convict any accused on the basis of a single identification, in which case the reasonable possibility of mistake in identification cannot be excluded."

In most cases of dacoity, the dacoits are not arrested on the spot. The evidence on the basis of which their conviction is sought consists only of identification and recovery of stolen property. Great importance is, therefore, attached to the evidence of identification. as it is on that evidence that the question of guilt has to be decided, it is expected that the evidence of identification should be entirely above board and should be such as can command confidence (1960 All Jour 414).

Where in a criminal trial of dacoity, the accused was put up for identification eight days after his arrest, his identification in the parade becomes rather suspicious and if two of the witnesses who were supposed to have identified him in the parade could no longer do so in court, he was entitled to the benefit of doubt (1957 Cr LJ 678).

No hard and fast rule can be laid down that in every case of dacoity, if there is identification by only one withness, that identification should never be accepted. Every instance of identification in circumstances which usually accompany a cases of dacoity has to be judged on the facts of that particular case presented by the prosecution, and if, after a careful scrutiny, there is the slightest hesitaion in the mind of the Court that there was possibility of a mistaken identification or that the statement of the sole witness was influenced by some of the cause, the accused, in view of the matter, is entitled as a matter of course, to the benefit of a reasonable doubt (1956 Cr LJ 95; AIR 1956 Pat 39 ; (1963) 2 Cr LJ 121).

The presence of an identifying witness at the scene or occurrence cannot be doubted merely because his name did not appear in the FIR when as many as all the twenty persons travelling by the bus were said to have been looted but the names of only a few were mentioned in the FIR (AIR 1972 SC 2478 = 1972 Cr LJ 1704).

Where the witnesses gave graphic description of dacoity in running train and identified all the accused on identification parade and there was no infirmity on evidence of occurrence and past occurrence witnesses it was held that the prosecution case proved to the hilt (1984 Cr LJ NOC 120 (Ori).

When in proceedings on charge of dacoity, the case of the prosecution rested mainly on the evidence of three identifiying witnesses coupled with the fact that some of the accused had superficial injuries on their person and no incriminatory or stolen articles were recovered from the possession of the accused and the evidence of two of these witnesses was liable to be discarded, it would not be reasonable and proper to base conviction on the sole evidence of the remaining one identifying witness when the witnesses was not reliable (1984 Cr LJ NOC 22 (Orissa).

Occurrence was during dark midnight. Evidence of witnnesses claimed to have identified culprits standing at distance of 150 feet with help of light emanating from the strawfire in the khandar which was at distance of 40 steps (80 feet) from the scene house is not reliable. Accused are entitled to acquittal (AIR 1992 SC 1854).

If after a careful scrutiny, there is the slightest hesitation in the mind of the Court that there was possibility of a mistaken identification or that the statement of the sole witness was influenced by some others cause, the accused in view of the matter, is entitled to the benefit of a reasonablee doubt (AIR 1956 Pat 39 1956 Cr LJ 95).

When a dacoity is committed, the victims and the inmates of the house are normally and naturally in a state of extreme excitement with a heavy sense of fear. The evidence of identification of an accused peroson at the trial for the first, is, from its very nature inherently of weak character. In order to carry conviction, the evidence should ordinarily show as to how and under what circumstances, the witness came to pick out the particular accused person and the details of the part which the accused had played in the crime in question with reasonable particularity. The purpose of a test identification parade seems to be to test and strenghthen the trustworthiness of the evidence given in the Court. As a safe rule of prudence, it is considered necessary to generally look for corroboration of the sworn testimony of a witness in the Court as regards the identity of an accused who is a stranger to him in the form of an earlier identification proccding (1982 Cr LJ 500 (Orissa.).

Occurrence taking place on a dark and clouding midnight. Culprits taking precution to conceal identity by painting themselves, wearing masks and using turbans to cover their faces. Sole witness claiming to identify accused, failing to explain as to how they identified on dark night. Absence of corroboration of his statement by any other evidence direct or circumstancieal. Accused cannot be convicted for the offences they are charged with (1982 Cr LJ 500 (Ori). Occurence taking place at 11 p. m. Witnesses, inmates of bus both in their earlier statements and in their oral evidence before Court have not given any description of dacoits. No explanation as to why accused persons were kept in police station for to days after occurrence. The very fact that all witnesses even without any margin of error had identified suspects as culprits, creating suspicion in mind of Court. Coviction of accused on basis of such identification, liable to be set aside (AIR 1993 SC 931).

In an identification, two accused got acquittal for failure in identification. Three persons were convicted. In appeal, it was held, when the eye-witnesses had sufficient opportunity of viewing the accused, their subsequent identification at parade and in Court is presumed to be genuine. Conviction maintained (1984) 1 Crimes 377(M. P.).

By the time witnesses came to give evdence in the Court, they could not have remembered which accused disclose which article. The question of identification completely loses its significance and is of no value at all in judging the question of recovery on which alone the appellants are liable to be convicted under Section 395, Penal Code, by applying the presumption warranted by section 114 of the Evidence Act (1985 Cr LR (SC) 196 = (1985) 1 Crimes 611 = AIR 1985 SC 486 = (1985) 2 SCC 533 = 1985 SCC (Cr) 263 = 1985 Cr LJ 753).

In the case of Budhsen v. State of U. P., 1970 Cr LJ 1149; AIR 1070 SC 1321 Supreme Court of India held that the evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character and it is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in Court as to the identity of the accused who was a a stranger to them in the form of earlier identification proceedings.

The learned trial Court held that the articles recovered have not been identified and there is no material to hold the articles to be belonging to the complanants and apart from it in the context of accepting the defence version where the accused persons were expected to remove the articles which belonged to them. After examining all the circumstancces the Court came the conclusion that the identification is without any substance. The evidence about removal of articles is therefore of no consequence at all but unfortunately the learned judges and the High Court have omitted to consider this aspect of the matter (1986 Cr LR (SC) 95; (1986) 1 SCC 549). In a bank dacoity case, the witness identified the accused at test identifidation parade and then in session Court, Held, his participation stood proved (1986 Cr LJ 381 (Cal); (1986) 1 Crimes 185 (Call).

"Held: victim who was working as a teacher, could reasonably be in a position to identify J. in the parade held after lapse of 8 days after robbery, as he had time to observe because of the injury inflicted by J on his left thigh. Non-recovery of robbed paltry sum of Rs. 397/-was no circumstance which introduced any infirmity in the case as such a small sum could easily be disposed of. However, as the victim did not state any thing about the kind of knife used to inflict injury or about the size of the blade etc, accused could not be convicted under Section 397 as the weapon used was not proved to be a deadly weapon'. He was rightly convicted under Section 394, His conviction under Section 397 was set aside" (1986 Cr LJ 233).

Identification by witness of an accused who was not known to him, prior to the incident, for the first time in the court, is almost valueless (Harish Natvarlal Mistry and ors. v. State of Gujarat 1993 (1) Crimes 453 (Guj.).

In Mohan Lal Ganga Ram Gehani v. State of Maharashtra, AIR 1982 SC 1982 SC 839, it was held as under:

"Thus, as Shetty did not know the appellant before the occurrence and no Test indentification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in Court, his evidence becomes absolutely valueless on the question of identification. On this ground alone; the appellant is entitled to be acquitted. It is rather surprising that this important circumstance escaped the attention of the High Court....." (1982 Cr LJ 630 = 1982 Cr LJ (SC) 77 = (1982) 1 SCC 700 = (1982) 1 SCJ 580 = (1983) 2 Cr ALL Ind Cr L. R).

The evidence was that whereas others had painted their faces, one person had hid his face with a Gamechha. Dacoits were spread over several place while a single lantern was burining only at one plaec. In the absence of sound proof indentification of all the accused was not possible nor could the identification be possible by voice.

The accused were given the benefit of doubts (1985) 2 Crimes 311 (P&H). Identification of T. I. parade does not constitute substantive evidence. They may, when, for example the Court is impressed by a particular witness, on whose testimony it can safely rely, without such or other cerroboration (AIR 1970 SC 1320; 1970 Cr LJ 1149). A conviction under section 395 is not sustainable when it is based on test identification parade. A identification parade to be dependable must satisfy certain conditions. In the first place, the accused should be unknown to the identifying witness by name. Secondly, he must not have had any opportunity to see the accused after the occurrence in connection with which he is put up for identification. Thirdly, the identifying witness makes no mistake, except of a most negligible character, in the matter of identification. If the accused was known to the witness by name from before the occurrence he would disclose the name of the accused immediately after the incident and at any rate to the investigating officer and in that case the queston of his figuring as a witness in a T.I. parade will not arise. His identification of the known accused in a test identification parade will thus be worse than useless. This is a major reason for not depending on a T.I. Parade held long after the incident (Hatu Mallik Vs. The State, 19 DLR 662; 7 DLR 564).

No doubts, statement in Court, is substantive evidence but the purpose of test identification is to test that evidence and a safe rule is that the sworn testimony of witnesses in Court as to identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration, which should be in the form of an earlier identification proceeding. There may be an exception to this rule as where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding AIR 1963 Andh. Pra. 314 (DB) ; AIR 1960 SC 1340; Rel. on

Where the identity of the appellants with persons who might have treaspassed in complainant's house had not been established beyond the possibility of reasonable doubt it was not possible to support the conviction (AIR 1923 Lah 161). It cannot be laid down as a hard and fast rule that identification evidence by itself is an insufficient basis for conviction. The value of identification evidence must vary with the cirumstances established in each case. Even in cases of dacoity conviction can be based on identification evidence alone, if it is established that the dacoits continued to plunder the house for a long time, and that during that interval their features were recognised and that there was sufficient light to be able to do so. But where all reasonable possibility of an honest mistake being made by some of the identifying witnesses has not been eliminated, it would be unsafe to convict on identification evidence alone unless such evidence is corroborated by some circumstances which may indicate that the individual concerned took part in the commission of the offence (PLD 1963 Dhaka 331 DB). It follows that conviction can be based on identification evidence alone if it is established that the dacoits continued to plunder the house for a long time and that their victims had full opportunity of noticing their features and that there was sufficient light for them to be able to do so and not otherwise (AIR 1934 Lah 641).

No hard and fast rule can be laid down that in every case of dacoity if there is identification by only one witness, that identification should never be accepted (AIR 1956 Pat 39). It is no doubt correct that generally a man should not be convicted on identification by one man alone. But if the court feels satisfied that the identification of one man was perfect, that he had ample opportunity of seeing the accused, and that there was enough light in which the accused could be identified, and particularly in cases where the identifying witnesses and the accused come in contact with each other during a dacoity, it may be possible to sustain conviction on

such identification (AIR 1955 NUC 3835). Where a witness has consistently identified the accused, both at the test parade and at trial, his identification may safely be accepted unless there are other cirumstances indicating that the witness had probably made a mistake (AIR 1963 AP 314).

As a rule of caution and prudence, courts should insist on proper identification proceedings during investigation, and if that identification is satisfactory, then only the sworn testimony of a witness in court should be accepted (ILR (1954) 4 Raj 476). No doubt, statement in Court, is substantive evidence, but the purpose of test identification is to test that evidence and a safe rule is that the sworn testimony of witnesses in Court as to identify of the accused who are strangers to the witnesses, generally speaking, reqduires corroboration, which should be in the form of an earlier identification proceeding. There may be an exception to this rule as where the Court is satisfied that the evidence of a particular witness is such that it can safely rely on it without the precaution of an earlier identification proceeding (AIR 1960 SC 1340).

Delay in edentification of accused.— The identification parade should be held soon after the arrests of the suspects. In case of delay there should be sound and convincing reason to explain it. The delayed identification is looked upon with suspicition. The delay of nearly one month in arranging the test identification of the accused after his arrest when unexplained by the investigating agency renders the identification of the accused unreliable (1984 CrLJ 1135 (Raj). Where identification parade is held a long time after the commission of dacoity, it loses much of its value because it becomes doubtful whether the witness has rightly identified the accused or not (PLD 1967 Kar 233). It has been held that delay in identification and the inability of the complainants to give any valid reason for remembering the faces of the dacoits makes evidence as to the identity of the dacoits altogether unreliable (1957 CrLJ 678). A considerable delay in holding test identification parade is bound to throw a doubt on the genuineness thereof (Ram Lakhan & Anr. Vs. State of UP 1991(1) Crimes 755 (All HC).

Test-identification parades should be held at the arrliest opportunity, because an early oportunity to identify the offenders tends to minimise the chances of the nemory of the identifier. Witnesses failing away due to long lapse of time (Jamna v. state 1986 (2) Crimes 529), where there is undue delay in holding of parade the evidence of witnesses cannot be acted upon (State v. Kalia 1986 (2) Crimes 145).

No hard and fast rule can be be laid down as to within what time, test identifications should be held, yet as observed by the Supreme court, it is desirable that they should be held at the earliest opportunity Sheikh Habib v. State of Bihar; (1972) 4 SCC 773; Bharat Singh v. State of U. P. (1973) 3 S. C. C. 896 = 1973 SCC(Cri) 574)

Although it cannot be laid down as a proposition of law that after the lapse of a long period witnesses in no case would be able to identify the suspect (Delhi Administration v. Bal Krishna; 1972 Cr LJ = AIR 1972 SC 3) early opportunity to identify tends to minmise the chances of memory to fade (Sheikh Habib v. State of Bihar (Sheikh Habib v. State of Bihar (1972) 4 SCC 773)

Where conviction was based on identification by five witnesses, and the test identification parade took place 42 days after the arrest it was held that the identification was doubtful and the conviction improper (Soni v. State 1983 SCC (Cri) 49).

Indentification evidence without a test identification parade is valueless when the accused is not known to the witness (Puran Chandra Sahu v. State 1984 Cri LJ

1407 (Ori). Where the test identification parade was held after delay of 56 days of arrest of accused against him and there was possibility of witnesses having seen accused from before the commission of offence, conviction can not be sustained on such evidence of identification (Sir Ram v. State of U. P. 1993 (1) Crimes 405 (All).). A belated test identification parade would not be acted upon (1986) 2 Crimes 145 (Ori).

Delay of 9 months, held, not safe to convict (1973 All Cr R 388). Delay of 15 nonths, held, no credibility can be lent to the performance of the witness and conviction based only on evidnece of identification cannot stand (1972 All Cr R 526).

Wherever a parade is held with delay, the prosecution should explaint it and absence of reasonable explaination will detract from the value of the test (Asharfi V. State AIR 1961 All 153). In Case of delay of 3 months the accused should crossexamine the Police officer and the Magistrate if he wishes to take advantage of the undue delay (Bharat Singh v. State of U. P. (19730 3 SCC 896; 1973 SCC (Cri) 574.

Where identification of two of the accused took palce after a gap of four days after their arrest with no explanation for delay, it was held that the accused could not be convicted (Bali Ahir v. state 1983 Cri LJ 434 (SC)= 1983 SCC (Cri) 312). However where the witnesses identified the accused not only in test identification parade but also before Sessions Judge the participation in dacoity was held proved (Robin Bepari v. State 1986 Cri Lj 381 (Cal).

Where the accused were made to wear the same clothes they were alleged to be wearing on the day of the dacoity whilst the other persons were wearing jail clothes, a proper test identification parade was not held (Jamana v. State 1986 (2) Crimes 529).

Test identification parade is meaningless when the witnesses are known to the accused from before (Achhey Lal Shani v. State of Bihar, 1976 Bihar Cr C. 164 (165) (Pat). Where the trial Court has held that the accused had probably been shown to the witnesses after his arrest, the evidence of identification against the accused is not at all reliable (Ram Adhar v. State, 1976 U. P. Cr. C. 288 (291) (All).

Where the occurrence took place on a pitch-dark-night and a prosecution witness admitted that he had seen the accused before the test identification and had picked them at a belated identification test at the instance of the police; the identification test cannot be relied upon for conviction (1970 P. C. r. LJ 34).

Where a dacoity is pre-planned and firearms are used in its commission, deterrent sentence should be passed (1969 DLC 427; 21 DLR 684 (DB).

Test identification parade should be conducted within a few days of the apprehension of the the suspects. Undue delay in holding of parade identification by witnesses cannot be acted upon (State v. Kalia 1986 (2) Crimes 745).

However, where the accused refused to join test identification parade, it was held that no adverse inference could be drawn against him (Adesh Kumar v. State 1986 Cri LJ 233(Del).

Dacoity committed at night : Evidence of identification of those taking part in dacoities at night is apt to be unreliable 1968 PCrLJ 1825. Where the occurrence took place on a pitch dark night and a prosecution witness admitted that he had seen the accused before the test identification and had picked them at a belated identification test at the instance of the police; the identification test cannot be relied upon for conviction (1970 PCrLJ 34).

Evidence inconsistent with FIR : Where in the first information report, only two dacoits are alleged to have been recognised at the time of commission of dacoity, subsequent evidence that they were all identified cannot be relied upon unless it is strongly corroborated (AIR 1915 Lah 396).

Enmity of witness with accused : In considering an identification in a dacoity case, the existence of hostility in the form of mutual grudge or animosity cannot be wholly excluded from consideration because the same may influence an honest witness whose mind is always prepared to accept the suggestion that the act was nobody else's but that of his enemy (AIR 1956 Pat 39).

14. Refusal to take part in the identification parade-Its effect.- Where the acused have refused to take part in the identification parade the identification in Court by the witnesses who were in a position to see the accused clearly at the time of occurrence has to be accepted (Parmama Lal v. State, (1985) (1) Crimes 535 (537) (Delhi).

Where the occurrence took place at about 2.00 a. m. in the night intervening between 4th and 5th June, 1978 and the appellants were arrested in the middle of the November, 1978 and some articles were recovered from their possession and they were identified by the witnesses and the appellants diclined to participate in the test identification parade and in their refusal they did not specify the date or time when they were allegedly shown to the witnesses by the police or their photographs were taken, it must be held that the plea of theirs appears to be false and consequently their refusal to participate in the test-identification parade on 22nd November, 1978 the fixed for the purpose raises an adverse inference against them (Siraguddin v. State, 1981 (1) Crimes 331 (1) Crimes 331(332, 334) Delhi).

15.Identification of stolen property.- In many dacoity cases identification of recovered articles is the only and at all events the most important material. A mistake in the procedure or an intentional or unconscious prompting of witnesses will surely lead to the conviction of a wrong person and may result in the escape of the real offender (AIR 1952 Vind Pra). At best of times the identification of articles concerned in a theft or dacoity involves uncertainty, unless they are very distinctive in appearance and are proved to a degree of practical certainty to be the ones stolen during the dacoity or theft (1968 PCrLJ 1825). But if the article identified is not distinctive in appearance, being of a class of common and unidentifiable articles, it would be very unsafe to convict on such identification (AIR 1952 Vindh Pra. 42). Where stolen articles are identified the mere fact that an identification parade for stolen property is held twice does not reduce its value (1960 Jab LJ 1037).

It is necessary for conviction of the accused that the articles recovered should be identified as those belonging to the victim of robbery. If that is not done, mere recovery of articles is not of much value (1969 PCdrLJ 1317). Where complainant observed mysterious silence for two days. On the third he went to the police station only when called by the police and identified his watch as stolen property this would not be sufficient to prove that accused was guilty of robbery (NLR 1988 Cr 584).

Where the accused were convicted on the sole evidence of their being found in possession of stolen goods which were later identified to belong to traders whose goods looled in a dacoity, it was held that the presumption that they were dacoits was rightly drawn (1970 SCWR 215).

As a measure of prudence the Court ought to insist on the proved identification of two articles of distinctive appearance about which there cannot be any reasonable chance of a mistake (1952 Cr LJ 986).

The evidence of the witnesses identifying stolen property cannot be thrown out merely on the ground that it was not proved that the witnesses had no opportunity of seeing the articless which were mixed with the articles to be identified (Ram Sanehi 1958 Cr LJ 800; 1963 (2) Cr LJ 1; 1963 All 308; Karan Singh; 1966 Cr LJ 318). If the identifying witnesses who identified the property were present at the time of the recovery of the property the finding as to identity of the property is not legally defective (AIR 1950 All 615).

Even though identfication proceedings were not held in respect of incriminating articles the evidence of witnesses identifying the articles in Court cannot be discarded on that ground alone (1959 Cr LJ 947; AIR 1959 AP 397). In the absence of distinctiv marks, no inference can be drawn from mere similarity of articles. Hence accused should be given benefit of doubt (1966 AWr (HC) 481).

In the absence of proof that the identifying witnesses had not seen the articless to be mixed up, the identification proceedings cannot be said to be genuine (AIR 1950 All 180). In case of identification of property, the rules are not so strict as they are in the case of identification of persons (State v. Ram Bilas; AIR 1961 All 614 = 1961 AlJ 402). In a case of identification of property in order to achieve proper and correct results, a larger number of articles should be mixed with the suspected articles and at least five or six similar articles should be there (1957 All Cr LR 67). But a mere non mention of the number of articles mixed in the identification memo will not make the test indentification unreliable provided it is indicated in the memo that similar articles were mixed (Bandhan Sao v. State 1960 BLJR 268).

Where the raticles which were put up for identification were of common use and pattern and the Magistrate did not take the elementary parecaution of putting chits if paper on the articles to be identified and the articles which were mixed, it was held that no value could be attached to such identification (1953 Cr LJ 705; 1966 Cr LJ 318,). Where a police Inspector himself holds identification proceedings in respect of an article recovered by him from the accused such proceedings do not fall under the Exception contained in section 27, Evidence Act since they follow the discovery and do not lead to it. It is also hit by Section 162, Criminal Procedure Code (1952 Cr LJ 1495).

The non-mention of a particular stolen property in the F. I. R. is by itself no ground for disbelieveing the owner when subsequently he states that it was also looted. It all depends upon circumstances, his status, the number of articles that have disappeared and the confusion and the hurry (1952 Cr LJ 986).

Failure to hold test identification parade.- It is always prudent to hold a test identification parade with respect to witnesses who do not know an accused before the occurrence, but failure to hold such a parade does not make inadmissible the evidence of identification in Court. The weight to be attached to such identification would be a matter for a Court to decide (1958 Cr LJ 698 = AIR 1958 SC 350).

The absence of test identification in all cases is not fatal. If the accused is well known, it would be waste of time to put him up for identification. If there is any doubt, the prosecution should hold test identification specially if the accused says that the witness did not know him (Fadu Nath singh v. State of U. P. 1977 SCC (Cri) 124; 1953 Cr LJ 848).

Failure to hold identification parade is not fatal where enough conclusive and corroborative evidence is present (Harbajan Singh v. State of J 2K (1975) 4 SCC 480 = 1975 SCC (Cri) 545). In the absence of identification proceedings, the mere *ipsi dixit* of the witnesses that the accused was one of the dacoits cannot be believed. But

merely beacuse the identification parade was not held, the evidence cannot be disbelieved (1971 Cri Lj 814; AIR 195 All 785 Rd, on).

Non-production of a witness in the parade does not render his substantive evidence inadmissible or per se weak (1972 Cut LR (Cri) 554).

Failure to hold identification parade for identity of ornaments held not fatal when they were recognized by four close relations and the goldsmith (Nagappa D. Kalal v. State of Karnataka. 1980 Supp SCC 336 = 1980 Cr LJ 1270 = 1981 SCC (Cri) 278).

16. Non-examination of Investigating officer and its effect.-The non-examination of investigating officer was a vital defect in the prosecution case and caused serious prejudice to the petitioner for his own defence of a criminal charge (Ratha Jana v. State of Orissa, 1986 (1) Crimes 299 (302) (Orissa). In the instant case, the prosecution may not have needed the evidence of the investigating officer and its evidence would have provided sufficient material for holding the appellants guilty but for the facts that witness to state that there were marks of violence at the place of the occurrence and the investigating officer had found such marks and materials which could show that the dacoits have indiscriminately fired from their respective fire arms and caused damage to the houses of the informant and Dwarika Ral. The defence could use in the trial, any fact found by the Investigating officer which was consistent with the prosecution evidence in the Court relying upon it to say that the prosecution case should not be believed. The Investigating officer would have provided the missing link in the evidence of Pw 5 to prove the list which he, according to his deposition, had filed with the police. His acknowledgment that the had received the list would have completed the evidence and proved that he list of stolen articles was delivered to the police by the brother of the informant. His deposition, as a witness particularly on the facts of this case would have removed doubt as to the veracity of the testimony of the witnesses or would have in the event of material contradictions destroyed their evidence altogether. His non-examination has resulted in denying to the defence opportunity to test the veracity of the prosecution case as well as the veracity of the deposition of the prosecution witnesses (Hazari Chaube v. State of Bihar, 1990 S. C. Cr. R. 19 (23) (Pat). It appears from the evidence that the dacoits were apprehended by the police, but the prosecution has not examined the investigation officer apprehending the dacoits with ornaments. Although examination of the Investigation Officer is not a must, but in this case such non-examination has cast a serious doubt about the prosecution case in view of the nature of evidence on record and attending facts and circumstances of the case. The trial Judge, in this case, did not at all notice the contradictions and inconsistencies in the statement of the witnesses examined by the prosecution. This sort of treatment of evidence in convicting persons under section 395 of the Penal Code can hardly be accepted by the appellate court (Abdul Gafur Vs. The State (1988) 40 DLR 475).

17. Punishment- Though a large number of factors fall for consideration in determinating the appropriate sentence, the braod object of punishment of an accused found guilty in civilized societies is to impress on the guilty party that commission of crime does not pay. The sentence to be appropriate should be neither too harsh nor too lenient (AIR 1973 SC 2200 = (1974) 1 SCJ 534 = 1973 Cr. L. J. 1187).

Where in a nasty dacoity, not only a person received injuries, but a little boy had a number of his teeth knowcked out and young girl of 16 was molested and deprived of her ornaments it was held that crimes like this are a disgrace to any civilised community, and should be put down with the utmost rigour of the law (AIR 1947 Pat

107 = 47 Cr LJ 780). Where only one injury was caused, the sentence of the three years rigorous imprisonement was held sufficient (1970) 1 SCC 487; 1970 SCC Cr R 415 = 1970 SCD 384 = AIR 1971 SC 196 = 1971 Cr LJ 260).

While carrying away the stolen property the accused exploded cracker to frighten the inmates of the house who wanted to pursue them. All the accused were young and they had already served a sentence of about one and half years. There was no attempt to cause any injury to any of the inmates of the house or other persons at the time of the commission of the offence or even after thereafter. It was held that taking into consideration all the circumstances, the ends of justice would be served if the sentence was reduced to imprisonment already undergone (AIR 1980 SC 788 = 1980 Cr LJ 313).

When the dacoity was committed at night using weapons including throwing bombs during the commission of the offence on which one of the witness was injured and was hospitalised for 10 days the accused was sentenced to imprisonment for life (1984 Cr LJ 559 (Cal). Accused convicted by trial court under Section 394 and 397, Penal Code, and sentenced to 3 years R. I. under each section, sentences running concurrently. Accused actually guilty of offence under Section 392 read with Section 397, Penal Code, and liable to 7 years, R. I! Held, in absence of charge under Section 392, read with section 397, High Court in revision could not convict accused under Section 392 sead with Section 397, and enhance sentence accordingly, since that might cause him prejudice (1982 Cr LJ (NOC) 122 (Mad).

In a dacoity case all the accused and convict persons did not appeal. Held, while acquitting the appellants, High Court can acquit others also (185 LJ 1822 (AP).

Where the dacoity is planned and is of worst the description, deterrent punishment is necessay (39 CWN 188; 36 Cr LJ 1322; AIR 1935 Cal 580).

Accused committed two dacoities and was given separate sentences. Held, separate sentences can be awarded. The sentence was reduced (AIR 1934 Rang 122). In case of highway robbery deterrent sentence is called for, although the value of stolen property is small. Six years were awarded (AIR 1942 Oudh 221; 43 Cr LJ 416).

Where the accused, While carrying away stolen property exploded cracker to frighten the persons who wanted to pursue them it was held that convictinn under section 395, was proper. The sentence was however, reduced to imprisonment already under gone in view of circumstances of the case (AIR 1980 SC 788 = 1980 Cr LJ 313).

Fine imposed must bear reasonable relationship with enormity of crime (AIR 1965 MP 225 = (1965) 2 Cr LJ 507). Where only one injury was caused, the sentence of three years rigorous imprisonment was held sufficient. (1970) 1 SCC 487; 1970 SCCCR R 415; 1970 SCD 384; aIR 1971 SC 196; 1971 Cr LJ 260).

Section 397 is only an enabling section to provide the mixiimum sentence of seven years in case of robbery and dacoity where the offender uses a deadly weapon or caused hurt to any person or attempts to cause death or grievous hurt to any person. conviction could therefore, be under section 395 with the aid of Section 397 and not merely under Sections of rioting under section 148 or under section 147, there could be no coviction under Section 324 with the aid of Section 149 Conviction and sentences, accordingly held liable to be set aside (1980) 17 Cr C 221).

"The High Court has not given any reason why three of the accused were convicted and sentenced to ten years R. I. whereas the other five accused, whose

acquittal was reversed, were sentenced to only eight years. In the circumstances, we think the proper course would be to award a uniform sentence to all the accused persons convicted by the High Court, and therefore, while upholding the conviction of the appelants we reduce the sentence to senve years R. I. in the case of all the apellants. All the sentences awarded for various offence shall run concurrently" (1985) 2 SCC 186 = (1985) 1 Crmes 611 = AIR 1985 SC 486 = (1985) 2 SCC 535 = 1985 SCC (Cr) 263 = 1985 Cr LJ 753).

Where in the course of dacoity one injury was inflicted the sentence was reduced from 5 years to 3 years R.I. (Shivapada vs. State AIR 1971 SC 196=1971 CrLJ 260). Where the only evidence was recovery of some stolen goods from the appellant the conviction was altered to one under section 411 (She Nath Vs. State AIR 1970 SC 535=1970 CrLJ 601).

18. Practice and procedure.- Where the fact relating to the looting of a property was mentioned in the FIR but not in the charge and the substantial evidence referred to extortings of Rs. 300/-it was held that the accused could be convicted under Section 384/ 149 and not under Sections 395/149 (1979 Cr LJ (SC) 723).

If the substantive evidence does not refer to the allegations that the accused persons looted away movables of the victimes, they cannot be convicted under Sections 395/149. If his evidence and FIR show extortion of money as price for sparing them their conviction may be altered to one under Section 384/ 149 Penal Code (AIR 1979 SC 1949 = 1979 Cr LJ 1305).

To constitute the offence of dacoity, it is necessary to prove that five or more person joined in a robbery. A conviction for dacoity based either on a finding of common object not charged, or on evidence which does not prove the essential ingredients of the offence could not be sustained. To justify a convictionfor dacoity by the application of Section 34 or Section 149, Penal Code, it is necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing docoity or that each accused knew that dacoity was likely to be committed in prosecution of the common object of the unlawful assembly (25 Cr LJ 396).

The term "offender" in Section397 is confined to the offender who used any deadly weqpon. The use of deadly weapon by one offender at the time of committing robbery cannot attract section 397 for imposition of the minimum punishment of another offender who has not used anydeadly weapon (1975) 2 SCJ 490 = 1975 Cr LJ 778 = AIR 1975 SC 905 = (1975) 1 SCC 791).

Dacoity committed on a public road is not less heinous than that committed in a house. The commission of a dacoity on the high way between sunset and sunrise must be treated as an aggravation of the offence justifiying a graver punishment (AIR 1956 All 1630).

Any overt act by accused for preparation of dacoity would immedately amount to an attempt to commit dacoity, and would immediately make them liable under Section 395, Penal Code. It would plainly be idlee to seek for an overt act for recording a conviction under Section 399, Penal Code; Section 395 would be the section applicable. The mere fact that the accused charged with the dacoity under Section 399 did not carry any instruments of house breaking can in no way weaken the prosecution case (AIR 1959 All 727).

19. Charge.- The charge should run as follows:-

I (name and office of the Judge) hereby charge you (name of the accused) as follows:-

That you, on or about the.....day of ....., at....., committed dacoity, an offence punishable under Section 395 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

Where there are two separate instances of dacoities alleged to have been committed in the same night against two separate persons, they consitute distinct offences and composite charge should not be framed insuch a case. (1962) 1 Cr LJ 168).

An accused cannot be charged with more than three dacoities. Particular dacoity must be stated in the charge (13 IC 781; 13 cr LJ 125).

Failure to mention in the charge that five or more persons committed the offence would not make the charge defective as the very nature of the offence under the section could be committed only by more than five or more persons (1973 Cr LJ 364). Where the accused appellant having been not placed on trial u/s. 397 P. C. his conviction u/s. 397 not sustainable n law (Abu Taleb Vs. State (1989) 41 DLR (Rang) 239).

Where the charge did not mention that the nine persons named therein and others had committed dacoity and no evidence was led that besides the appellant and eight others named in the charge, there were others un amed or unidentified persons besides the person who was named by the approver but not prosecuted, the appellant could not have been convicted of an offence of dacoity when the number of persons after the acquittal of the other persons named in the charge would come to three including the apprever (1982 Cr LJ 487 (Ori).

The accused are charged and convicted under section 395 as well as under section 397 Penal Code and awarded a sentence of imprisonment under section 397, Penal Code alone; no separate sentence was, however, passed under section 395, Penal Code. Held, section 397, Penal Code being complementary to section 395, Penal Code, a charge under section 395 read with section 397, Penal Code instead of two distinct charges should have been framed. The expression "if the offender uses any deadly weapon" interpreted (Hoshiar Ali Vs. The State 21 DLR 575).

396. Dacoity with murder.-If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or [1][imprisonment] for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Essentials.
2. "Conjointly committing.....murder ."
3. Evidence and proof.
4. Evidence of identification.
5. delay in holding identification parade.
6. Punishment.
7. Charge.

1. Essentials.- To constitute this offence, ti must be proved (i) that dacoity is joint act of the accused, (ii) that murder was committed in the course of commission of dacoity (29 CLJ 325; 6 CWN 72; AIR 1943 Pat 413 = 45 CrLJ 577). If during dacoity a dacoit commits murder, the other members are guilty of murder, although they did not participate in it or although it was not committed in their presence (17 All 86=PLR 1904 Cr=1 CrLJ 258=AIR 1944 Pat 413=45 crLJ 577).

The transaction of dacoity comes to an end the moment the dacoits take to their heals. Therefore if a dacoit while so running away kills some body, he is guilty

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

of murder under section 302, Penal Code, and not under section 396, Penal Code (AIR 1957 SC 320(323) = 1956 CrLJ 416). Where shooting was resorted to for removing opposition to commit dacoity, all persons are guilty under section 396-149 (AIR 1934 Rang 30=35 crLJ 863).

It is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in or abetted its commission (AIR 1954 Pat 109; AIR 1953 Assam 45=15 Lah 84(106)=20 Lah 67; AIR 1944 Pat 413). Murder should take place during the commission of the dacoity and then alone the accused will be conjointly liable (AIR 1955 Hyd 147=1955 CrLJ 953).

Where in an attempt to commit dacoity by five or more persons, accused remaining without committing dacoity owing to a hue and cry being raised by the villagers chased the dacoits and one of the accused killed one of the chasers. Since no dacoity or theft was committed section 396 was held to be not attraced but the accused were convicted under section 302 (AIR 1957 SC 302). The murder must have been committed in committing dacoity. While murder was committed and the dacoits were retreating it was held that this section was inapplicable (Shaka Ram Vs. State, 2 Bom LR 325).

2. "Conjointly committing ..... murder ".- Section 396 is enacted to declare the liability of other persons as co-extensive with that of actual murderer, and for this purpose all that is requried to be proved is that they should have "conjointly committed" the dacoity and death caused by a dacoit in the course of the dacoity would be murder and attributed to all of them. The death need not be proved against any one of the dacoits in particular, so long as death is the result of cumulative effect of the violence used by gang. The accused are not allowed to plead that they do not know that the death will be the result of the violence used (1955 CrLJ 953=ILR (1954) Hyd 758).

Where a gang consisting of five or more persons conjointly commit dacoity and one of them commits murder in the course of dacoity, all other members of the gang who conjointly commit dacoity are liable under this section. The only requirement is that all of them should conjointly commit dacoity. It is not necessary that the murder was in the previous contemplation of the members of the gang (Monaranjon Bhattacharjya Vs. State AIR 1932 Cal 818 (FB) = 33 CrLJ 722).

Where certain persons who had committed dacoity were pursued in hot haste after the act of dacoity and being brought to bay, one of the dacoits stabbed and murdered a man who was pursuing him, it was held that the act of murder was not a separate transaction but an offence committed "in committing the dacoity" within the meaning of section 396 (AIR 1932 Cal 818=33 CrLJ 722 FB).

Where the dacoits, by the pursuit immediately after commisison of the loot were overtaken at a short distance and there was an encounter between the dacoits and pursuits and the dacoits had not abandoned the entire booty before the murder was committed, it was held by the Rajashtan High Court that the transation of encounter and murder were not separate and distinct from the dacoity and as such the "murder was committed while committing dacoity" (AIR 1967 Raj 134 = 1967 CrLJ 818).

3. Evidence and proof.-At the time of dacoity at night there was a lantern burning at a man's height in a varandah. The victim was manhandled by the dacoits who must have come very close to the victim so as to be recognised by him. The light was emitted from the burning of phoos near the place of incident on the next day the miscreants where were seen distributing the looted property behind a wall

which had hole large enough through which the witnesses could clearly see the faces of the accused who fled when detected and there was also recovery of looted articles on chasing them. Lastly there was a fair identification parade. It was held that there was sufficient evidence to bring home the guilt of the accused (1976 CrLJ 345). Where it appears from the evidence of the prosecution witnesses that the night in question was a moonlight night and the torches were also flashed by the dacoits as also by the members of the compolainant party and it was thus, that the witnesses were able to identify the dacoits, and no other view was possible on the evidence other than conviction, it was held that the appellants had been fully proved to have participated in the dacoity (Jugal Gope vs. State of Bihar, 1981 CrLJ 4(4).

Where stolen goods in dacoity were recovered 3 dyas after the occurrence his conviction under section 411 was held to be proper and that he cannot be convicted under section 396 (AIR 1970 SC 533).

The offence of dacoity continues till the dacoits have retreated with their booty. Therefore where, in attempting to carry away stolen property, one of the dacoits commits a murder within a very short time of commission of the dacoity, or where murder is committed by dacoits while retreating or carrying away stolen property in order to facilitate their escape, it is committed in the commission of the dacoity and all the accused are liable to an enhanced punishment (1970 SCMR 828).

Murder committed by one of the dacoits while making good their escape with their booty is murder committed in committing the dacoity and all the dacoits would be liable for it (State of Uttar Pradesh vs. Jageshwar, 1983(1) Crimes 978(980); see also Gafur Sheikh vs. State, 1983 (2) Crimes 174).

Where an accused charged for dacoity with murder was found sitting on the bank of the river and he was washing his chadar subsequent to the occurrence. The water was alleged to have turned red but the chadar alleged to have bloodstains on it was neither seized nor sent to chemical examiner. An extra-judicial confession allegedly made before witnesses was retracted and not corroborated in material particulars by other evidence. The conviction of the accused was set aside as it was not supported by any evidence (PLD 1969 Dhaka 504 (DB). Similarly where crime weapon and clothes were allegedly recovered at the instance of the accused but the articles remained with the police for 8 days and origin of blood on them was not determined; their recovery cannot furnish any evidence to connect the accused with the offence and they cannot be convicted (1969 PCrLJ 655).

Where the person found in possession of stolen property was not named by the eye witnesses or in dying declaration in dacoity, it was held that he could only be convicted under section 411, penal Code (1969) 2 SCWR 793=AIR 1970 SC 535=1970 CrLJ 601=1970 UJ (SC) 111). None of the witnesses in their earlier statements or in oral evidence gave any description of the dacoits whom they alleged to have identified in the dacoits, nor did the witnesses give any identification mark viz. statute of the accused or whether they were fat or thin or of a fair colour or of black colour. In absence of any such description, it will be impossible to convict any accused on the basis of single identification in which case the reasonble possibility of mistake in identification cannot be excluded (Waki Singh Vs. State of Bihar AIR 1981 SC 1392; Raghvendra Vs. State 1983 All LJ 611).

There was sufficient moonlight for the witnesses to see the culprits who were stated to have been moving in and out of the house of the deceased and a witness during the occurrence. It was held that on a consideration of the evidence and other circumstances of the case, namely, that the dooor of the eastern kotha of the house of the deceased was found broken open, that the dead body of the deceased was

found lying in the eastern kotha and that the boxes had been found broken open and the locks were found lying nearby in the verandah the prosecution had been satisfactorily proved beyond all reasonable doubt (AIR 1983 SC 431=1983 CrLJ 31).

Failure to mention in the charge that five or more persons committed the offence would not make the charge detective as the very nature of the offence under the section could by committed only by more than five or more persons (1973 CrLJ 364).

4. Evidence of identification.- Weight to be attached to identification of accused must depend on circumstances of each case and presence of other corroborative or independent evidence (1969 SCMR 860). But it must be remembered that conviction cannot be based on test identification alone. Corroboration of such evidence is necessary (1969 PCrLJ 655).

5. Delay in holding identification parade.- Even fleeting glimpse of a person specially placed in a position of immense importance, would be revived in memory after a long time, provided bond of event and emboding it in memory were of permanent character. Therefore delay per se, particularly where accused are apprehended after a long time would not prejudice capability, if otherwise enough, of eye witnesses to identify culprits (1985 SCMR 1834=1985 PSC 645).

Where the case against an accused person rests on recovery of subject of dacoity from him or at his instance it is necessary to show that the articles recovered were the same as were identified in Court as exhibits. If that is not done, benefit of the doubt must go to the accused (1969 SCMR 703).

Where a person who was not arrested at the time of dacoity and about whom there is no proper evidence of identification cannot be convicted only because he was found in possession of stolen property. He can be convicted under section 412, Penal Code (1969 SCMR 860=1972 Law Notes 296=1960 all L. J 414).

Where stolen clothes were recovered from the accused and the evidence of their guilt was corrobroated by extrajudicial confession of accused to a respectable person. Conviction of accused was held to be proper (1982 PSC 882=PLD 1982 SC 267=PLJ 1982 SC 489).

6. Punishment.- Death sentence should be passed where the accused is found to have used a gun even though it is not proved that he was the accused who caused the death (1959 ALJ 540; AIR 1960 All 190 DB). Section 396 does not mean that all the accused convicted under it ust be sentenced to death. The sentence of transportation for life can also be passed (AIR 1944 Sind 113; ILR 1943 Ker 371; 45 CrLJ 704). Reasons should be given for not imposing death (AIR 1934 Rang 61; AIR 1934 Pat 603).

"Supreme Court has laid down in a number of cases that the sentence of death should not be passed except in the rarest of the rare case.One noticeable feature in the case is that although the appellant P had taken an active part as the appellant B, he had been sentenced to life imprisonment for his conviction under section 396, Penal Code. Regard being had to the facts and the circumstances of the case and the sentence passed against P, we do not think that it is one of the rarest of the rare cases in which death sentence should be passed" (1985) CrLJ 1573).

Every murder is cruel and every dacoity is gruesome. Death sentence should not be passed in very case of murder except in the rarest of the rare case (1985 CrLJ 161= (1984) 2 Crimes 198=(1984) 58 Cut LT 422=91984) 1 Orissa LR 772).

Where two inmates were fired to facilitate dacoity the Supreme Court enhanced life sentences to one of death sentence (AIR 1966 SC 1464).

7. Charge.- The charge should run as follows :-

I (name and office of the Judge) hereby charge you (name of the accused) as follows :-

That you, on or about the ..... day of....., at..... committed dacoity, and that, in the commission of such dacoity, mruder was committed by one of your member, and that you thereby committed an offence punishable under section 396 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

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).

Joint trial of receiver of property looted in dacoity along with persons involved in dacoity who were charged with dacoity with murder under section 396, Penal Code. Held, in order (Ali Vs.d The crown, 6 DLR 52(WP).

Even persons were charged under section 396 and alternatively under section 302 and 120-B of the Penal Code. Held, the trial was vitiated by misjoinder of charges. Neither section 239(D) nor section 236 of the Cr. P.C. justified such a joinder. Section 239 (D) permitted joinder of persons accused of different offences committed in course of the same transaction, but a charge under section 396 Penal Code, deals with persons accused of the same offence and joinder of different offences under sections 396 and 302/120 is not permissible under section 236 Cr. P.C. Prosecution led evidence as to an incident which took place six years back to show that the accused made then an attempt to posion the murdered man. Held, the Sessions Judge should have refused to record evidence on this matter and should have ruled it out of consideration. If a point arose in the evidence against the accused which the Court considered vital it was the duty of the Judge to call the attention of the accused to the point and to ask for an explanation there of (The Crown Vs. Abdul Kuddus, 5 DLR 52; 3 DLR 518).

397. Robbery or dacoity, with attempt to cause death or grievous hurt.- If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Synopsis

1. Scope and applicability.
2. Constructive liability.
3. Use of deadly weapons.
4. Deadly weapons.
5. Evidence and proof.
6. Conviction and sentence.

1. Scope and applicability.- Section 397 does not create substantive offence but merely prescribes minimum sentence for the accused who actually used the deadly weapon or causes for attempts to cause grievous hurt to a person in the course of committing dacoity. It thus postulates individual act of the accused. It has no scope for constructive liability. The individual act of an offence covered by section 397 does not make his fellow miscreants liable under section 397. Sections 34 and 149 have no applicability to a case covered by section 397 (1984 CrLJ 1135 Raj). This section

prescribes the minimum punishments which can be given if robbery or dacoity is committed using a deadly weapon causing grievous hurt or attempted to cause grievous hurt and the conviction must be under section 395 read with section 397 (1977 crLJ 252 MP).

Section 397 does not apply to every member of the gang of dacoits some of whom were armed with deadly weapons. Section 397 applies only to a particular offender who used deadly weapon or caused grievous hurt or attempted to cause grievous hurt or death. A statement that some of the dacoits were armed with guns is not sufficient to bring the case against any particular offender, within the purview of section 397 (AIR 1945 All 344; AIR 1947 Pat 157). The absence of any grievous hurt to any person or use of any deadly weapon, conviction for such an offence cannot be sustained (Kashem Mollah Vs. State (1990) 42 DLR 453).

To attract section 397 of the Code, it is necessary to estabish that at the time of committing robbery or dacoity the offender had used any deadly weapon or had caused grievous hurt to any person or had attempted to cause death or grievous hurt to any person (Kailash Mahanta Vs. State (1985) CLT 541(542).

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Mere attempt to cause grievous hurt to any person or a show of threat would be sufficient to bring home charge against the offender under Section 397 Penal Code, 1860 (Dhan Pad Chetri & anr. v. State of Assam 1988 (1) Crimes 414 (Gau).

Section 397 applies only to those persons who come within the four corners of the enactment and to no other, because, this section does not create an offence but merely regulates the measure of punishment (AIR 1937 Lah 561). Where a dacoity has been committed and not merely attempted and weapons were actually used, may be by being shown or brandished, section 397 and not section 398 applies to the case (AIR 1925 Nag 136).

Operation of section is not confined to the case of actual causing of injury or attempt to cause injury. It covers the case of a persons who displays a deadly weapon to frighten his victims their neighbours or who makes use of any deadly weapon for other similar purposes (AIR 1934 Lah 522). Thus where the accused was armed witha pistol at the time of commission of robbery, and had threatened to shoot at and kill the comoplainant at the time when he had demanded of the latter to surrender his property. It was held that the accused had used the pistol at the time of commission of the robbery within the mischief of the expression uses any deadly weapon mentioned in section 397, Penal Code (PLD 1958 Lah 676).

In an offence under section 397 of the Penal Code where the charge is that the accused has actually taken part in a dacoity, at least four other persons than the accused having a common intention with him must be shown to have been present before there can be a conviction under the section (AIR 1958 Cal 25). But the section also applies to cases of robbery. Therefore conviction under this section is possible where the offenders are less than five but one of them uses any deadly weapon or cause grievous hurt to any person or attempts to cause death or grievours hurt (AIR 1955 NUC 4489).

An accused cannot be convicted under section 394 and section 397 of the Penal Code, if the evidence discloses that the offence committed is mere theft. The words for that end in section 390, Penal Code clearly mean that the hurt caused must be with the object of facilitating the commission of theft or must be caused

while the offender is committing theft or is carrying away or attempting to carry away property obtained by theft. They do not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. Where hurt was caused first and theft took place subsequently, the offence committed was mere theft and not robbery (AIR 1953 Sau 85). Where accused did not cause injuries to complainant in order to commit theft or in committing theft or carrying or attempting to carry away property obtained by theft. Injuries were caused when complainant tried to apprehend appellant after commission of theft. There can be no conviction under this section (PLJ 1988 Cr. C 222). Similarly removal of ornaments from the body of one, after causing his death may amount to an offence section 404 but it does not come under section 394 read with section 397 of the Penal Code because a dead body is not a person (AIR 1958 MP 192).

2. Constructive liability.- The principle of construtive liability does not apply to cases under this section. Section 397 applies only to the actual person or persons who at the time of committing robbery or dacoity may use any deadly weapon or may cause grievous hurt to any person, or may attempt to cause death or grievous hurt to any person. It does not apply to his associates (PLD 1977 Kar 695). It follows that section 34 or 149 of the Penal Code cannot be invoked for the application of section 397 of the Penal Code (1975 PCrLJ 1304). Where two accused had jointly committed a robbery but one of them only was armed witha deadly weapon and the accused who was not so armed was convicted under section 397 read with section 34, of the Penal Code. It was held that section 34 of the Penal Code could not be invoked in the case of the accused who was not armed with a deadly weapon so as to convict him under section 397 of the Penal Code (AIR 1955 NUC 2372). Where two of the robbers were armed and attacked their victim and the third one was unarmed and stood by, and all of them were convicted by the trial court under section 397/149. It was held that section 149 cannot by invoked for the application of section 397 of the Penal Code and that only those accused can be brought within the ambit of the latter section who are armed with deadly weapons or cause grievous hurt to any person or attempt to cause death or grievous hurt. (PLD 1961 Kar 269).

3. Use of deadly weapons.- The word 'use' occurring in section 397 of the Penal Code should be construed broadly as including the case of carrying of a deadly weapon during dacoity or robbery (1980 PCrLJ 836) with a view to overawe persons intending to resist the commission of the dacoity (1971 PCrLJ 1304). Therefore if a person carries a knife with himself with intent to threaten another for the purpose of committing robbery, he uses the knife within the meaning of section 397 of the Penal Code (AIR 1956 Bom 353). It follows that if a culprit armed with a deadly weapon threatens the victim therewith and thus makes it easy for the other culprit to commit robbery or dacoity without let or hindrance, he would be taken to have used the deadly weapon within the meaning of this section (PLD 1960 Lah 559). Where the accused pointed a pistol and a gun on the complainant to get keys of the safe from him and beat him to induce him to give them the keys. It was held that they were guilty of an offence under this section (1980 PCrLJ 836).

For conviction under section 397 it is necessary that a deadly weapon should have been used at the time of dacoity. Where it was used prior to dacoity, no offence was committed under this section (AIR 1961 Guj 20).

It is not necessary that the deadly weapon should be actually used (Nanke Vs. State AIR 1931 All 367=32 CrLJ 567; Phool Kumar Vs. State AIR 1975 SC 905=1975 CrLJ 778). It is sufficient that the robber or dacoit carries in his hand a deadly weapon open to the view of the victims or brandishes the same to frighten or terrorise them. The use of deadly weapon by one offender will render that offender

alone liable for the minimum sentence. That can not render other offender who did not use such deadly weapon and to such persons the section prescribing minimum sentence may not apply (Pholl Kumar Vs. State AIR 1975 SC 905=1975 CrLJ 778). Section 397 can apply only to the actual user of the weapon and not to others constructively (Nageswar Vs. State ILR 28 All 404; Nabi Bux AIR 1928 Bom 52 = 29 CrLJ 383).

Where an accused at the time of committing robbery carries in his hand, a knife open to the view of the victims, it is sufficient to frighten or terrorise them and he can be convicted under this section. Any of the overt act such as brandishing of the knife or causing of grievous hurt with it, is not necessary to bring the offender within the ambit of Section 397 (AIR 1976 SC 905; 1975 Cr LJ 778). Carrying of a deadly weapon in the course of dacoity involves an offence falling under section 397 Penal Code, irrespective of the fact whether the arms were used in the dacoity or not. Obeying unlawful order of a superior does not exonerate a person who commits an offence as a consequence of such order. If the order is obviously is illegal the officer carrying out the order would be justified in refusing to carry out such an order (Mohammad Ismail Vs. The State, 22 DLR 218 (WP).

On a comparison of the provisions of section 397 and 398 Penal Code, it will be found that even in the case of attempted robbery or dacoity when the offender is armed with deadly weapon, he is liable to be punished with a minumum sentence of seven years imprisonment. Section 397 Penal Code should be given a liberal interpretation so as to include a case where the dacoit armed with deadly weapon uses it in any manner for the purpose of facilitating the commission of the dacoity or his protection (Idris Ali Majhi Vs. The State, 21 DLR 448).

The point for determination is whether the mere carrying of dangerous weapons like guns for the commission of a dacoity would attract the provisions of this section or not. Held, The word 'uses occuring in section 397, Penal Code should be construed broadly as including the case of carrying of a deadly weapon during the dacoity or robbery although the gun was not actually used in the course of committing the offence (Ahmad Vs. The State 16 DLR 30 SC; 8 PLD Lah 157, 2 PLD Lah 269).

It must be proved as a fact that a particular accused used the weapon. It is not sufficent merely to allege that one or two or some of the dacoits were armed with deadly weupons in order to justify his conviction under Section 397 besides conviction under Section 395 (1984 Cr LJ 1135 (Raj).

The term "offender" in section 397 is confined to the offender who uses any deadly weapon. The use of deadly weapon by one offender at the time of committing robbery cannot attract Section 394 for imposition of the minimum punishement on another offender who has not used any deadly weapon (1975) 2 SCJ 490 = 1975 Cr LJ 778 = AIR 1975 SC 905 = (1975 1 SCC 797). The Bombay High Court has held that the word "uses" is not intended to mean that the knife must be actually used for the purpose of statbbing any person. If it is used for the purpose of producing such an impression upon the mind of a person that he will be compelled to part with his property, that will amount to using the weapon within the meaning of this section (Govind Dipaji v. State (1956) Cri LJ 700).

Even in the case of an attempted robbery or dacoity, the mere crrying of deadly weapon by an offender would entail the consequence that in case of a conviction, Section 398 provides the key to the correct interpetation of Sec. 397. The word "use" occuring in Sec. 397, Penal Code, should be construed broadly, as including the case of carrying of a deadly weapon during the dacoity or robbery (Noora v. State, P. L. D. 1963 SC 737(739).

For conviction under Sec. 397 Penal Code, a deadly weapon must be used or grievous hurt caused or an attempt to cause death or grievous hurt must be made at the time of committing robbery of dacoity and not before the commission of the robbery or dacoity. When prosecution has not led evidence to show that the deceased was alive when the ornaments were removed from her body the conviction of the accused under Sec. 397 is not proper (State v. Kachara Sada, AIR 1961 Guj. 20 (22). Where the accused brandished deadly weapons threatening with dire consequences and took fish away from the tank of the complainants, the accused, were held guilty of an offence under Section 395/ 397 (Gedda Raminaidu v. State 1980 SCC(Cri) 322).

Where the accused caused knife injuries on the victim which enabled him to remove the carrying of the victm and the keys from her person, the case was said to fall under S. 392 read with this section (Shikander v. State 1984 Cri LJ (NOC) 103 (Del).

Where the accused used a 20 Centimetres long folding knife usually used for daily purposes and PW 1 did not depose as to how the accused showed him the knife or threatened him, his conviction was altered from one under this section to S. 392 (Raja 1986 Cri Lj 295 (Mad).

Where in a highway robbery a knife of unusual proportion was used and the passengers were looted, a deterent punishment would be called for and it would be the duty of the trial Court to frame a charge under S-397 and not under s. 392 (Om Prakash v. State 1978 Cri LJ 797 (All).

Where the victim did not state anything about the kind of knife used to inflict injury or about the size of the blade, etc. the accused could not be convicted under s. 397 as the weapon used was not proved to be a deadly weapon (Adesh Kumar v. State 1986 Cri LJ 233(Del).

4. Deadly weapon.- A lathi cannot be described as deadly weapon within the meaning of Section 397 of the Code (13 I.C 998 = 13 Cr LJ 182).

Knives are not deadly weapons *per se* such as would ordinarily result in the death by their use what would make a knife deadly as its design or the manner of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved and prosecution should prove that the knife used by the accused was deadly one (1983 Cr LJ 1438 (Orissa).

What is a deadly weapon is not defined in the Code. It must therefroe, be a weapon which if used was likely to cause death. Knives are weapons available in various sizes are not deadly weapons *per se* such as would ordinarily result in death by their use. What would make a knife deadly is its design or the manner of its use such as is calculated to or is likely to produce, death. It is, therefore, a question of fact to be proved and prosecution should prove. That the knife used by the accused was a deadly one. Though the knife that was recovered from the accused was a deadly one. Though the knife that was recovered from the accused a few hours of the occurrence was no doubt a deadly one on account of its size and design, but it was not shown to the victim when he came to depose nor has he given any description of the knife so that it could be held that the knif alleged to have been placed by the accused on his abdomen was the one recovered or the one similar to that one. The accused can, therefore, legitimately claim that the weapon used by him has not been proved to be a deadly one. And if there is want of proper proof, the benefit should go to the accused and the prosecution cannot invoke. Sec. 397, Penal Code to fix him up in the minimum sentence of seven years (Balak Ram v. State, 1983 (1) crimes 1037 (1039).

5. Evidence and proof.- The conviction of the accused purely rested on recovery of a torch and currency notes. The identification of these two articles was not satisfactorily established. So far as the torch was concerned it was a very common article and no particular mark appeared thereon. The currency notes were not claimed by accused as his money but till those notes were established to be the subject matter of the dacoity, the accused was not called upon to explain its possession.The conviction was held unsustainable (AIR 1982 SC 948 = 1982 Cr LJ 819).

Mere proof of the fact that the accused who was one of the dacoits dealt a blow with a lathi on the head of a person while committing dacoity will not be sufficient for conviction under Section 397, Penal Code in the absence of evidence that the lathi used was deadly weapon or that he caused or attempted to cause grievous hurt. The accused can be convicted only under Section 395 and not under S. 397, Penal Code (AIR 1937 Tripura 48; 1957 Cr. L. Jour 1457).

Where the crime weapon and clothes were allegedly recovered at the instance of accused. The articles remained with police for 8 days and origin of blood on them was not determined. The recovery, in the circumstances of the case, could not furnish any evidence to connect the accused with the offence (1960 P. Cr. L. J. 655 (DB).

A deadly weapon is a thing designed to cause death, for instance a gun, a bomb, a fifle, a sword or even a knife. A thing not so designed may also be used as a weapon to cause bodily injury and even death. It will be a question of fact in each case whether the particular weapon which may even be a knife can be said to be a deadly weapon. In the instant case, there is evidence to the effect that the knives which the accused were having were small in size. They were ordinary vegetable cutting knives. This renders the possibility of those knives being deadly weapons highly doubtful and as such the appellants shall be entitled to benefit thereof (1985 Cr LJ 1621).

Where the testimony of the eye-witnesses is corroborated by identification of the accused in test identification parade as well as by recoveries, he may be convicted (NLR 1980 Cr. 438). And where there was no proof that offender at the time of committing dacoity used deadly weapons, conviction was quashed (Ramkishan v. State 1982 Cri LJ (NOC) 14 (MP).

Conviction under this section cannot be sought merely by recovery of empty cartridges from the scene of occurrence after six days on the rationale that the cartridges could have been fired from the accused's licensed gun (Chhte Lal Singh v. State 1978 SCC (Cri) 572).

Illustration (a) to Sec. 114, Evidence Act, applies to stolen property which may include, under Sec. 410 of the Code, any property which is the subjectiion or criminal breach of trus. The presumption under Sec. 114, Evidence Act, would, therefored, be that a person in recent possession of articles seized in a dacoity is a dacoit or receiver of stolen property. This presumtpion is not of one definite offence but of an alternative offence, because possession of stolen property by itself is not sufficient to prove participation in the offence of theft. It can only go to corroborate other independent evidence of theft. If there is no such evidence, the conviction may be of the alternative offence and the punishment only for the lower offence of possession under Sec. 72 of the Code. Empty carttidges were found near the place of occurrence which were said to have been fired from the licensed gun of the appellant. It was held that that by itself was not conclusive because there had been a delay of as many as six days after the occurrence in the recovery of the cartirdges. Moreover the possibility of the cartirdges having been used by someone else by

borrowing the gun of the appellant could not be reasonably excluded. There could be no escape from the position that the articles which were recovered at the instance of the appellant, were the subject matter of dacoity and have been properly identified by the owner of the articles. In these circumstances there would be a presumption that the appellant was a receiver of the property, transferred to him in the course of dacoity. The conviction of the appellant was altered from one under Sec. 397 Penal Code, to that under Sec. 412, Penal Code (Chhote Lal Singh v. State of Madhya pradesh (1979) 1 SCC 131 (132); 1978 Simla L. C. 410 (411).

Where the conviction of the accused rested purely on recovery of a torch and currency notes. The identification of those two articles was not satisfactorily proved as forming part of the *corpus delicti*. So far as the torch was concerned it was a very common and no particular mark appearing thereon has been indicated as enabling a witness to identify it as belonging to him. As regards the currency notes it was true that those have not been claimed by accused as his money but till those notes were established to be the subject matter of the dacoity the accused was not called upon to explain its possession. For those reasons, it would be difficult to maintain the conviction (Bhura Khan Vs. State of MP. AIR 1982 SC 948=1982 CrLJ 819).

Conviction and sentence.- Conviction under section 397 is possible only if it is proved that deadly weapons were used by the accused If that fact is not proved, there should be no conviction under this section (AIR 1941 All 359).

In cases of robbery with murder, the accused cannot be convicted on the basis of test identification alone without any corroborative evidence (1969 PCrLJ 655).

The mere carrying of a deadly weapon by an offender would entail the consequence that in case of conviction, he would receive a minimum sentence of seven years rigorous imprisonment (PLD 1974 Kar 195). A rober who casues simpole hurt in the course of a robbery may be punished under section 394 by imprisonment for life. Section 397 does not prescribe a separate or enhanced sentence; it merely prescribes a minimum sentence (1901 Pun Re. No. 16,page 92).

Consecutive sentences in respect of convictions under section 394 and section 397 are illegal, if they are based on the same facts. (AIR 1926 Lah 47).

Where the offence committed is punished under section 394/397 of the Penal Code the minimum sentence which a court can impose is the sentence of rigorous imprisonment for seven years. It is only for the purpose of circumscribing the poowers of the court in regard to the minimum sentence that can be awarded that section 397 of the Penal Code has been enacted (PLD 1967 Kar 233). Therefore where the accused is convicted under section 394 and 397 the sentence cannot be reduced below 7 years' R.I. (1979 PCrLJ 357). Where the accused committed dacoity by using firearms and injured a prosecution witness, the crime weapon recovered at accused's instance was discovered to be stolen, sentence of 7 years R.I. under sections 396/397 was held to be proper (21 DLR 684). Where on conviction under section 397 a sentence of three years (PLD 1967 Kar 233) or a sentence of 4 years was passed, the sentence was enhanced to seven years (29 CrLJ 35).

Several accused.- Where some accused were given benefit of the doubt and acquitted, other accused whose case is identical with them may also be acquitted (PLD 1986 FSC 257).

Charge under Ss. 395 and 397.- Where a case falls under S. 397, the accused should be charged under S. 395 read with section 397 and two distinct charges under S. 395 and S. 397 should not be framed (1979 P. Cr. L. J. 137 (DB) = (1961) 21 DLR 575 (DB).

Alteration of conviction for one under Sec. 397 to that under Sec. 412.- Where none of the witnesses was able to identify the accused at the test identification parade but the articles which were received at the instance of the accused were the subject-matter of docoity and had been properly identified by the owner, it was held presumption would arise that the accused was a receiver of the property transferred to him in the course of dacoity. The conviction of the accused from one under Sec. 397 was altered to that under Sec. 412, Penal Code (Chhote Lal Singh v. State of Madhya Pradesh, AIR 1978 SC 1390 (1391) = 1978 Cr LJ 1411).

A minimum sentence of seven years is to be imposed wher a dacoit has used a deadly weapon or has caused grievous hurt, but that does not mean that a sentence of less than seven years should be passed on persons against whom it is impossible to prove that they used dangerous weapon themeselves or caused girevous hurt (AIR 1947 All 359; 42 Cr LJ 97).

Where the accused had committed pre-planned dacoity and murdered two persons in a cruel manner and buried the bodies in order that the evidence may disappear and the accused were sentenced for six years rigorous imprisonment, the supreme court rejected the plea of reduction of sentence to the period alreadyundergone (Lalli v. State 1986 Cri LJ 1083 (SC).

Charge.- The charge should run as follows:-

I (name and office of the Judge) hereby charge you (name of the accused) as follows:-

That you, on or about the ...day of....., at....., committed robbery/dacoity offences punishable under Section 392 or 395 of the Penal Code (Give details as per the above sectins) and that at the time of committing the said robbery or dacoity you used a deadly weapon namely ..... or caused grievous hurt to A or attempted to cause death or grievous hurt to A, and thereby committed an offence punishable under section 392 or 395 read with section 397 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

398. Attempt to commit robbery or dacoity when armed with deadly weapon.-If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

399. Making preparation to commit dacoity.-Whoever makes any preparation for committing dacoity, shall be puished with rigorous imprisionment for a term which may extend to ten years, and also be liable to fine.

Synopsis

1. Scope and application.
2. Intention to commit dacoity.
3. Evidence and proof.

1. Scope and application.- "Preparation" in section 399 implies devision or arranging meands essential for the purpose of the commission of the offence of dacoity in respect of which the determination to commit the offence exists. Any stage antecedent to such determination would ordinarily not amount to preparation (1972) 74 Punj LR 176 = AIR 1970 SC 713; 1970 Cr LJ 750).

Where the persons assemble at a particular spot for committing dacoity, they are guilty under Section 402. Facts that they had come from several miles away from their homes, armed with weapons of defence and attack and had assembled at an hour usual for committing dacoity, are enough to establish that, they had made preparations to commit a dacoity (AIR 1960 pat 582 = 1960 Cr LJ 1650).

In the words "Preparation for committing dacoity" occurring in Section 399 it is implicit that the persons making preparation had conceived the design of

committing dacoity. In other words, Section 399, contemplates that there is general design to commit docoity, or to engage in an expedition for that purpose though the plans of the dacoits are not matured (AIR 1952 Punj 249 = 1952 Cr LJ 1119).

What is necessary to prove is that the accused has done som act or acts which, coupled with the circumstances of the case plainly manifests an intention to commit a robery and commit it conjointly with five or more of the persons. The actual association of the intention of the other persons with his own intention is plainly not necessary (AIR 1958 Sal 25; 1958 Cr LJ 25). Where there was an assembly of eight persons at 1 a. m. in a school compound near a market place and a gun and cartridges were recovered from them, though they may have assembled for committing an offence, then conviction, under Section 399 or Section 402 cannot stand (AIR 1979 SC 1472; 1979 Cr LJ 1090).

It is ordinarily no offence to make preparation for committing a crime until the stage of preparation ahs passed and that of attempt is reached. But it is an offence under section 399 of the Penal Code, to make any preparation for committing dacoity. No hard and fast rule can be laid down that any particular act or any particular kind of steps towards the commission of an offence are necessary to constitute preparation. There must be persons who had concieved the design of committing dacoity Once the existence of such a conspiracy has been established, any step taken with the intention and for the purpose of forwarding that design may justify the court in holding that there has been preparation within the meaning of the section (AIR 1943 Pat 82). To constitute an offence under section 399 commission of overt acts is not necessary. It is sufficient if some act to get ready for dacoity is done. A mere assemblage to commit dacoity is not such preparation but possession of instruments for hosue breaking and of arms for offence and defence, and actual visit to the scene of contemplated dacoity, show such preparation The making of such preparation by each member of the gang need not be proved (AIR 1916 Lah 334). Persons found attempting to conceal their identity and armed with guns which they used when pursued by the villagers were rightly convicted for preparation to commit dacoity (27 CrLJ 116 Lah).

Section 402 applies to mere assembling without further preparation while section 399 applies where such preparation is proved in addition A person may not guilty of dacoity, though guilty of preparation and not guilty of preparation yet guilty of assembly (AIR 1914 Cal 456). The difference between sections 399 and 402 of the Penal Code is that while under section 402 mere assembly without other preparation is enough, section 399 is attracted when some additional step is taken in the course of preparation (AIR 1960 Punj 482). Where the dacoits assemble unarmed they can be convicted under section 402 and not under section 399 (AIR 1918 All 361)

2. Intention to commit dacoity.- In order to establish a charge under section 399 some act amounting to preparation must be proved and what must be proved further is that the act, for which the preparation was being made, was a dacoity, that is to say, robbery to be committed with five or more persons. For the latter, the test is the intention of the accused himself and his intention alone and if his intention to commit dacoity along four or more other persons, is proved, it is not necessary to prove that at least four other persons, sharing his intention and associated with him in the project, actually existed. Still less it is necessary to prove, where four or more other perons were externally at least associated with the accused in the preparation and that they did in fact share his intention. His belief in their intention and his own intention to commit a dacoity along with them is sufficient (AIR 1958 Cal 25). The onus is on the prosecution to show that there was intent to commit dacoity or that any step was taken towards committing it If no proof was forthcoming that the

common object was dacoity or no force or violence was used upto the time when they were separated, no charge under section 148 is possible (AIR 1915 Bom 247). Where a group of persons was sitting around a fire with firearms but there was no evidence to show that they had the intention to commit dacoity and they ran away when they saw the headman of the village, they could not be convicted for dacoity. (AIR 1935 Rang 294).

It is not necessary for the porosecution to prove that the intention of the accused was to commit dacoity in the hosue of a particular person of a particular vilalge. The legal requirements would be satisfied if it is proved that the assemblage or preparation was made for the purpose of committing a dacoity irrespective of the place where it was to be committed (AIR 1960 Pat 582).

3. Evidence and proof.- The prosecution must show that there were persons who had convicted the design of committing dacoity. Once the existence of such conspiracy is established then any step taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been preparation within the meaning of the section (AIR 1949 EP 340; 51 Cr LJ 167).

Where certain persons were found attempting to conceal their identity and were also found armed with a gun which they used while pursued by the villagers, it was held that they were rightly convicted for preparation to commit dacoity (27 Cr LJ 1161).

If persons five or more of different castes and different places as the accused were going about armed with guns and lot of ammunition and torches and were found assembled in night in a solitary place and began to run when challenged by the police, then there are very strong circumstances for coming to the conclusion that the accused had assembled for the purposes of and were all set for commting dacoity (1976 Raj C.R.C. 303).

The proof of an offence under this section is mainly a question of inference from facts. Where a band of armed men, some of them with unlicensed firearms, were moving about many miles from their vilalge and attempted to conceal their presence, threatened those who enquired who they were, resisted pursuit and fired at those who pursued them, the only reasonable inference that can be drawn is that the men were dacoits and had made preparations to commit dacoity (AIR 1943 Sind 212). Similarly the natural inference from the fact that the accused were all found assembled in the dark in the night, inside a grove, some furlongs away from the village abadi, and far from their own homes, with two guns and a pistol and a lot of cartridges would be that they had assembled there for the commission of a dacoity. Such a presumption is no doubt a rebutable one and it is open to such persons to show that they had assembled there for a lawful purpose and thus rebut the presumption. (1951 All LJ 466). Where the accused do not give an explanation as to why they had come together, armed themselves, and concealed their presence, (AIR 1935 Oudh 471) or where they did attempt to offer an explanation of their object or intention for travelling together in a tonga with torches and illicit firearms and they gave false explanation of the facts proved against them, the only possible conclusion is that they were guilty of an offence under section 399 of the Penal Code. (AIR 1959 All 727).

There is nothing to prevent a set of criminals from perpetrating a crime at one place after preparing for it or assembling for it at a distant place. Hence, the fact that the accused were not arrested near the place of the contemplated dacoity is not sufficient for concluding that the accused had not assembled for committing dacoity (AIR 1959 All 727).

No conviction under Section 399 could be recorded merely on the basis of the fact that a certain number of persons, some being armed, were apprehended at the platform of the Railway Station (1978 Cr LJ 877; 1978 Pat LJR 284).

In AIR 1971 SC 708 it was contended that the accused R was a cousin of C and if he was staying with C, the mere fact of his presence, could not be sufficient to establish the charge under Section 399, Penal Code. The contention was repelled and it was held that there might have been some force in the argument if the party of the dacoits had not left the baithak of C; that it was only after the dacoits started coming out of the house that they were arrested: That it might be assumed, although there was some dispute; that he was a cousing of C, but even assuming that the fact that he was arrested outside the house destroyed the version of R that he was at the baithak of C for innocent purposes; that a pharsa was recovered form his possession and that it was not possible to agree with the contention that in these facts the charge under Section 399 was not made out.

What is required to be proved under Section 399 and 402, is that the assemply and the prepartations were for a dacoity and not that they were made for a particular dacoity (1960 All LJ 277).

The making of preparation should be shown to the satisfction of the Court by some act such as the collection of men, arms, provisions, etc, which coupled with other circumstances plainly manifest the intention to commit dacoity (1957 All LJ 678).

"Preparation" in section 399 implies devising or arranging means essential for the purpose of the commission of the offence of dacoity in respect of which the determination to commit the offence exists. Any stage antecedent to such determination would ordinarily not amount to preparation(1972) 74 Punj LR 176).

In an appeal against conviction under section 399/402, Penal Code there was no evidence of talks passing between the persons alleged to be preparing a dacoity. Held, the conviction cannot be maintained. A mere presence of persons with arms at a place could not necessarily lead to the inference that they had designs to commit dacoity any where (1984) 2 Crimes 392 (Delhi).

The facts that the accused persons assembled at a lonely place from different places at an odd hour with dead weapons without any explanation for it and that there conversation over heard by a police officer and independent witnesses lead to the only conclusion that they had assembled for the purpose of committing dacoity and did make preparation for committing the dacoity (1984) 1 Crimes 83 (All).

A raid party punced upon the accused. Neither the I. O. nor did the independent witnesses tender any evidence. There out of witnesses named in FIR were not examined under Section 161, Cr P. C. The place from where talks of designs of dacoity were over heard was at such a distant place that they were discredited. An attempt was also made to plant a revolver. The prosecution evidence was disbelieved and the acquittal follwowed. Recording of statements of all witnesses in FIR is obligatory. A default would prejudice the accused (1982) 2 Crimes 359).

Charge under Section 399 not graver than the one under Section 402, Penal Code. same persons or same set of persons cannot be charged and convicted simultaneously under both the sections. Their conviction under either section would, however be competent (1985) 1 Crimes 422).

The prosecution story was that on information provides by an informant, of the prosepective dacoity, the raiding party provided to the situs of assemblage of the accused persons on reaching there with the informer it waited 24 hours to 2. 30 a.

m. of the maxt day. When 5 of the accused persons only could be apprehended. Revolvers cartidges and knives were recovered from their search and took the case property into possession. Ruggas were sent to the R. S. to record a case under the Arms Act. Trial Court was impressed with the evidence brought on record. There was no chance of false implication in a criminal case under Section 399/402, Penal Code. Concurring with the guilt, the High Court held that minor discrepancies can occur in a testimony when witnesses were examined after long time (1985) 2 Crimes 674 (Del).

Lone person found in a lonely place charge of preparation for dacoity not proved. Accused was found seated in a lonely place in the night. Fire-arms bombs and a Bhiyali were seized from him. Held, charge was not proved (1986) Cr LJ 1031).

400. **Punishment for belonging to gang of dacoits.**-Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with [1][imprisonment] for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope and object.
2. Association for the purpose of hibitually committing dacoity.
3. "Gang".
4. Actual participation in dacoity.
5. Previous conviction.
6. Offences under section 395 and section 400.
7. Evidence and proof.
8. Punishment.

1. Scope and object.- The offence under this section is the association with the knowledge that a ring is formed for the purpoose of committing dacoities and conviction can be made under the secton even where no actual commission of dacoity by a particular person is proved (1957 CrLJ 947). The main ingredients of the section is the association of persons for the purpose of habitually committing dacoities and the agreement may be inferred from circumstances (AIR 1928 Cal 309=29 CrLJ 705).

Section 400, Penal Code creates an offence of a very special character. The gist of the offence appears to be association for the habitual commission of dacoity. The offence thus lies in the agreement habitually to commit dacoity. It is not necessary that the evidence should be of the same quality as would be required to establish the commission of the dacoity itself. Even if the evidence on the record is such as would have justified a trial upon a specific charge of dacoity the mere fact that there was no such charge of trial would not make that evidence inadmissible or unreliable in a case under section 400, Penal Code. The association and the purpose of the association may be proved either by direct evidence to the effect that the accused or the accused and others met and resolved to join together for the purpose of habitually committing dacoity or, in the absence of such direct evidence, it may even be established by proof of facts from which the association may reasonably be inferred. (Ramzan Ali Vs.d The State,20 DLR 49 SC).

In order to establish the guilt of an accused under section 400, Penal Code for belonging to a gang of persons it is not incumbent upon the prosecution to show that a particular accused who belongs to such a gang did actually take part in any one or more of the dacoities concerned. The participation of an accused in dacoity is evidence showing his connection with the gang and establishing his object for such connection. The evidence of general association in the present case as against the accused persons was of a set type, namely, that they along with the approver and

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

others were seen moving about in groups and met at different places sometimes before and sometimes after some particular dacoities. There was no evidence to show that the accused persons had any particular redezvous where they used to meet. Held, In such a state of things, it is not safe to uphold a conviction of any accused whose participation in none of the dacoities has been established. The association in order to be penal must not be of a casrial nature and must be for the purpose of committing dacoities habitually, such association must be shown to have been spread over a sufficiently long period of time, in order to establish that the person concerned had identified himself with a group of persons whose common purpose was the habitual commissionof dacoity (Nur Ali Gazi Vs. The State, 13 DLR 740).

A person may belong to a gang of dacoits without having actually participated in the commission of even one dacoity. A clever member of the gang may always remain in the background while organising the operations of the gang, giving them active assistance for the purpose of meeting together, furnishing them with weapons and also screening them after the commission of the crime and helping them in the disposal of the looted property (1956 CrLJ 1208).

In order to establish the connection of the gang with a particular dacoity, it is not necessary for the prosecution to show the complicity of everyone of the members of the gang in that dacoity. After coming to the finding that there was a gang whose purpose was to habitually commit dacoities, it will be sufficient, if it is established that one or more of them members of the gang took part in a particular dacoity in order to make the gang responsible for it (1962) 13 DLR 740 (DB)= PLD 1962 Dhaka 249).

In the absence of evidence of the approver or any other evidence regarding the formation of the association, the existence of an agreement and the participation of persons in the agreement can only be inferred from the circumstances of the case. If on evidence it is established that a number of persons had participated in the dacoity within a short period, it could be inferred that they had formed themselves into an association for habiually committing dacoities (Ram Das. v. State AIR 1966 A. P. 344 (346).

One of the chief points to be established in a case of gang dacoity is association in the crime and if it is proved that the accused and other poersons joined together to commit dacoities, the former fact would be strong evidence of criminal association and would be relevant to show that they are members of the gang (AIR 1959 AP 387). It is not necessary for participation of any member even in a single dacoity (Bhima show v. State AIR 1956 Ori 177).

2. Associated for the purpose of babitually committing dacoity.-When people of bad antecedents are poved to have been kept in jail for several months in 1949 and when subsequent to their release they are proved to have participated jointly in several dacoities it will be reasonable to intfer that they operated as a gang engaged in labitually committing dacoity (1956 Cr LJ 374 = AIR 1956 Orissa 177).

The element of the offence under Section 400 is association with the knowledge that the Ring is formed for the purpose of committing dacoities and conviction can be had under this section even where no actual commission of dacoity by a particular accused person is proved (1959) Cr LJ 974).

3. "Gang"- The word 'gang' means any band or company of persons who go out together or act in oncern. The essence of the word 'gang' in this section is that the person should act in consent and, therefore two or more persons can consitute a gang. Their purpose of habitually committing dacoity may be proved by their

declaration or by their conduct. Where the relevant evidence consists in the conduct of the accused n having participated in different dacoities and there is no other evidence to prove the criminal purpose, participation in more than two dacoities within a short space of time is sufficient to prove the existence of a gang (1963) 2 Cr LJ 121).

Association for habitual pursuit of dacoity is the gist of an offence under this section (PLD 1967 SC 545). The offence thus lies in the agreement habitually to commit dacoity and not in the actual commission or attempted commission of dacoities. It is not necessary in order to get a conviction under this section that evidence should be of the same quality as would be required to establish the commission of a dacoity itself, for, a person charged as belonging to a gang of dacoits need not actually participate in the commission of dacoities, although the evidence of actual participation would go a long way towards establishing both his association with the gang and the object of such association. Thus even if evidence on the record is such as would have justified a trial upon a specific charge of dacoity the mere fact that there was no such charge or trial would to make that evidence inadmissible or unreliable in a case under section 400. (PLD 1967 SC 545). The association in order to be penal must not be of a casual nature and must be for the pourpose of committing dacoities habitually. Such association must be shown to have been spread over a sufficiently long period of time, in order to establish that the person concerned had identified himself with a group of persons whose common purpose was the habitual commision of dacoities (PLD 1967 SC 545). Therefore the prosecution should endeavour to prove in such cases that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time. In order to get a conviction under this section one has not to establish actual participation in the commission of dacoities but it is enough if there is some participation or empoloyment for the pourposes of the crime, such as scouting, collecting information, giving warning of approaching police or in some other way facilitating the commission of the crime (PLD 1967 SC 545).

The sense of the word gang in section 400 is that the persons should act in concert and therefore, two or more persons can constitute a gang. Their purpose of habitually committing dacoity may be proved by their declaration or by their conduct. Where the relevant evidence consists in the conduct of the accused in having participated in different dacoities and there is no other evidence to prove the criminal purpose, participation in more than two dacoities within a comparatively short space of time is necessary to prove the existence of the gang (AIR 1963 AP 314).

4. Actual participation in dacoity.- The essence of the section is the agreement habitually to commit dacoity, not the actual commission or attempted commission of dacoities. The existence of such an agreement and the participation of any person in the agreement may be inferred from circumstances (PLD 1967 SC 545). For a conviction under section 400 it is not necessary that the person convicted must have taken part in any one of the dacoities On the other hand evidence showing the actual participation by an accused in any given dacoity is evidence both of his association with the gang and of his object in such association. Such evidence which though not believed for the purpose of the conviction under section 395 of the Penal Code may yet be relied upon for the purpose of conviction under section 400 of the Code (Omor Ali v. State, PLD 1967 Dhaka 310). If a person with a bad past record participates in the commission of a dacoity even on one occasion in association with a well known gang of habitual dacoits, knowing them to be such a gang, it may be reasonably inferred that he belongs to that gang unless there is some other material

on record to justify an inference that the association was of a casual nature (AIR 1956 Ori. 177). It is to be remembered that a person cannot be said to belong to a gang of dacoits about whom the Court is satisfied that his connection with the gang was limited (11 CrLJ 551).

5. Previous conviction.- If a gang of persons can be shown to ahve been associated for the habitual commission of dacoities, evidence as to other crimes committed by the gang may be relevant against the accused. (AIR 1961 Pat 260). Where other evidence has established association for the pourpose of habitual committing of theft, evidence of previous convictions whether for offences against property or for bad livelihood is admissible to prove not bad character but habit and for such purpose evidence of conviction for bad livelihood is more valuable (AIR 1956 Ori 177). Evidence of previous convictions for dacoity is admissible to prove an offence under this section but the conviction must have been made on dates precedent to the charge under this section. Evidence of such convictions after the date of charge are not admissible to prove an offence under section (400 PLD 1967 Dhaka 310). It is further to be noted that where the only material evidence in respect of the accused charged under section 400 of the Penal Code is a judgment whereby they were convicted under section 411 of the Penal Code in respect of the occurrence the judgment is inadmissible as evidence to prove their connection with the crime, when none of the witnesses to the material facts are called again at the trial. (ILR 1967 AP 96).

Previous acquittal.- In a trial under section 400 Penal Code evidence against a particular accused to prove that he took aprt in a certain dacoity, when it is shown that he has already been tried on the charge of having committed that particular dacoity and has been acquitted, cannot be admitted (PLD 1962 Dhaka 249=13 DLR 740 DB; AIR 1928 Oudh 430 DB). But it is open to the prosecution to show that he was found in the company of some members of the gang in the neighbourhood of the place of occurence sometime before or after the occurrence along with other members of the gang whose purpose was to habitually commit dacoities (PLD 1962 Dhaka 249=13 DLR 740 DB).

Conviction for other offence.- Normally general evidence of bad character in the shape of commission of other crimes or conviction for other crimes, such as thefts, burgalaries, etc, although inadmissible as evidence of character, may be admissible to prove habit or association. Even previous acquittals in case of dacoity or for being in possession of goods stolen in a dacoity may be relevant for establishing association of the accused with a gang (PLD 1967 SC 545 = 20 DLR (SC) 49).

6. Offences under section 395 and section 400.- Where the commission of a dacoity by the accused is proved on evidence his conviction both under sections 345 and 400 is not bad (11 CrLJ 551). A conviction can be had under section 400 even where no actual commission of dacoity is proved. The element of the offence is association with the knowledge that it is formed for the purpose of committing dacoities habitually. Hence where a sentence is already passed for the offence of committing dacoity, there is no bar to the passing of a sentence under section 400 (AIR 1925 Oudh 374).

7. Evidence and proof.- Association which is the main point, to be proved that the accused and other persons had joined together to commit burgalaries as well as dacoities, the former fact would be strong evidence of criminal association and would be relevant to show that they are members of the gang. If a gang of persons can be shown to have been associated for the habitual commission of dacoities, evidence as to other crimes committed by the gang may very well be relevant ageinst the accused (AIR 1959 AP 387; 1959 Cr LJ 947 = 27 Cr LJ 123).

Evidence that the accused person or groups of them had been concerned in a large number of dacoities within a comparatively short space of time may be sufficient evidence of such association (1972 Cr LJ 1074; 1972 Assam LR 71; 1956 Cr lJ 1208).

Where the accused, young man and students were not previous convict, it was held that it was fit case for release on probation of good conduct (1979 UJ (SC) 202).

The association and the purpose of the a ssociation may be proved either by direct evidence to the effect that the accused or the accused and others, met and resolved to join together for the purpose of the habitually committing dacoities or in the absence of such direct evidence, it may even be established by proof of facts from which the association may reasonably be inferred. The evidence of the first kind, namely direct evidence, can in such a case only come from a participant or an associate alone for, it is unlikely that persons entering into an agreement to join together for the purpose of habitually committing dacoities would do so in the presence of strangers. It is for this reason that it has become the general practice in such cases to get this direct evidence through the mouths of accomplices who are made approvers by the tender of pardon. Such a peron is, no doubt, a competent witness against an accused person and under section 133 of the Evidence Act a conviction upon his uncorroborated testimony may not even be illegal but since under Section 114, Illustration (b) of the Evidence Act, the Court is to presume that an accomlice is unworthy of credit unless his testimony is corrobrated in material particulars, therefore as a rule the evidence of an accomplice, unless corroborated in material particulars by independent evidence, is not relied upon. The extent and the nature of corroboration required may, no doubt, vary from witness to witness and from case to case, but it is not necessary that there should be corroboration in every particular, all that is necessary is that corroboration must be such as to affect the accused by connecting or tending to connect him with the crime. In other words, there must be corroboration not only of the commission of the crime alleged but also of the participation of each individual accused charged with the commission of that crime (PLD 1967 S. C. 545; 1949 SCMR 604; 1969 P. Cr. LJ 1158).

In Bangladesh by reason of the riverine nature of many of the districts the incidence of dacoity is usually high and more often than not such crimes remain undetected due largely to the failure of witnesses to identify the dacoits but even those difficulties cannot furnish any justification for the non-observance of the rules relating to appreciation of evidence in criminal cases and the same should not in any way be relaxed. These rules have been designed to secure for the accused person assurance of a fair and impartial trial and practial difficulties notwihstanding the standards which have been laid down for safe dispensation of criminal justice, cannot be altered or deviated from to meet the diffuculties of ivestigating agencies. In spite, therefore, of the diffulties stated above the Court did not approve of the tendency, displayed in such gang cases to too readily accept the *ipse dixit* of the witnesses of association and to draw inferences from them which do not always follow (PLd 1967 S. C. 545 = (1968) 20 DLR (SC) 49).

8. Punishment.- In determining what is an adequate sentence to pass upon an accused convicted of an offence falling under section 400, among others may be noted the following: (i) how long has the accused blonged to the gang; (ii) What dacoities have been committed by the gaag since the accused joined it; (iii) in how many of these dacoities did the accused actually take part; (iv) what was the character of the dacoities in which the accused actually took part whether they were accompained with murder culpable homicide, grievous hurt, torture, or with any acts

of a specially brutal character, or were they only dacoities of the ordinary character (AIR 1955 NUC (Mad) 432; 1963 MWN 933).

A conviction can be had under section 400 even where no actual commission of a dacoity is proved. The element of the offence is association with the knowledge that it is formed for the purpose of committing dacoties habitually. Hence where sentence is already passed for the offence of committing dacoity there is no bar to the passing of a sentence under Section 400 (AIR 1925 Oudh 37; 27 OC 385; 26 Cr LJ 1412).

In Case under Section 400 against a gang of desperate men prepared to do any thing in carrying out their crimes, the haviest possible sentence should be passed. In awarding sentences the Court should not consider whether particular offenders were concerned in only one or more of the dacoities committed by the gang but whether it was clearly established that they did in fact join a recognised gang is an mportant point (12 cr LJ 260).

An offence under Section 400 being in its very nature more serious than a charge of committing dacoity, it is necessary that more severe sentence should be awarded for it than for dacoity, so as to be a deterrent to the commission of such an offence (AIR 1961 Pat. 260; ILR 38 Pat. 1251; 1961 (1) Cr. L. J. 841).

In awarding sentence the Court should not consider whether particular offenders were concerned in only one or more of the dacoities committed by the gang but whether it was clearly established that they did in fact join a recognised gang (12 Cr. L. Jour 260 (DB) (Lah).

There is nothing illegal in passing separate sentences on an accused person who has been proved to have taken part in a particular dacoity and also to have been a member of a gang of dacoits. The limit of punishment prescribed by Section 71, Penal Code, does not apply to such a Case. The provisions of Section 397, Cr. P. C. 1898 will apply to such a Case and then it will be at the discretion of the Criminal Court whether the two sentences should run concurrently or not (AIR 1925 Oudh 374 Rel. on) AIR 1925 NUC (Mad) 432; 1953 Mad WN 933).

Where the acused, young man and students were not previous convict, it was held that it was a fit case for release on probationof good conduct. (1979 UJ (SC) 202).

401. Puishment for belonging to gang of thieves.-Whoever, at any time after the psassing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

402. Assembling for purpose of committing dacoity.-Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be puished with rigouous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Comments

The mere fact that the appellants were found at a lonely place with arms is not sufficient to cinvict them under section 402, Penal Code when there is no evidence that this assembly of five appellants was for the purpose of committing robbery (Baldv Singh v. State of Haryana 1988 (2) Crimes 916 (P & H).

Of Criminal Misappropriation of Property

403. Dishonest misappropriation of property.-Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations.

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being joint owners of a horse, A takes the house out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse, and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.- A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.-A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it, it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations

(a) A finds a [1][taka] on the high-road, not knowing to whom the [1][taka] belongs. A picks up the [1][taka]. Here A has not committed the offence defined in this section.

1. Subs. by Act VIII of 1973, s. 3 and 2nd Sch. (with effect from 26-3-1971) for "rupee."

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person on whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

Comments

Ingredients of offence.-In order to prove an offence under S. 403, Penal Code, the prosecution has to prove: (1) that the property was the property of the complainant, (2) that the accused misappropriated that property or converted it to his own, use, and (3) that he did so dishenestly (PLD 1958 S. C. (Ind.) 247 = AIR 1958 S. C. 56).

Where accused while working as an officer in a Bank, in collusion and abetment of co-accused, knowing that signature of officers on a demand draft were forged, verified the signature as genuine and thus abetted co-accused to decitfully collect proceeds of draft by using it as genuine, he commited criminal misappropiation of amount of draft (1988 P. Cr. LJ. 515 = NLR 1988 Cr. L. J. 32).

Where officers of a Bank were charged for abetment for having made payment of cheques which were singed by one officer instead of two as required by Bank rules. It was held that on basis of the fact that cheques in question were paid by accused in spite of the fact that they were signed by one officer instead of two officers, one could not jump to the conclusion that they had abetted offence of dishonest misappropriation of property unless there was positive evidence in proof thereof. Where prosecition failed to produce cogent evidence to show link between accused or any conspiracy between them to misappropriate money. Conviction and sentence were set aside (PLD 1986 Kar. 417 = NLR 1986 Cr. 868 (DB).

Where a partner of the complainant removed Government stock of grain entusted to them so as to put pressure on the complainant to clear his account with him. It was held that by removing the foodgrains from the depot to his own house and saying that he would not return the same, P intentionally kept A out of the property which had been kept in his charge by Covernment. He there by caused werongful loos to A and his act of removing the foodgrains to his own house amounted to dishonest remeval within the meaning of S. 403 (AIR 1964 Orissa 119). Money paid to a person by mistake may be the subject of criminal misappropriation, in the same way as money received for one purpose is misappropriated by being converted by the payee to his own use (2 N. W. P. H. C. R. 475).

In an ofence of theft there must be removal of the property out of the possession of another with intention to take dishonestly. Appellant received Taka

9000/ = in good faith from the Bank's counter instead of Tk. 1900/= to which he was entitled and he had no knowledge that the was being overpaid. The dishonesty became full blown when the cashier requested him to return the excess amount in the evening at the school but the appellant gave a denial of having received the excess amount at all. The facts of the case do not constitute an offence of theft but they constitute another offence, dishonest misapproproiation under section 403 of the Penal Code. The appellant may have received the money in good faith but the decision to appropriate the excess money to his own use makes it culpable. The conclusion is inescapable that he is inside the net (Kawsarul Alam Vs. The state (1990) 42 DLR (AD) 23 = 1990 BLD (AD) 12)

Where no specific allegation was made in complaints that accused had sold their stock of hypothecated goods otherwise than in ordinary course of business. The mere statement that accused are liable because they disposed of hypothecated good, was not sufficient to saddle them with criminal liability (PLJ 1988 Cr. C. 397 (Special Court).

Thus if a servant employed to collect his master's debts, keep back such debts when collected, in satisfaction of claims of his own, he commits the offence of criminal misappropriation. Information to the master that the debts collected have not been realized is the clearest indication of animus furandi (AIR 1959 S. C. 1390; 1960 S. C. 889; 1962 K. L. T. 679).

It is to be noted that conviction of a person for the offence o criminal breach of trust may not in all cases be founded merely on his failure to account for the property entrusted to him or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intention may readily be made (PLD 1963 Dhaka 983; AIR 1960 S. C. 889; AIR 1959 S. C. 1390).

Where however the explanation of the accused is worthy of credit, he cannot be convicted (PLD 1962 S. C. 489 = 14 DLR S. C. 258).

Evidence and proof.-If from proved facts and circumstances, it appears that the accused retained an amount with the intention of causing wrongful loss to the rightful owner and wrongful gain to himself, dishonest misappropriation must be regarded as proved (AIR 1938 Nag. 445 (DB).

The burden is on the prosecution to prove dishonest misappropriation either by direct evidence or by evidence of circumstances which lead to a reasonable inference (PLD 1962 S. C. 128). The fact that money was subsequently disbursed for purpose for which it has been entrused is no defence to charge a criminal misappropriation (AIR 1972 SC 998=1972 SC (Cr) R 312).

Where evidence on record showed that accused was the person, who opened the account in bank; had drawn five cheques for withdrawal of amount and had signed the amount opening from in presence of prosecution witnesses. Omission to refer his singature to the Handwriting expert to prove that the accused had in fact signed the account opening form or the cheques which were drawn, would not effect the result of the case (PLD 1988 Kar. 359 (DB).

404. Dishonest misappropriation of property possessed by deceased person at the time of his death.-Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease and has not since been in the possession of any person legally entitled to such

possession, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liabe to fine ; and if the offender at the time of such person's decease was employed by him as a clerk or servants, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Of Criminal Breach of Trust

405. Criminal breach of trust.-Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Illustration

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods; A has committed criminal breach of trust.

(c) A, residing in [Dhaka], in agent for Z, residing at [Chittagong]. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of 3[taka] to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer lost, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

406. Punishment for criminal breach of trust.-Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

(Section 405 and 406)

1. Scope and applicability.
2. Criminal breach of trust,theft, cheating and criminal misappropriation.
3. Entrusted with property, or ..... dominion over property.
4. "Dominion over property".
5. "Property".
6. 'Misappropriates or converts to his own use that property'.
7. Dishonestly.
8. Agreement to refund does not bar prosecution.
9. Disputed claim.
10. Wilful omission to account.
11. "In violation of any direction of law..... or of any legal contract."
12. Mere retention of money does not by itself amount to criminal breach of trust.
13. Civil breach of trust.
14. Debtor and creditor.
15. Partner.
16. Temporary retention.
17. Misappropriation by wife.
18. Criminal breach of trust in respect of stridhan.
19. Loan.
20. Undertaker failing to make good his promise.
21. Hire purchase agreement.
22. Evidence and proof.
23. Punishment.
24. Practice and procedure.
25. Charge.

1. Scope and applicability.- There can be no doubt that if money is paid as advance or as part-price, for the purchase of certain property, then it becomes the property of the person to whom it is paid and it is open to him to utilise it in any manner he likes and he cannot be convicted of criminal misappropriation or criminal breach of trust for not returning, it. If, however, the money is entrusted to a person for a specific purpose and is not paid to him towards the price of the property intended to be purchased, it does not become his property but he is merely a trustee, and if he misappropriates it he renders himself liable for conviction under Sec. 406, Penal Code, (Birendra Prasad Lahiri v. State, 1957 Cr. L. J. 265 (266-67): 1956 A. W. R. (H. C.) 558).

To establish a charge of criminal breach of trust the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly misappropriated, converted, used or disposed of that property himself or that he wilfully suffered some other person to do so (PLD 1956 SC 417). Where there was neither any allegation made nor evidence produced that petitioner forged any document. No entrustment of any property whatsoever was made to petitioner by complainant. Question of misappropriation or conversion to his own use of any property in violation of any legal contract, would not arise. No offence of forgery or of criminal breach of trust, was therefore, made out (1988 PCrLJ 1229). It must be remembered that every breach of trust is not criminal. It may be intentional without being dishonest or it may appear to be dishonest without being really so. In such cases the court should be slow to move and this caution is all the more necessary because there is tendency to secure speedy results by having recourse to criminal law (AIR 1955 Tri. 35).

For an offence of criminal breach of trust besides showing that the property was entrusted to the accused it is further necessary to show that he had dishonestly misappropriated or converted it to his own use. In the absence of such allegation the offence under Sec. 406, Penal Code, will not be consituted (Chiranjilal Sharman v.

Raja Ramsingh, A. I. R. 1964 Raj. 207 (270); Sh. Avnash Chander v. State o Punjab, 198 (2) Crimes 454).

The offence of "criminal breach of trust" may be broadly defined as the fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. To make out a case of criminal breach of trust it is generally necessary to show that the property belonged to someone other than the accused, that the accused acquired it lawfully or with the consent of the owner, that it was in the physical or constructive possession of the accused at the time of the conversion, that the accused occupied a fiduciary relationship, that his dealing with the property constituted a conversion or appropriation of the same to his own use or the use of any person other than the owner and that there was a fraudulent intent to deprive the owner of his property (State v. jage Ram, A. I. R. Punj. 103 (104); 54 P. L. R. 11).

Before a person can be convicted under S. 405, Penal Code, it must be proved that there was an entrustment of property or a dominion over property. Secondly, it must be proved that there was dishonest misappropriation or conversion by a person to his own use of that property or that there was dishonest use or disposal of that property in violation of any direction of law prescribing the mode in which such trust was to be discharged, or of any legal contract express or implied, which he has made touching the discharge of such trust, or that he wilfully suffered any other person to do so (Desai Champakalal Nemchand v. State (1961) 1 Cr. L. J. 654 (655) (Guj).

Under S. 406 the prosecution must prove: (1) that the accused was entrusted with property or with dominion over it; (2) that he misappropriated it or converted it to his own use or used it or disposed of it; (3) that he was in violation of any direction of law prescribing the mode in which such trust was to be discharged or any legal contract, expressed or implied, which he had made touching the discharge of such trust or he wilfully suffered some other persons to do as above (1979) 31 DLR 63 (DB); ILR 1954 Hyd. 901; AIR 1955 N. U. C. (Raj.) 4036); AIR 1971 S. C. 1543).

The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in the breach of an obligation to account for the property entrusted, if proved, may in the light of others circumstances, justifiably lead to an inference of dishonest misappropriation or conversion (PLD 1963 Dhaka 983 = (1963) 15 DLR 97).

Where though money is paid for a specific purpose but there is no entrustment and payment for completion of a civil contract. This section does not apply even if the money is not utilized as agreed, Thus where the money was paid to the petitioners by the complainant as a advance for the purchase of cloth as agreed between the parties and as such the money became the money of the petitioners and they were not holding the same in trust for the complainant. If the petitioners fail to supply the goods contracted or refund the money they may be liable for breach of contract and the dispute would be one of civil nature, but it cannot be that they have committed criminal breach of trust, punishable under section 406 (1979) 31 DLR 63 (DB).

Where there is no entrustent to the accused, he cannot be convicted of an offence under this section (1984 P. Cr. LJ 603). Thus where the accused obtained money from the complainant on the promise that he will give a girl to him in marriage, but he neither gave the girl nor returned the money. It was held that there

was no entrustment of money to the accused. Therefore no offence was committed under this section (1971) P. Cr. L> J. 1296 (Kar).

In order to constitute an abetment of an offence under sections 406/109, Penal Code intention is essential. A person having no knowledge of the fraud cannot have intended to aid the commission of any offence by any other person (The Crown Vs. Motilal Sen and others, 5 DLR 66; 8 DLR 64 (WP).

2. Criminal breach of trust and theft, cheating and criminal misappropriation.- Where certain property is in possession of the man accused as a public servant as its custodian and it is dishonestly removed by the accused himself or by some one else at his instance, the offence does not amount to theft as the removal is with the consent of the accused but amounts to criminal breach of trust punishable under Section 409, Penal Code (AIR 1950 Lah. 199).

The offence of criminal breach of trust may be broadly defined as fraudulent appropriation of another's property by a person to whom it has been entrusted or into whose hands it has lawfully come. It is akin to cheating, theft and criminal misappropriation but differs from them in important respects. In criminal breach of trust the property is lawfully acquired or acquired with consent of the owner, but dishonestly misappropriated by the person to whom it is entrusted. In cheating the property is wrongfully acquired in the first instance by means of a false representation. In theft the property is taken without the consent of the owner and the dishonest intention to take the property exists at the time of such taking. In criminal misappripriation the property is innocently acquired, often casually and by chance but by a subsequent change of intention the retaining becomes wrongful and fraudulent (AIR 1951 Punj 103).

Where the property of the applicant was attached in execution of a decree and was placed in custody of K and on the death of K, the applicant took back the property. It was held that the applicatn was guilty of theft and not that of criminal breach of trust. (12 CrLJ 374).

There is a clear distinction between cheating and criminal breach of trust. In a case of criminal breach of trust there is entrustment of the property whereas in case of cheating there is no trust but the property is obtained by practising deception. So the act of cheating bears no resemblance with the act of entrustment of property 1971 PCrLJ 1296. Acts constituting the offence of obtaining property by cheating cannot by themselves constitute the offence of criminal breach of trust. The ingredients of the offences are different and so is the evidence requisite to estabish them. There can be a breach of trust indepedently of cheating. The offence under section 420 is compolete as soon as delivery is obtained by cheating and without the further act of misappropriation there can be no breach of trust. When the cheat afterwards sells or consumes or otherwise uses the fruit of his cheating, he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practised to get hold of the property. It is not necessary to strain the language of section 405 to catch the cheat, for he can be dealt with apart from that section. In fact there would be little use for section 415 if cheating is only a form of criminal breach of trust (AIR 1936 Mad 353).

As a matter of fact a case of breach of trust is inconsistent with a case of cheating. Where the prosecution story is that the accused deceived the complainant into believing that gold jewels had been pledged in order to get money dishonestly while in fact there had been no pledge and false entries had been made in accounts to support the false representation, the offence is not one under section 409 but under section 420 of the Penal Code (1937 All 309). Similarly where in the absence

of deception a person obtains property for one purpose and uses it for another, he is guilty of an offence under section 406 and not under section 420 of the Code (AIR 1919 All 309). Some silver having been entrusted to them for the purpose of making ornaments, the accused introduced copper in it. It was held that the offence was criminal breach of trust and not cheating (4 Bom HCR (Cr) 16 (DB).

Criminal breach of trust and cheating.- In cheating, property is wrongfully acquired by means of deception i. e. misrepresentation inducing belief by an act or omission. In criminal breach of trust the property is acquired lawfully or by free consent. But there can be no consent by a person who is cheated. He is a victim of deception. The act of cheating itself involves conversion. The conversion signifies depriving the owner of the use and possession of his property. When the afterwards sells or consumes or otherwise uses the fruit of his cheating; he is not committing the act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practised to get hold of the property. If a person presents a false bill or cheque to the bank and the bank pays him the cash, it follows that an offence of Section 420, Penal Code is committed by the accused (1967) MLJ (Cr) 20; 8 Law Rep 80; (1973) MLJ (Cr) 424; 1974 Cr LJ 207; (1965) 1 SCJ 414; (1965) MLJ (Cr) 217; (1964) 7 SCR 70; 'AIR 1965 SC 706; 1977 Cr LR 134).

Acts constituting the offence of obtaining property by cheating cannot by themselves constitute the offence of criminal breach of trust. The ingredients of the offence are different and so is the evidence requisite to establish them. There can be a breach of trust independently of cheating and the offences are distinct and separate. The offence under Section 420 is complete as soon as delivery is obtained by cheating, and and without the further act of misspropriation there can be no breach of trust (37 Cr LJ 637 = AIR 1936 Mad 353).

Criminal breach of trust and criminal misappropriation.- The illustrations to section 403 Penal Code, which are rather statements of principle than mere illustrctions clearly show that the essence of criminal misappripriation of property is that the property comes into the possession of the accused in some natural matter, whereas the illustration to Section 405 show equally clearly that the property comes into the possession of the accused either by an express entrustment or by some process placing the accused in a position of trust. For example as given in illistraction A, the accused being an executor. Where the ornaments were handed over to the accused by the beneficial owner in confidence that they would be returned to the beneficial owner in due time after having been used for the purpose for which they are handed over, this amounts to entrustment and failure on the party of the accused to return them, amounts to offence or criminal breach of trust (AIR 1949 Cal. 207).

3. 'Entrusted with property, or.....dominion over property.- Entrustment is the main ingredient of the offence for criminal breach of trust. The accused must have domain over the property or it must be entrusted to him. If there is no entrustent it does not constitute an offence (1969) 21 DLR 933). Entrustment or dominion over the property is essential ingredient of the offence under section 406 together with the element of misappropriation (Md. Shahjahan Vs. Hazi Yakub Ali Chowdhury, (1979) 31 DLR 63; (1988) 40 DLR 431). The expression "entrustment" carries with it the implication that the person handing over any property or on whose behalf that peoperty is handed over to another, continues to be its owner (Puspa Kumar v. State 1978 Cri LJ 1379 (Sikkim). Entrustment is an essential ingredient of the offence of criminal breach of trust and a man can not be guilty of this offence unless he is entrusted with the amount. If section 34 of the Penal Code is to be applied to punish several persons for the offence of criminal breach of trust,

it is necessary to establish that all of them were entrusted with the amount (Abdus Salam Chowdhury Vs.d The Crown, 4 DLR 80; 2 DLR 366).

Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them (Jawantlal v. state (1968 Cri LJ 803 = AIR 1968 SC 700: Tata J R D V. Payal kumar 1986 (2) Crimes 449).

A trust is an obligation attached to the ownership of the property and it can be traced in the hands of the legal representative. A mere retantion of the unspent money will not amount to criminal misappropriation but if retention is followed by an intention to wrongfully deprive the owner of its use and secure it for his own benefit it will amount to criminal breach of trust (Samarendra Nath Halder Vs. The state 1987 BLD 348). Where jewellery is pledged in order to cover the repayment of an overdraft there is an entrustment (Tata J R D v. Payal Kumar 1986 (2) Crimes 449).

Where the Superintendent of the Pakistan section of an insurance society which was a unit of LIC collected premium directly from the policy-holdders, issued receipts and made false adjustments in the records he was guilty (Supdt and Remembrancer of Legal Affairs v. Roy SK 1974 SCC (Cri) 339). There is no entrustment within the meaning of this section when property is obtained by cheating (Nudiar Ali v. state (1960) Cri LJ 188 = (1960) ALJ 33).

The section does not provide that the enturstment of property should be by some one or the amount received must be the property of the person on whose behalf it is received. A person authorised to collect moneys on behalf of another is entrusted with the moneys when the amounts are paid to him and though the person paying may no longer have any proprietary interest nonetheless the person on whose behalf it was collected becaomes the owner as soon as the amount is handed over to the persons so authorised to collect on his bahalf (Som Nath Puri v. state 1992 SCC (Cri) 897).

Mere delay in payment of money entrusted to a person, when there was no particular obligation to pay at a certain date, does not amount to misappropriation (1993 BLD 85 (86).

Mere inability to pay back a sum of money entrusted, the sale proceeds of a property entrusted will not establish the fact of criminal misappropriation, if *mens rea* is not established. The prosecution must establish, apart from entrustment, also that the accused had ishonestly misappropriated the property entrusted (1993 BLD 85 (86). For an offence under Section 406, Penal Code, there must be a specific allegation of any entrustment of any specfic article (s) to particular accused (Bagh singh & 3 ors. v. State of Haryana & Anr. 1991 (20 Crimes 83 (P & H).

Money lent by the Complainant to the accused-petitioner induced by representation to repay and there is absence of any entrustment. Allegations constitute no offence of criminal breach of trust and the charge thereof is quashed (Shafiuddin Khan Vs. State (1993) 45 DLR 102).

The question whether the complainant entrusted the property to accused depends upon the actual facts of the case and not merely upon the legal terms employed by the parties. If the real nature of the transaction is a loan, the fact that the parties in writing call it a trust, it could not attract the offence of criminal breach of trust. Every payment of money by one person to another does not amount to entrustment unless there are circumstances attending it from which one can gather that it was on enturstment and not a mere payment (Jairani Devi v. Krishna Kumar Jauhari 1985 Cri LJ 64 (All).

The paddy was exclusively purchased by P. W. 1 who handed over the same to the appellant on condition that the appellant would sell the same at Chittagong and deliver the sale proceeds to P. W.1, but the appellant refused to deliver the sale proceeds and ultimately denied the entire transaction. It is not the case of the prosecution or of the defence that the profits arising out of the sale would be distributed between the complainant and the accused. The prosecution's case of entrustment was fully proved (Md. Musa Vs. Kabir Ahmed 1989 41 DLR (AD) 151 = 1989 BLD (AD) 18).

Entrustment will arise whenever something, whether it be money or any other thing, is given to some person with some direction as to how it should be dealt with. Where gold is given to a goldsmith, whose business is merely to prepare ornaments, for the purpose of making ornaments desired by the person giving it, there is clearly entrustment of that gold to the goldsmith. Similarly, when money is paid to a goldsmith, whose job is to make ornaments and charge for his labour, with a direction that he should purchase a certain quantity of gold and prepare oranaments; it would amount to entrustment of money, and if such goldsmith dishonestly converts it to his own use in violation of the implied contract that he should use it to purchase gold and prepare ornaments, he will be guilty of criminal breach of trust (Mitha Lal v. State (1955) Raj 907 = (1965 Cri LJ 107).

In cases of criminal breach of trust a distinction has to be drawn between the person entrusted with property and one having control or general charge over the property. In case of the former, if it is found that the property is missing, without further proof, the person so entrusted will be liable to account for it. In the latter case, that person will be lible only when it is shown that he misappropriated it or was a party to criminal breach of trust committed in respect of the property by any other person (Kesar Singh v. State (1969 Cri LJ 1595).

In a prosecution for criminal breach of trust, the fact of trust must be established beyond any doubt (NLR 1986 CrLJ 84). Where station master and consigner of allegedly misappropriated bags of rice was not produced to prove loading of the same in full at station of booking. All bags booked were received at railway station but there was no evidence on record to show that all bags including missing bags of rice were actually entrusted to accused - Guard. Possibility that missing bags were either not loaded at all or they were removed somewhere in transit, could not be excluded. Most important ingredient of entrustment of goods to accused was held to be lacking. He was given benefit of doubt and acquitted (1985 PCrLJ 1504 But where cash at treasury is actually handled from day to day by the cashier, it cannot be said that he was not entrusted with the cash even though the ultimate responsibility for the cash was that of the Treasurer (AIR 1951 Ajmer 15).

The word 'entrustment' in section 405 connotes that the accused holds the property is a fiduciary capacity (ILR (1949) 1 Cal 454). The expresion 'entrusted' in section 405 is used in its legal and not in its figurative or popular sense. The section makes no distinction between different kinds of movable property. If the expression 'entrusted' is applied to a thing which is not money it would indubitably indicate that such thing continues to remain the property of the prosecutor during the period during which the accused is permitted to retain its possession or is permitted to have any domain over it. When money is entrusted within section 405 to the accused it would be transferred to him under such circumstances which show that, notwithstanding its delivery, the property in it continues to vest in the prosecutor, and the money remains in the possession or control of the accused as a bailee, and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with the instructions (AIR 1928 Sind 106). A person is entrusted with property

when he receives it from another otherwise than for or on account of himself. He may be entrusted with it either for or on account of the person from whom he receives or of a third party or parties (AIR 1936 All 691). The word entrusted is not necessarily a term of law. It may have different implication in different contexts. In its most general significance, all it imports is handing over the possession for some purpose, which may not imply conferring of any proprietary right at all (AIR 1936 Mad 1).

The entrustment of property within the meaning of section 405 does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remain the legal owner of the property and the person in whose favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtains a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him (AIR 1956 SC 575).

Where an employee or servant receives money on behalf of his master, he has the money with him in trust for his master (10 CrLJ 482). Thus where a clerk in the service of an estate is authorized to receive money on its behalf and to pay them into the estate treasury, money so received by him is not his money for which he has merely to account to the estate but is actually the estate money which is entrusted to him and if he misappropriates the same, he commits criminal breach of trust. The offence is not one merely falling under section 403, but one falling within the definition of section 405 and the conviction would be under section 408 of the Penal Code (AIR 1920 Mad 965).

Where money is received by the cashier from the stores department of a railway to be appropriated by him in accordance with the standing accounts instructions and the cashier alone is in charge of the keys of his safe and the cash box where according to him the amounts in question had been kept, then it cannot be maintained that he was not entrusted with any money. The fact that some one else also possessed keys of the cash room cannot alter the fact of entrustment of the money with the cashier (AIR 1957 Madh -B 33). The fact that large sums of a co-operative society were allowed to remain with a person because he possessed extensive properties and consequently there was no danger to the sums and that after the appointment of that person as Secretary of the Society he kept the surplus funds with himself, would not make such a person a banker of the society. The amounts deposited with him or kept by him must be held to have been entrusted to him and if he had utilized any amount from those funds for his own purposes it would amount to misappropriation (AIR 1956 Bom 524). Where the cash at treasury was actually handled from day to day by the cahsier it could not be said that he was not entrusted with the cash even though ultimate responsibility for the cash was that of the Treasurer (AIR 1951 Ajmer15).

However, the mere giving of Keys of sub-treasury to the sonar on a holiday does not amount to giving charge (Amreet Sakaaran Sarap 1972 SCC (Cri) 166).

However, where the accused a cashier was in possession of the keys of the safe, the keys of the inner drawers were kept inside the safe and the eash disappeared from the safe, the inference was that the accused was party or privy to extraction of the eash from the safe (Surendra Prasad Verma 1973 SCC (Cri) 700).

Where jewel ornaments were pledged by the debtor as security for payment of the debt entitling the pledgee to dispose of the ornaments if the debt was not paid within the stipulated period with 15 days clear notice to the pledgor and the pledgee disposed of the ornaments without notice to the pledger for a price which was far below the real value of the ornaments without notice to the pledgee may constitute criminal breach of trust (Taka JRD, Chairman, TISCO v. Payal Kumar 1987 Cri LJ 447 (Del).

However in a 'treade sales' transaction there being no element of entrustment as the property in goods passes to the buyer, the buyer failed to pay the price promised to be paid. No criminality could be imputted to the buyer (Mohinder Kumar 1982 Cri LJ 524 (P & H). Money paid on the basis of an agreement for purchasing some goods becomes the money of the recfpient and as such constitute no offence under section 406 of the Penal Code for criminal breach of trust (Abdur Rahim Vs. Begum A Morshed (1982) 34 DLR 320).

4. "Dominion over property".- Before a person can commit the offence of criminal breach of trust he must be entrusted with the property or with dominion over the property. A Municipal Water Works Inspector, whose duty it is to supervise and check and distribution of water, has dominion over the water belonging to his employers and if he dishonestly misappropriates such water or uses it for his own use or of any other person without giving any information to his employers, he is guility of criminal breach of trust (Bimala charam Ray v. State 35 All 361).

The complainant pledged gold articles with Bank for securing loan. The articles were alleged to be of inferior quality and value at the time of their return. he filed a complaint alleging breach of trust against Bank Manager, Accountant and Head Cashier. It was held that it was Bank Manager who had power to transact business on behalf of Bank and dominion over pledged articles. The prosecution against the Accountant and the Head cashier who were never functions (Sic) of the Bank was misconceived (1984 Cr LJ 969 (Kart).

In a complaint case filed by wife against her husband, the Magistrate ordered transfer of gold ornaments and house hold materials to the wife. In appeal, husband claimed them but it was dismissed. In revision, nothing incorrect illegal or improper was found on entitlement to these itmes. Held, the court had properly appreciated the evidene and circumstances of the case and no fundamental rules of evidence were violent. Such a concurrent finding is not liable to be interfered with (1985) 2 Crimes 386 (Ker) = 1985 Cr LJ 1158 (ker).

The prosecution must prove the factum of entrustment and of misappropriation of the entrusted articles. An overseer was convicted for shortage of some articles from open godown which were in physical charge of chowkidars. The physical charge of the godown was not shown made over to the overseer nor was evidence produced to show misappropriation by the overseer. The goods were open and accessible to all and sundry and the possibility of the goods being stolen or pilfered by others existed. As both the ingredients were not proved the coviction was quashed (Janeshwar Das Aggarwal v. state 1981 SCC (Cri) 616).

Where the Prisident and Sales Clerk of a society took delivery of levy sugar for the purpose of distributing to ration card holders, the President and the clerk would be deemed to have taken possession of the sugar on behalf of society and to have been entrusted with the property of the society. Consequently, they would be guilty of an offence under this section when they sold it to persons other than ration card holders (Ayyadurai Dever v. state 1981 Cri LJ 258 (Mad).

The Tahsildar failed to deposit treasury amounts of land revenue, fines, etc. Tahsildar had dominion over the accounts and was entrusted with money. The office practice and procedure was not followed and the amounts were not entered in the account books. The accused was held guilty of misappropriation of the amounts entrusted to him (Vasant Moghe v. State 1979 SCC (Cri) 868).

Where there was nothing even to suggest that anybody else other than the accused had at any point of time any dominion or contract over the money after the same had been received by him from the Bank, the accused was liable for conviction (Pelevilie Peter Angami v. State 1982 Cri LJ 1085 (Gau).

5. "Property".- There is no good reason to restirct the meaning of the word 'property' to movable property only when it is used without any qualification in Section 405 Penal Code, or in other section of the Penal Code, Whether the offence defined in a particular section of the Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property'. but on the fact where that particular kind of property can be subject to the acts convered by that section. It is in this sense that it may be said that the word 'property' in a particular section covers only the type of property with respect to which the offence contemplated in that section can be committed (AIR 1962 SC 1821 ; AIR 1925 All 673).

The expression 'property' occurring in Section 405 of the PenalCode should not be given a narrow construction. Blank forms of tickets are also property when the same are converted into tickets after sale (1993 BLD 85).

In AIR 1926 Lah 385; 27 Cr LJ 1383, the contention that mere transfer of amount from the bank account to his own account by the accused did not amount to misappropriation was repelled, it being held that in order to establish a charge of dishonest misappropriation or criminal breach of trust it was not necessary that the accused should have actually taken tangible property such as cash from the possession of the bank and transferred it to his own possession as on the 'transfer of the amount from the account of the Bank to his own account, the accused removed it from the control of the Bank and placed it at his own disposal. The conviction of the accused for criminal breach of trust was confirmed.

When a contract creates a trust in respect of the property which is alleged to have been misappropriated it will amount to an offence of criminal breach of trust. In case of purchase of goods a person entrusted to discharge the obligation by purchasing and delivering the goods will be trustee for the unspent money in his hand and if there is any misappropriation of that amount it will be an offence of criminal breach of the trust (Samarendra Nath Halder Vs. the State 1987 BLD 348).

6. Misappropriates or converts to his own use that property.- Mere entrust or dominion over the property will not prove the charge. The prosecution to prove its misappropriation by the accused or its conversion by him ((1989) 41 DLR 4). Direct evidence as to mis-appropriation is not essential when circumstances clearly lead to an inference of guilt (1963) 15 DLR 97).

For an offence of criminal breach of trust besides showing that the property was entrusted to the accused it is further necessary to show that he had dishonestly misappropriated or converted it to his own use. Therefore in the absence of any allegation of misappropriation or conversion of the property by the accused, an offence under section 406 is not constituted (PLD 1962 SC 489). In this context it must be remembered that for convicting under section 405 actual conversion or appropriation must be proved. Mere intention or preparation to do so is not sufficient (AIR 1938 Mad 172).

In a case of criminal misappropriation it is not necessary that the prosecution should always prove that the money entrusted to the accused was applied in any particular manner, or for any particular purpose. It is sufficient if dishonest intention can be gathered from the circumstances. Thougn the mere fact of retention of the money would not by itself constitute the offence, it is one of the circumstances to be taken into consideration in a case of this kind (Ravunni Menon v. State, 1959 Ker. L. T. 549 (552); see also K. L. Sachleva v. Pakesh Kumar Jain, 1983 (2) Crimes 821).

An accused would not be liable for an offence under section 406, Penal Code, when it was not suggested that the accused acted dishonestly or that he misappropriated or converted to his own use any property entrusted to him, or suffered any other person to do so, or that he used or disposed of any such property entrusted to him or suffered any other person to do so, or that he used or disposed of any such property in violation of the terms of any law (AIR 1955 NUC (Raj)4036). Thus the mere loss of property entrusted to the accused would not bring section 405 into play (1968 PCrLJ 358). Where a tenant removed a fallen tree to his own house but there was nothing to show that he and others had dishonestly misappropriated or converted to their own direction of law prescribinbg the mode in which such trusts had to be discharged or any legal authority. They could not be convicted of an offence under section (405 PLD 1967 Lah 65).

7. Dishonestly.- Dishonest intention is a necessary ingradient of an offence of criminal breach of trust as diffined in Section 405 of the Penal Code, entrustment and misappropriation simpliciter should not attract the provisions of the said section (Dipak Moormoo v. Sonaram Phukan 1989 (3) Crimes 21 (Gau).

There are two distinct parts involved in the commission of the offence of criminal breach of trust. The first consists of creation of an obligation in relation to the properly over which dominion or control is acquired by the accused and the second is the misappropriation or dealing with the property dishnestly and contrary to the terms of the obligation created. Here in this case, the petitioner received certain quantity of paddy with the obligation to deliver the resultant rice to the Government after husking the paddy in his mill but neither the resultant rice in full quantity was given delivery to the Government nor the stock was found in the mill godown and as such the accused-petitioner has dealt with the Government paddy dishonestly and contrary to the terms of the agreement (Haji Md. Mohsin Vs. The State 40 DLR 431).

Dishonest intention is the gist of an offence punishable under section 406 (AIR 1953 Ajmer 58 = 1953 Cr LJ 149). The word "dishonesty", does not carry the pouplar sense of the term. When a person acts with the intention of causing wrongful gain i. e., gain by unlawful means of property to which the person gaining is not legally entitled or when a person acts with the intention of causing wrongful loss, i. e. loss of property by unlawful means to which the person losing is legally entitled. He acts dishonestly (1960 Cr LJ 1485; AIR 1960 pat 518 = 1960 BLJR 275).

Where the motor pump was given under hire agreement for pumping out water for particular period but the accused retained motor after the said period, it was held that the expiry of the stipulated period for the user would not by itself amount to criminal breach of trust and that if the accused retained possession of motor upmp with dishonest intention he committed criminal breach of trust (1973 MLJ (Cr) 424).

Where a creditor secized property of his debtor with the intention not of permanently retaining that property but for compelling the debtor to satisfy the debt and the taking was dishonest within the meaning of the defintition. To establishe

dishonesty, therefore, it is not necessary that the prosecution should establish an intention to retain permanently the property misappropriated. An intention wrongfully to deprive the owner or the use of the property for a time and to secure the use of the property for his own benefit for a time may be sufficient (37 Cr LJ 877; 8 Bom LR 951 = 5 Cr LJ 5).

The gist of the offence being the mental act of the accused, it is beyond the power of any other person to give direct proof of the act or of its date; the prosecutor, in asking the Court to frame a charge, is entitled to refer to the date of the overt act by which that intention if manifested and put into effect and on which he relies is proof of the misappropriation (37 Cr LJ 877 = AIR 1936 Pat 350).

Even if a person was required under rules to deposit the amount entrusted in the treasury within a few day.s the failure to do so would not by itself amount to the offence of criminal breach of trust because in addition it must be proved that there was dishonest misappropriation or conversion or dishonest use or disposal of that property etc. The element of dishonesty must also be proved. Sometimes a person may due to negligence or forgetfulness, fail to deposit the money which may have been entrusted to him. The mere failuree to deposit the money would not, therefore, prove dishonesty and there must be other circumstances to prove the element of dishonesty and unless the etement of dishonesty is proved the mere retention of the money would not by itself be the offence of criminal breach of trust (1961) 1 r LJ 645).

The accused was entrusted with 9, 000 Litres of diesel oil for being delivered to certain military depot by authorities of Indian oil Company. The accused delivered only 6, 000 litres and huriedly rushed to a certain place and emptied remainder into barrels of private depot owner. The accused pleaded that the vehicle developed mechanical trouble. The plea was negatived as the accused failed to inform consignee or the oil company of the balance in the tanker. This indicated a dishonest intention (Nizam Ali v. State 1982 Cri LJ (NOC) 6 (Gau).

The Sarpanch of Gram Panchayat took advances for execution the works of the Panchayat contrary to the financial rules. And after taking the advances he did not execute the works and did not explain the urgency for executing the works which made him take advances contrary to the rules. It was held that the sarpanch took the advances whith dishonest intention (State v. Mukteswar Panda 1986 LJ 1025 (Ori).

The accused a Patwari was entrusted with a receipt book. The accused failed to return this receipt book. It was held that mere omission or failure to return the entrusted property does not amount to breach of trust (Sardar Singh 1977 Cri LJ 1158 (SC).

Uses or disposes of.- Too narrow an interpretation should not be placed on the word dishoenst so as to lead to substantial injustice (AIR 1933 Pat 554). The word dishonesty in the Penal Code means the doing of an act with the intention of causing wrongful loss or wrongful gain; wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled (3 Mad HCR 6). It is the intention which is essential; whether the wrongful gain or loss actually result is immaterial, it is a consequence, which is not an essential part of the offence (AIR 1930 Bom 490).

Every breach of trust gives rise to a suit for damages but it is only when there is evidence of mental act of fraudulent misappropriation that the commission of embezzlement amounting to a civil wrong from the offence of criminal breach of trust. Criminal Courts should not be used for enforcing civil claims and the parties should not be encouraged to resort to the criminal courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil

court. The tendency on the part of the litigants to do so should be checked by criminal courts who should be on their guard against lending their aid to such procecdure. A clear distinction exists between criminal and civil liabilities (1985 PCrLJ 596). The definition of criminal breach of trust in section 405 of the Penal Code penalises a dishonest misappropriation or conversion or dishoenst use or disposal of property in an improper manner, that is to say, dishonesty is an essential ingredient in the offence and must be proved (AIR 1936 Pat 350). The offence of breach of trust is compelte when there is dishonest misappropriation or conversion to one's own use, or when there is dishoenst user in violation of a direction express or implied, relating to the mode in which the trust is to be discharged (AIR 1934 Cal 532).

The mere rentention of any property without the element of dishonesty is not sufficient to bring a case under this section. It follows that mere failrue to return an article hired does not prove dishonesty nor does mere failure to deliver possession of the property to the lessor on the expiry of the lease amount to criminal breach of trust (1985 PCrLJ 596). Where a school teacher was directed by his superior to cover pictures of some hindu saints painted on certain almirahs of the school and he in order to keep the school premises neat and clean, because of anticipated visit of the Deputy Commissioner, removed such almirahs from the school premises with the intention of using them later in the Science Hall, then under construction; he cannot be convicted under this section (1968 PCrLJ 1098).

Where there is a charge of criminal breach of trust against a person but he is willing to repay the money alleged to have been misappropriated; it would be very difficult to raise an inference of dishonesty against him. When repayment is at once made on demand the court should be slow to assume guilt in an accused person (AIR 1927 Sind 28).

Where a sum of money was taken by accused Manager (of Bank) as Eid Advance meant to be paid back by deductions from his future salary. The accused had no intention at any time to misappropriate the sum, his act in obtaining such advance did not fall within the scope of earlier portion of section 405 of the Penal Code (PLJ 1987 Cr.C. 200). *Mens rea* of offence of criminal breach of trust, would be lacking in a case where accused bank manager takes up the defence that he withdrew the amount in ignorance of relevant instructions issued by bank which prohibited such withdrawal (NLR 1986 CrLJ 379). Similarly where a person was convicted under section 405, Penal Code for dishonestly using certain cattle in violation of the spurdnama entered into by him and it appeared that he had brought the cattle in question to the tahsil and was willing to produce them; it was held , that under the circumstances he could not be held to have dishonestly used them in violation of the terms of the spurdnama and his conviction should be set aside (AIR 1933 Lah 235).

Where by an order the Assistant Information Officer was directed to take charge of all articles belonging to the Government in the possession fo the Director of Publicity and no reference whatever was made in the order that the former should take charge from the latter of the articles which the latter got from the place; it was held, that retention by the latter of the articles found at the place was not with dishonest intention (1951 Ker LT 344).

The false explanation is sufficient to prove the element of dishonesty. Thus, where in the case of the amount of Rs. 571. 87 np. according to the prosecution and according to the findings of both the cours below, the amount was received in December, 1957, but at the trial the accused stated that the amount was received in April, 1958 and denied that the amounts were received on the dates on which they

were proved to have been paid, this false explaination is sufficient to prove the element of dishonesty (1961) 1 Cr LJ 654).

The accused received the consignment of goods which came from Tatangar. It was admitted that he had removed them and it was found by the High Court that they never reached the Central Tractor Organisation. He gave an explanation in court which had been found to be false. The accused also made statement to the effect that he had lost the railway receipt and therefore had never got delivery of the goods which was also false. In these circumstances, the court concluded that he had dishonestly misappropriated the goods of the Central Tractor Organistaion. it was further held that the giving of the false explanation is an element which the court can take into consideration (1959 Cr LJ 1508 = AIR 1959 SC 1930).

8. Agreement to refund does not bar prosecution.- An agreement between the prosecutor and the accused that the money embezzled shall be refunded can not be pleaded in bar of the prosecution (Mayandi Pillai (1886) 1 Weir 462).

Where facts and circumstances clearly establish that there was embezzlement of the Government money by the accused, inasmuch as the accused had put to personal use the Government money entrusted to him, instead of depositing the same in the proper place, the fact that the accused refunded the amount when the act of his defalcation came to be discovered does not absolve him of the offence (Vishwanah 1983 Cri LJ 231; (SC) = AIR 1983 SC 174).

Criminal intention to misappropiate is proved when a postman repays the amount of money order to the payee's mother subsequent to the filing of a complaint with the postal authorities (Saling Ram v. State 1973 Cri LJ 1030 (HP).

9. Disputed claim.-It is not possible to fasten criminal liability beyond reasonable doubt before the right and title to the peroperties in question is not properly established (Superintendent v. Birendra Chandra Chakravarty 1974 SCC (Cri) 191).

10.Wilful omission to account.- In cases of criminal breach of trust failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. But accused must not be convicted on it alone. It is only an indication, a piece of evidence pointing to dishonest intention and must be considered along with other facts of the case (31 CrLJ 249; 1985 CrLJ 563 (Cri).

The usual evidence of breach of trust in regard to moneys received for the purpose of paying over is either non-payment or non-accounting or false accounting. Breach of trust is a definite act like theft or misappropriation and the above circumstances does not constitute it, but merely evidences it. Where it is the duty of the accused to pay over money at once, or on any different periods his non payment is prima facie evidence that he has wrongfully appropriated it to himself. But this presumption may be negatived by evidence that the delay was caused by forgetfulness or that it was acquiesced in by the person to whom the money was due (AIR 1956 Mad 452).

In case of criminal breach of trust failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstances against the accused. But the accused must not be convicted on it alone. It is only an indicative piece of evidence pointing to dishonest intention and must be considered along with other facts of the case (AIR 1930 Pat 209).

Where property is entrusted to a servant, it is the duty of the servant to give a true account of what he does with the property so entrusted to him If such servant fails to return the property or to account for it or gives an account which is shown to be false and incredible, it ordinarily is a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use (PLD 1952 Lah 648). But in a case where no evidence of misappropriation or conversion is available and the accused person was under an obligation, in relation to the money in question, to deal with it in a particular way the court cannot reach any conclusion to the effect that the accused did not fulfil this obligation upon the mere presumption, and it would be the duty of the prosecution to establish, by such evidence as may be available, that in fact the accused was guilty of contravening his duty in respect of the particular sum in question (PLD 1954 Lah 648).

The intention to defraud cannot be presumed from the mere fact of refusal on the part of an agent of a firm to render accounts and to allow one of the partners to have access to the account books without further facts being proved The agent cannot be prosecuted in a criminal court. Such refusal may be a good ground for a civil action, but it does not amount in any case to a criminal offence, much less to an offence under section 409 of the Penal Code (AIR 1937 Rang 505).

Where according to the complaint a sum of money was due to the compolainant on accounts. The accounts were not settled. There was no time fixed for payment of the balance which could be determined only on settlement of accounts. The complaint did not allege any such settlement. It was held, that even if some money may be found due to the complainant it could not be said that there had been any such dishonest use or disposal of any money entrusted to the petitioner as would bring the case under section 409, of the Penal Code (ILR (1951) 3 Assam 63 DB).

Where the accused a cashier not only made no payments of the amounts mentioned against complainants names in the acquittance rolls but also went to the extent of writing falsely in the cash book that amounts had been paid it could not be a case of mere negligence but a deliberate act on the part of the accused to commit misappropriation (Albana Dias Vs. State, 1981 CrLJ 677 (Goa).

The accused a traffic assistant in the office of Indian Airlines Corporation depanded on behalf of the Corporation certain excess amounts for trunk call charges from passengers for reservation of seats. After the amounts were received he passed receipts on behalf of the corporation. He, however, subsequently falsified the cunterfail receipts and fraudulently misappropriated the excess amounts. The accused was held guilty of breach of trust (Sam Nath Puri Vs. State, 1972 CrLJ 897 (SC).

11. **"In violation of any direction of law.....or of any legal contract."**- Criminal breach of trust is constituted, among other things, by disposal of a property held in trust, in violation of any direction of law (Nakuleswar Shaha Vs. State (1983) 35 DLR (AD) 285=1984 BLD (AD) 10). In order to constitute an offence of criminal breach of trust, the misappropriation or conversion etc, must be in violation of legal direction prescribing the mode in which trust is to be discharged, or of legal contract express or implied, touching the dischagrge of the trust. Disposal prior to payment to vendor by vendee of goods given to him under an arrangement that property in them should pass to him on payment is an offence (AIR 1924 Cal. 816). Where accused was entrusted with a tractor and he was under obligation to produce it before the Court, but instead of producing the tractor he disposed of it in violation of any legal contract express or implied which he had made touching the discharge

of such trust. All the ingredients of 'criminal breach of trust' were *prima facie* present in the action of the appellant, and as such, he came well within the mischief of this section (1983) 35 DLR (SC) 281).

Where the driver of a truck took away the truck from the control of the owner with the intention of disposing it off, he was held guilty of an offence under this section (PLD 1968 Dhaka 229 = 20 DLR (DB).

Where person takes from a goldmith a gold jewel for showing it to his wife to and placing an order for a similar jewel if she approve of it but fails to return it and retains it with himself towards some debts due to him by the goldsmith, he will be guilty of an offence under section 406, Penal Code. He has utilised the jewel for a purpose not intended and against the express agreement (1949) 2 MLJ 293 = AIR 1950 Mad 49).

Failure to execute the work in violation of contract where the accused was entrusted with money would not only constitute criminal liability but would also constitute Civil Liability. The acucsed would be guilty of criminal breach of trust (Dr. Babar Ali Vs. The State 1985 BLD (AD) 169; (1980) DLR 247).

The accused induced the complainants to pay Tk. 20,00,000/= on his assurance to procure 20 NOC visa but fails to keep the promise and finally denied to have received the money is a clear case within the mischief of section 406 of the Penal Code. No scope lies arguing that the deed was the creation of a partnership business (1989) 39 DLR 24).

It is well settled that the property which becomes the subject-matter of the criminal breach of trust remains in the ownership of the owner but is placed in the hands of another who becomes its trustee. And on his dishonest misappropriation thereof or conversion to his own use or disposal in violation of any direction of law presribing the mode in which the trust was to be discharged, or of any legal contract express or implied made touching the discharge of such trust, the provisions of Secs. 405 and 406 of the Penal Code would be attracted. The element of entrustment is altogether lacking in trade sales. In trade tranaactions, the property in goods passes to the byer and the mere fact that he fails to pay the price promised to be paid, no criminality can be imputed to the buyer. The property becomes his and ceasses to be that of the seller (Mohinder Kumar v. State of Punjab, 1982 Cr. L. J. 524 (526) (P & H).

Violation of contract will hold good for an offence of criminal breach of trust if the condition as to entrustment within the meaning of section 405 is satisfied (Shamsul Alam and others Vs. A.F.R. Khan (1988) 40 DLR 46). Where the breach of terms of contract does not show that there was any breach of trust the section does not attract. Failure to fulfil the terms of a contract does not amount to any criminal offence (Sayed Ahmed Vs. State (1980) 32 DLR 247).

Disposal of funds against law, rules regulations and bye law in the direction is an offence under the section. Ratification of the criminal breach of trust against rules governing disposal, by an authority who has no power to override the rule is ineffective and does not violate the disposal (1970 SC Cr R 328 = (1970) 1 SCC 504).

12. Mere retention of money does not by itself amount to criminal breach of trust.- Mere retention of money does not by itself amount to criminal breach of trust. Thus where a person takes away ormanetns on approval with a promise to return the same in the evening, failure to do so will not sustain a charge under Section 406, Penal Code (1953 Cr Lj 1586 = AIR 1953 Nag. 301 = ILR 1953 Nag. 813; AIR 1970 pat. 311 = (1966) 1 Cr LJ 654; AIR 1953 Cak. 800). But the case will be alogether

different where a person takes from a goldsmith a gold jewel for showing it to his wife and placing an order for a similar jewel if she approved of it but fails to return it and retains it with himself towards some debts due to him by the goldsmith. In such a case he will be guilty of criminal breach of trust under Section 406, Penal Code because he has utilised the jewel for a purpose not intended and against an express agreement. The mere fact that the jewel is intact is irrelecvant (51 Cr LJ 330; AIR 1950 Mad 49 = 1949 MWN 631).

It is true that normally mere retention is not such a circumstance from which one can draw an inference that there has been misappropriation. But there may be cases where it is possible to draw such an inference. It is not possible to lay down a hard and fast rule to the effect that in no case retention would lead to an inference of misappropriation (AIR 1958 Mys 82 = 1958 Cr LJ 784).

A President of a Co-operative Credit society was authorised to draw a certain amount of money from a bank. After so doing he himself retained the amount instead of crediting it to the Society. It was proved that he did this with the permission of his fellow members of the Managing Committee, as he needed fit for some work, it was held that under the circumstances the ofence committed may be said to be purely of a technical nature and even this is doubtful (32 Cr LJ 274 = AIR 1930 Lah. 1045).

Mere retention of of property without misappropriation does not consitute criminal breach of trust nor does a mere breach of contract give rise to a criminal prosecution (PLD 1976 Lah. 516 = PLJ 1976 Lah. 294 ; AIR 1953 Nag. 301). But where temporary retention is for dishonest purpose, it would be wrongful and dishonest conversion for the purposess of section 406 Penal Code (1977 P. Cr. L. J. 850).

Where there was a regular practice prevailing in Road Transport Corporation that conductors of buses used to deposit their collection not on the same day but even after four or five days as in some cases they purchased petrol, mobil-oil and other material during jurney and made payments of sale collection as soon as these bills were reimbursed to them. The accused was not liable under this section, for delay in depositing his collection (1986 P. Cr. L. J. 1232).

It is not possible to lay down any hard and fast rule to the effect that in no case retention would lead to an inference of misappropriation. In other words, whether or not an inference of misappropriation from the fact of retention could be drawn would depend on the particular facts of each case (ATR 1958 Mys. 82 = ILR 1957 Mys. 68 = 1958 Cr. L. Jour 784).

13. Civil breach of trust.- The mere breach of contract or breach of the condition of an agreement is not necessarily synonymous with the criminal breach of trust. There is only a civil liability for which the complainant can proceed against the accused (Yusuf Vs. Theyyu, 1969 Ker LT 667(668); 1983 (1) Crimes 385). The ornaments gifted to the girl on the occasion of betrothal ceremony, if not returned back on the breach of promise to marry created a liability under Civil Law and not under Criminal Law (Miss Snehlata Tiwari Vs. Vimuktanand Saraswat, 1991 Cr LJ (NOC) 69 (MP).

The word 'trust' is a comprehensive expression which has been used not only to cover the relationship of trustee and beneficiary but also those of bailor and balee, master and servant, pledgor and pledgee, guardian and ward and all other relations which postulate the existence of a fiduciary relationship between the complainant and the accused. The above exposition of the concept of 'entrustment' does not cover or include a transaction of land or money with or without condition. The reason

seems to be fairly simple. In a transaction of loan the loan giver does not retain any control over the loan amount or the property therein and it becomes the personal money of the loanee. The loanee or for that matter his agent cannot be convicted of committing any breach of trust in respect of his own money. If there is any violation by the loanee or his agent of the terms of the agreement under which loan is taken the liability of the loanee will be under the contract to be decided in the civil court and no criminal action would lie against him for criminal breach o trust or for any other offence (Shamsul Alam Vs. A. F. R. Hassan (1988) 40 DLR 46).

Two things are essential to constitute this offence. In the first place, there must be a trust, and in the second place dishonesty. Where there is one and not the other, it may be a case of civil breach of trust but not one imposing criminal liability. Where the accused has come forward with a plea which relates to settlement of accounts and where prosecution has not produced any evidence of dishonest misappropriation, the accused cannot be convicted on the basis of any presumption (Agadhya Misra Vs. State ILR 1958 Cut 580 = 24 Cut LT 455).

It is only when there is evidence of a mental act of fraudulent misappropriation that the comission of embezzlement becomes an offence punishable as Criminal breach of trust. It is this mental act of fraudulent misappropriation that distinguishes an embezzlement amounting to a civil wrong or tort from the offence of criminal breach of trust. Every offence of criminal breach of trust involve a civil wrong in respect of which the compliainant may seek redrees in a civil court: but every breach of trust, in the absence of *mens rea* is not criminal. Where an agent produces his litsts of accounts and admits the withrawal of money, if he be reluctant, even if, there is good ground for suspicion that he was not altogether honest, yet so long as there is no intention to misappropriate, money belonging to his principal, the agent's prosecution under Section 409 for criminal breach of trust is not the proper remedy: the proper remedy lies in suit for accounts in a civil court. (31 Cr LJ 852 = AIR 1930 Pat 221 = Cr C 429 = 14 AE Cr R 395; (1976) 2 Ker LJ 163). The amount of money accrued in course of long business transaction can not be the basis of a proceeding for cheating rather it constitutes a civil liability (1990 BLD (AD) 168).

Company collected all sorts of legal information to find out if it was liable to certain taxes. Legal opinion showed that it was not liable but at the same time it deducted taxes by way of abundant caution from the share holders. It did not deposit these collections either with the revenue authorities nor did it refud the same to share holders. Held, it did not involve criminal breach of trust (1985) 1 Crimes 1094).

Distinction between a civil wrong, which givs rise to a suit for damages for that wrongful act or tort, and a criminal offence punishable under the Penal Code is very clear. Every breach of trust gives rise to a suit for damages but it is only when there is evidence of a mental act of fraudulent misappropriation that the commission of embezzlement of any sum of money becomes a penal offence punishable as criminal breach of trust under sections 408 and 409 of the Penal Code. It is this mental act of fraudulent misappropriation that clearly demarcates an act of embezzlement which is a civil wrong or tort from the offence of criminal breach of trust punishable under section 408 of the Penal Code (1985 PCrLJ 96 (DB).

The accused was employed to collect certain dues out of which he was entitled to a certain percentage as his commission. He had to deposit the balance in the treasury, but no period was fixed wihin which he was to do so. It was held that his retention of the money did not expose him to this charge (Nurul Hasan Vs. State, 507 I.C. (Pat) 669; Munusami Naimar Vs. Emperor, AIR 1930 Mad 507 (508).

Where the manager of an estate receives money belonging to the state and fails to account for it when asked to do so, he is civilly as well as criminally liable (AIR 1942 Oudh 89). Where embezzlement is proved, the agreement between complainant and accused to refund the amount embezzled would not be a bar to prosecution for that embezzlement (1 Weir 464). Where accused was entrusted with a tractor and he was under obligation ot produce it before the court, but instead of producing the tractor he disposed of it in violation of a legal contract express or implied which he had made touching hte discharge of such trust. The fact that his bond is liable to forfeiture and he incurs a civil liability in terms of his bond is not a ground for exoneration from criminal liability when his wilful act/omission brings him within the mischief of section 405. By his failure to produce the tractor in the court he incurred both civil and criminal liabilities which may co-exist and are not mutually exclusive (983) 35 DLR (SC) 281).

Where there is no criminal liability, it would be highly improper to use criminal courts to enforce civil rights (AIR 1920 All 274). Therefore where a tenant paid Rs. 90 as rent to his landlord, deducted Rs. 25 towards some subscription and refused to grant a dakhila or return of money until Rs. 25 more were paid (13 CrLJ 512) or where money was advanced in respect of a contract, and there was no entrustment in a fiduciary form (AIR 1936 Cal 674), or where a potato-grower mortgaged his crop to a commission agent to secure to the latter the sale of the crop and his commission and he subsequently sold the crop to another commission agent in breach of the contract (27 CrLJ 949), or where the dispute was regarding the terms of a contract of employment (AIR 1939 Sind 48), or where the pourchaser of goods on instalment made default in payment of instalments, the dispute was of a civil nature and no criminal prosecution was justified (37 CrLJ 856). Where monies had been spent upon the business to the company, in the absence of proof of dishonest intention to cause loss to the compoany, the managing agents could not be held liable for criminal breach of trust although there had been a breach of contract indirectly causing loss. (AIR 1936 Cal 647).

A criminal court should not entertain a complaint where liability is purely of a civil nature. Where a party filed a civil suit and it failed in the trial court as well as in the High Court whereupon he instituted proceedings under this section. The High Court in constititonal jurisdiction quashed proceedings of criminal complaint filed by respondent against the petitioner, and held that the dispute being of a purely civil nature and the same having been concluded in favour of the petitioner there was no justification for continuation of criminal proceedings It would amount to no more than abuse of process of court (NLR 1981 Cr. 196). Where a party has sought her remedy before Revenue courts and she was clearly told that her remedy lay in civil court but she did not seek her remedy there. Instead she filed an FIR under section 406/420. It was held to be an abuse of the porocess of the court and proceedings were quashed (1981 PCrLJ 767).

Where a transaction is no more than a loan which has not been repaid, there can be no criminal prosecution under this section (1977 PCrLJ 195). Where the accused admitted his liability in case of a business transaction and undertook to settle business accounts the dispute was held to be civil in nature and no prosecution could be permitted to overcome difficulties likely to rise in civil litigation 1969 PCrLJ 1569 Where the complainant gave a credit of Rs. 1,500 to the accused when the latter purchased cattle from him. The accused did not pay him the amount on demand, and sought time on account of financial difficulties. It was held that the matter was of a civil nature and no complaint could be filed under this section (PLJ 1981 CrC 110).

Where G borrowed money from F on the security of I and a cheque issued by G was dishonoured and F launched criminal prosecution against G and I under sections 420 and 406 of the Penal Code. Idt was held that criminal prosecution against I in absence of evidence that he himself either committed or abetted fraud was misconceived (1969 PCrLJ 354). The accused who were two brothers went to H, a goldsmith, and made a false representation to him that their mother wanted a necklace of a certain design for getting the design copied for S, wife of one of the accused. H gave the necklace of the required design to the accused who promised to return it in the evening but subsequently they refused to return it. It was found that the mother of the accused had died long ago and S was not married. It was held, that there was no contract of entrustment between H and the accused. The transction amounted to nothing but a loan of the necklace by H to the applicants and refusal to return the necklace was not punishable under section 406, Penal Code, when it was not entrusted to them. (AIR 1960 All 387). Where dispute between parties related to settlement of accounts. Complaint as well as statement of witnesses disclosed no case of criminal liability. acquittal of accused was upheld (1988 PCrLJ 1434).

Breach of contract : Where a case is one of breach of contract, no proceedings can be taken under this section (1980 DLR 247). Where the purchaser takes delivery of the thing sold but refuses to make payment, onlya civil suit is competent. NO criminal complaint lies (1977 PCrLJ 135). Where accused allegedly received a certain amount of money from complainant at L where agreement was reached and some amount at Q towards sale consideration. accused backed out and sold the house to some one else. Dispute was held, to be purely of a civil nature for which criminal courts have no jurisdiction (1986 PCrLJ 503). Where the accused had undertaken to pay toll tax on certain conditions under a contract with Government. Failure to pay an instalment of stipulated amount involved a civil liability and criminal case for such default was uncalled for (PLJ 1981 Cr C 155).

There cannot be any criminal cases simply because the petitioner failed to deliver the contracted goods within the stipulated period and thereafter refused to refund to the opposite party No. 1 moneys advanced for purchase of goods by way of import. There is no allegation that the complainant retained control over her moneys paid to the accused petitioner by way of any stipulation so as to bring the accused petitioner and the complainant within the ammit of a fiduciary relationship. There being no entrustment there cannot be any offence under section 406 Penal Code. In the present case essential ingredients of entrustment and cheating are missing. However, in a proper case a breach of contract may also amount to cheating or crimnal beach of trust punishable under the Penal Code, Dispute being of civil nature petitioner may be liable for breach of contract (Abdur Rahim Vs. Begum A. Morshed, 3 BCR 15). Where money was paid to the petitioner by the complainant as pric for sanitary wares and other articles agreed to between the parties. This transaction being a trandsaction for the purchases of goods by way of import, the money advanced to the petitioner cannot be said to have been entrusted to the petitioner. as soon as the money was paid to the petitioner, the money became his money and the only liability of the petitioner was to deliver the contracted goods to the complainant retained any control over money paid to the petitioner by way of any special stipulation so as to bring the petitioner and the complainant within the ambit of a fiduciary relationship. There being no entrustment, no offence under section 406, was committed (1982 DLR 320). Appellant entered into a contract with the District Controller of Food for milling Government paddy under certain terms and conditions that if the miller failed to deliver husked rice within 30 days of the period of delivery upto another 15 (fifteen). Due to various causes and other

circumstances the miller failed to deliver husked paddy within the stipulated period. Inspector of food, Munshigonj made an inspection of the stocks during the temporary absence of the appellant. Appellant contended, inter alia, that even if the prosecution case was believed it would be a case of civil liability against the appellant. Contention was accepted and proceedings were quashed (Jahanara Begum Vs. The State, 5 BCR 281 (AD). If an offence is made out under section 406, the mere fact that a civil remedy is also open to the complainant would not oust the jurisdiction of the criminal court (1975 PCrLJ 545). Thus where both the courts below have come to the conclusion that the amount was paid to the accused, and he admitted its receipt; but later on, having misappropriated or converted it to his own use, he kept on making promises for re-payment and finally refused to pay, the act of the accused does come withint he definition of the offence under section 406, Penal Code and a criminal offence is made out. Merely because the complainant has remedy to recover the amount through the civil court, a criminal complainant cannot be thrown out (PLJ 1986 Cr. C 110). Where an accused was alleged to have entered into an agreement with the complainant because of his dishonest intention, an offence under this section was made out (1968 PCrLJ 1248).

14. Debtor and creditor.- If the person paying intends to repose trust in the payee expecting him to dispose of the money ina particular way, then only there is entrustment. The mere payment by a debtor to a creditor is no entrustment (AIR 1940 Mad 329). Therefore the accused who receives money from the comoplainant on condition that he would purchase a motor car sells it and returns her the money with half the profits, but applies the money for other poruposes is not guilty of criminal breach of trust. The money is received as a loan and no trust is created by the transaction (AIR 1914 All 196).

Business trnasactions were going on between the complainant and the accused for a long time relating to supply of fish and the latter made payments in parts. A blance amount claimed by the complainant was not agreed on and the accused refused to pay it. This refusal to pay the blance does not constitute any criminal offence under sections 406/ 420 Penal Code. (Islam Ali Mia Vs. Amal Chandra Mondal 45 DLR (AD) 27 = 1993 BLD (AD) 28).

Section 405 does not cover the case of a loan or of an advance of money when the borrower or the depositee intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof (AIR 1954 All 583). Therefore the Manager of a Bank who uses money of the depositor for another business is not guilty of an offence under this section (AIR 1952 Cal 193). Even if a person uses amount of loan in violation of contract, he cannot be said to ahve committed offence of criminal breach of trust. (PLJ 1988 Cr. C 397).

15. Partner.- A partner does not hold the partnership property as a trustee unless there is a special agrement to that effect and consequently cannot be held guilty of an offence under S. 405, even if he is shown to have dishonestly isappropriated that property or converted the same to his own use. Every partner had dominion over partnership property by reason of the fact that he is partner and that this is a dominion of a kind which a joint owner has over joint property. Since no joint owner can commit misappropriation in respect of the property which he holds jointly with other co-owners, likewise no partner can commit misappropriation of partnership's property belonging to him and his other partners (Lok Nath v. Jagir Suri 1982 Cri LJ 1328 (J & K).

An owner of property, in whichever way he uses his property and with whatever intention, will not be liable for misappropriation and that would be so even if he is not the exclusive owner thereof. A partner has undefened ownership along with the other partners over all the assets of the partnership. If he chooses to use any of them for his own purposes he may be accountable civilly to the other partners. But he does not thereby commit any mispropriation (1984) 36 DLR (SC) 14; PLJ 1980 Cr C 95 = 1980 PCr L J 818.

A partner is liable to be called upon for an account of the expenditure of the money which he has received, and it is open to him to spend the money received by him and to account for it in dealing with the partnership. Where it was not satisfactorily made out that this was not done, and it could not be made out in the absence of a proper demand for accounts, it was held that there was no dishonest conversion, which would justify his conviction under this section (Debi Prasad Bhagat v. Nagar Mull (1901) 35 Cal. 1108).

A partner cannot be charged under section 406 of the Penal code in respect of partnership property jointly belonging to him and the complainat partner. Where a partner holds property belonging to the partnership he holds it as one of the partners entitled to hold it and until dissolution on accounts it cannot be said that he holds the property in a fiducary capacity.

Unless there is an agrement between the partners that a particular property would be the separate property of partner, there cannot be an entrustment of it to the other partner or partners. In the absence of such agreement, each partner is interested in the whole o the partnership assets and there cannot be an entrustment of "a partner's property" as such by one partner to another because there is no "property" which can be entrusted (Mostafa Chowdhury Vs. State (1983) 35 DLR 68 = 1983 BLD 190).

Once it is held that it was a partnership business and the complaintant and the accused persons were partners (then on the principle laid down in AIR 1951 Calcutta 69 approved by the Sureme Court of India in AIR 1965 (SC) 1433) such prosecution cannot be maintained. If the prosecution for criminal misappropriation cannot be maintained, the proscution for cheating under Section 420 cannot also be maintained (Nasiruddin Mahmud Vs. Momtazuddin Ahmed 36 DLR (AD) (1984) 14 (para-18) = 1984 BLD (AD) 97).

A partner cannot be held liable for a charge under Section 406 of the Penal Code for not rendering account to any partner and for withholding the share of profits of the other partner when the accounts have not been gone into and it has not been ascertained whether there have been any profits in the partnership business at all and what sum is due to the complainant in these profits (1964) 2 Cr LJ 730 = AIR 1964 Raj 267 = 49 Cr LJ 543 = AIR 1948 Cal 292; 50 Cr Lj 108).

Every partner has dominion over partneship assets unless there is an agreement authorising entrustment of any property. Where the agreement provided that the working partner may recover money and utilise the recoveries for partnership business, his failure to deposit moneys in Bank will be covered by sec. 409 (Velji Raghaji v. State AIR 1965 SC 1433 = (1965) 2 Cr LJ 431).

In order to establish "entrustment of dominion" over property to an acused person, the mere existence of that persons dominion over property is not enough. It must further be shown that his dominion was the resutlt of entrustment. Therefore, the prosecution must establish that dominion over the assets of a particular asset of the partnership was, by a special agreement between the parties entrusted to the

accused partner. If in the absence of such a special agreement a partner receives money belonging to the partnership he cannot be said to have received it in a fiduciary cappacity or cannot be said to have been "entrusted" with dominion over partnership property (AIR 1965 SC 1437; 1977 Cr LR 44).

A Partner failing to account may not be accused for fraudulent breach of trust unless there is a clear agreement where by the accused is entrusted with the property for specific purpose which the accused fails to carry out and misppropriated it (Musa Bin Shamsher Vs. Ansarul Huq (1987) 39 DLR 24).

It it is proved that a partner was in fact entrusted with partnership property or with dominion over it, and he has dishonestly misappropriated it or converted it to his own use he may commit criinal breach of trust (R.K. Dalmia Vs. Delhi Administration, AIR 1962 Del 1821).

A partner who holds partnership property holds it in his own right, and it cannot possibly be said that he holds it in a fiduciary capacity (Hardev Singh v. Karam Dad Khan, AIR 1959 J & K. 19 (20) = 1959 Cr. L. J. 322).

It has been held in Bhubhan Mohan v. Surendra Mohan (AIR 1961 Cal. 69), by a Full Bench of two Judges of the Calcutta High Court that it cannot be said that a partner who receives or holds property of a partnership is entrusted with the property or dominion over it and no change uder Sec. 406, Penal Code, can be named against a person who, according to the complaint, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners (Jaikrishan v. Crown, AIR 1950 Nag. 99 (101).

A Partner who receives partnership property has dominion over that property as a partner quite apart from any arrangement with his other partners. The fact that he is a partner gives him dominion over the property and he does not hold that poperty in fiduciary cappacity. It may be that by special arrangement between the parties one partner could be regarded as being entrusted with property. But apart from such special arrangement, it cannot be said that a partner who receives partnership property on behalf of his partners has been given dominion over that property by his co-partners or has been given dominion over the share of his co-partners by the latter. In ordinary cases where a partner receives moneys or an asset belonging to a partnership, or holds moneys or assets of a partnership, he does not hold that money in a fiduciary capacity. Where there is no averment in the complaint that under a special agrement or special arranagement between the partners or under the terms of the partnership deed the accused person were solely entrusted with the work of management of the affairs of the firm and with the work of getting the work in their capacity as partners of the firm, committed o offence of criminal breach of trust (Jashbhai Cordhanbhai Patel v. Hasmukhlal Kalidas Patel, (1972) 13 B. L. R. 617 (619), 621; Sri Ram v. Parshadi Lal, AIR 1982 All. 60 (67).

16. Temporary retention of money by agent.- If money collected by an agent in due course of Law was retained by him for benefit of principal for a little longer than it was supposed to be restored to principal, the question whether or not it amounted to criminal breach of trust would be answered in the light of attending circumstances and if element of *mens rea* was absent, agent could not be attributed a conduct justifying punishment under Ss. 405 and 409 Penal Code (1986 P. Cr. L. J. 1232).

17. Misappropriation by wife.- Where a sum of Rs. 60, 000 was entrusted by the husband to his wife which she had taken away with her on leaving the house along with her clothes and ornaments. The way in which she had left proved that she intended to appropriate what was in trust with her and had already appropriated

part of it. A case of breach of trust was established against her. She was rightly convicted under section 406 Penal Code (PLD 1983 FSC 204 = PLJ 1983 FSC 209).

18. Criminal breach of trust in respect of stridhan.- It is settled view that the mere factum of the husband and wife living together does not entitle either of them to commit a breach of criminal law and if one does then he/she will be liable for all the consequences of such breach. Criminal law and matrimonial home are not strangers. Crimes committed in matrimonial home are not strangers. Crimes committed in matrimonial home are not strangers. Crimes committed in matrimonial home are as such punishable as anywhere else. In the case of stridhan property also, the title of which always remains with the wife though possession of the same may sometimes be with the husband or other members of his family, if the husband or any other members of his family commits such an offence, they will be liable to punishment for the offence of criminal breach of trust under Secs. 405 and 406, Penal Code (Pratibha Rani v. Suraj Kumar, 1985 (1) Crimes 614 (619) (SC) = 1985 Cr. L. J. 817 = AIR 1985 S. C. 628).

There is no justification to launch prosecution against the husband and other members of his his family for the offence under Section 420 Penal Code in respect of alleged articles of dowry in the absence of dishonest intention at the time of marriage (Surjit Singh & ors. v. Kulwant Kaur 1990 930 Crimes 232 (P & H).

No offence of criminal breach of trust is made out against the daughter-in-law when she left the matrimonial house along with the ornaments the part of which was given to her by the father-in-law at the time of marriage and a part thereafter (Gayachand & ors. V. Thawardas; 1990 (1) Crimes 154 (Bom).

19. Loan.-If a sum of money is advanced by way of loan no criminal breach of trust is committed even if the borrower uses it for a purpose other than that for which the advances was made. The accused was given a sum of money for the purpose of buying paddy for the complainant. At the time of the advance he signed an agreement under which he undertook to use the money solely for buying paddy, and to deliver the paddy to the complainant. The value of the paddy was to be credited at the market rate on the day of delivery. The accused had also signed a demand promissory not for the amount of the advance. The accused failed to carry out the arrangement and was convicted of criminal breach of trust. It was held that the conviction was bad as the transaction amounted to a loan and not a trust (14 Cri L. J. 145 (FB). Criminal breach of trust in respect of loan taken from the Bank by way of over draft. Security was furnished by the loanee more than a year after disbursement. There was no security when the payment was made. Criminal breach of trust is constituted, by disposal of property held in trust in violation of any direction of law (Nakuleswar Shah Vs. The State, 4 BLD 10(AD).

Complainant on his failure to secure the repayment of the loans borrowed from him by the accused persons entered into a Partnership Deed executed on 26.4. 74 in the Partnership venture M/s. Linker Enterprise. The complainant later found that the accused petitioner No. 1, who received Tk. 44661/- on different dates for the purpose of business, deposited dishonestly various amounts in the name of Linkers Enterprise showing him as the owner of the firm with the Sonali Bank Khulna instead of depositing the amount in the account of Linker Enterprise under the ownership of the complainant in Uttara Bank, Khulna. The complainant's hope of getting money back on execution of a partnership deed were dashed to the ground as the accused persons in collusion with one another misappropriated by cheating him, thus committed offence under section 420 and 406 (Nasiruddin Mahmud Vs. Momtazuddin Ahmed, 4 BCR 301 (AD); 4 BLD 97 (AD); AIR 1965 SC 1433).

Giving a loan to somebody for accommodating person to have money for certain time is not entrustment of money with a direction that the money would be utilised in a particular manner (Satyabrata Bhattacharya v. Jarnal Singh 1976 Cri LJ 446 (Ori); (1993) 45 DLR 102). A transaction of loan of money under an agreement does not operate as an entrustment occurring in section 405 (1988) 40 DLR 46).

A complaint for criminal breach of trust was lodged by an Advocate on the allegation that the accused refused to return the oranamets pledged with him. No document executed during the period of pledge was produced in support of pledge. Thus no evidence was produced from which an inference of entrustment could be made (K Lakshman Das 1981 Cri LJ (NOC) 81 (Ori).

A fixed deposit made with a bank is money paid to the Bank and not a trust with the Bank. In fact money paid to the bank ceases to be the money of the depositor. The only stipulation that operates is that when the fixed deposit becaomes due amount equal to that deposited amount shall be paid to the depositor (Dablok Rp v. Kaushalya Devi 1982 Cri Lj 1342 (Del).

20. Undertaker failing to make good his promise.- Undertaker on his undertaking to produce the deposited tractor in court when called upon failing to make good his promises guilty of criminal breach of trust (35 DLR (AD) 281); 1982 BCR 161)

All the ingredients of 'criminal breach of trust' are *prima facie* present in the action of the appellant and as such, he came well within the mischief of this section. That his bond is liable to forfeiture and he incurs a civil liability in terms of his bond is not a ground for exoneration from the criminal liability when his wilful act/omission brings him within the mischief of section 405. By his failure to produce the tractor to the Court he has incurred both civil and criminal liabilities which may co-exist and are not mutually exclusive (Shahidullah Patwary Vs. The State 35 DLR (AD) 1983) 281 = 1984 BLD (AD) 25).

21. Hire purchase agreement.- Where ia hirer under a hire-purchase agreement sells the articles hired without making payment to the person in full, he is guilty of criminal breach of trust (15 Cr LJ 425; AIR 1914 (LB) 157).

The mere failure to pay instalment of hire will not make out a case of criminal breach of trust. Section 405, Penal Code, cannot include within its ambit case of breach of hire-purchase agreement (S. Mitter v. State 61 C. W. N. 210 (211).

The accused hired a motor car from the complainant's Company under the hire-purchase agreement which provided that he shall not, during the hiring assign, underlet, or part with the possession, of the same in any way whatsoever. Whilst the agreement was in force the accused pledged the car to different persons on three different occasions. It was held that the pledging of the car by the accused was a violation of the legal contract made by him in regard to the hire of car and that the violation was dishonest (16 Cr LJ 665 = AIR 1915 Bom 206).

The liability of a hirer arose out of breach of the hire-purchase agreement with respect to a charge under Section 406, Penal Code, the agreement vests in him certain interest as a result of which the removal of the components of a truck does not make him liable. Held, no case for offence under Section 405, Penal Code is made out as its ingrediends are not caused by the alleged offence charge quashed (1986) 2 Crimes 601 (Cal).

Sale on deferred payment basis.-Where a sale is made on deferred payment basis and the property is delivered to the purchaser who agrees to pay the sale price subsequently. If he does not pay the price as agreed. As no entrustment has taken

place the question of commission of an offence under section 406, Penal Code would not arise. The case is only of nonperformance of contract and a criminal complaint is by one means the remedy for the same (1976 P. Cr. L. J. 225).

22. Evidence and proof.- Where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly misappropriated, converted, used or disposed of that property himself or that he wilfully suffered some other person to do so (Shakir Hossain Vs. The State, 9 DLR 14 (SC). Dirctect evidence to establish misappropriation is not essential when circumstances clearly lead to an inference of guilt (Khalil Vs. The State, 15 DLR 373). To establish a charge under section 405 of the Penal Code the prosecution must prove not only entrustment of or dominion over the property but it must also prove that the accused has dishonestly misappropriated or converted to his own use or dishonestly used or disposed that properly or wilfully suffered any other person so to do. Now it has been found as a matter of fact by the lower appellate Court that the petitioner was entrusted with 500 maunds of the paddy over which he has dominion and he had sold the same to Chittagong market and misappropriated the sale proceeds and did not return the same in spite of repeated demands of opposite party. Therefore, from the above finding of the Lower Appellate Court which is the last Court of fact it appears that the inredients of the offence u/s. 405 of the Penal Code have been proved (Md. Musa Vs. Kabir Ahmed (1989) 41 DLR 4).

In a case where entrustment is admitted, it would be for the accused person to account for the money entrusted with him and the prosecution may not be in a position to establish as to how exactly an accused person has misappropriated the amount and converted the same to his own use, but the evidence and the circumstances of the case must warrant a conclusion that the accused, in order to cause wrongful gain to himself or wrongful loss to another has commtted misappropriation of the amounts (1983 Cr LJ (NOC) 27 (Orissa).

It is neither necessary nor possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, since by law even temporary retention provided it is dishonest is an offence. But where there is no direct evidence of misappropriation and one is left to surmise as to what use was made by the accused by the money, one ought to require clearer evidence of dishonest intention than in a case where there is direct evidence to prove that the money was appropriated by the accused for a particular use which is inconsistent with his position as a trustee of the money (Shariful Islam v. state 1973 SCC (Cri) 721; Kurian v. State 1982 Cri LJ 780 (ker).

In a case under Section 406, Penal Code, the question of trust must be fully enquired into. For this purpose it is essential that the whole of prosecution evidence should be recorded. It is impossible to guess at an intermediate stage what will be the result of the quiry. The Magistrate is not so much concerned as to whether an offence has been committed which is punishable by the law of the land. Consequently when only a few of the prosecution witneses have been examined, it is too premature to decline to examine any more witnesses for the prosecution and discharge the accused on the ground that the case is of civil nature (41 Cr LJ 25; 184 IC 471).

Entries in books of account unsupported by any other evidence are not sufficient to saddle a person with civil liability, much less criminal liability which necesitate the discharging of an additional burden on the part of the prosecution (1979 Cr LR (Guj) 42).

Where a wife complained against her parents-in-law for an offence under Section 406 alleging that her jewels given as stridhan had been entrusted with them

for safe custody and that they misappropriated them, and the parents filed application for quashing the charge, it was held that the petitioner must be given an opportunity to prove that the jewles given to her as stridhan were misappropriated and that the complaint could not be sought away quashed (1978 Cr Lj 340 (Punj).

Where the accused, a public servant was entrusted with funds for purchase of articles to be utilised for public purposes actually purchased the articles the allegation against the accused that he had secured the bills regarding the purchase of the articles but the supporting vouchers were not produced is not a sufficient ground for proving criminal misappropriation of amounts because the payments could be made without cochers or the vouchers could be misplaced (1983 Cr LJ 1896 (HP).

In a prosecution for criminal breach of trust direct evidence of dishonest conversion, to the accused's own use, of the money entrusted with him, can be inferred from the proved facts and circumstances of each case (Ashutosh Roy v. State AIR 1950 Orissa 159 (165); 26 Cut, LT 269; 1959 Cr. L. J. 1157).

Where the accused, a receiver of a Court Mill appointed by the High Court, in the exercise of discretion conferred on him by the High Court, demanded and received payment over and above the market price in respect of bales allotted to a shopkeeper. The accused, however, failed to account for this extra payment. He was charged for and held guilty of criminal breach of trust in appropriating the extra money without bringing it into the mills' accunts. The question was whether the extra money was given by the shookeeper to the accused for and no behalf fo the Mill or was given to him personally as a motive or reward for showing some favour, it was held that the money was intended to be paid to the accused as his own personal profit and it was not an item of additional or extra price for the goods purchased which was demanded by or paid to the accused on behalf of the Mills. (2) as the sum was paid by way of illegal gratification, there could be no question of entrustment in such payment. The criminality of the act consisted in illegal receipt of the money and the questions of subsequent misappropriation on coversion of the same, did not arise at all (AIR 1953 SC 478 = ILR 1953 Tra. Co. 181 = 1954 Cr. L. J. JOur 102).

If section 34 is to be appllied to punish several persons for the offence of criminal breach of trust it is necessary to establish that all of them were enterusted with the amount. In the absence of entrustment a person may be guilty of abetment but cannot be charged and punished as a principal offender by the application of section 34, for this section cannot create entrustment where there is none (PLD 1952 Dhaka 354 = PLR 1951 Dhaka 723 = 4 DLR 80).

It must however be remembered that conviction of a person for the offence of crminal breach of trust may not in all cases be founded merely on his failure to account for the property entusested to him or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account, or renders an explanations for his failure to account which is untrue, an inference of misappropriation with dishonest intention may readily be made (PLD 1963 Dhaka 983 = 15 DLR 97).

Where the cash box of the accused was found short of cash by Rs. 3, 000 but the accused gave a reasonable explanation of how the money was lost and also made it good on the same day on which it was found missing, it was held, mere absence of the money without more is not, in all cases sufficient to establish misappropriation. The accused is under a duty to furnish an explanation for the shortfall since the custody is excluvely his but cases are conceivable, e. g. of faulty accounting, or of lack of control in access to the safe-deposit, where it would also be necessary to furnish something by way of proof of conversion to sustain a conviction (PLD 1962 S. C. 489 = 14 DLR (S. C.) 258).

If any explanation that the accused chooses to give is not proved beyond doubt, he cannot claim to be innocent; but even so, if his explaination throws a reasonable doubt on the prosecution story, he would be entitled to acquittal not because he proves the facts and circumstances referred to, but because the prosecution has failed to establish his guilt beyond reasonable doubt. That is to say, if the Court thinks the explanation given may reasonably be true, althought, the court is not convinced that it is true, the accused is entitled to be acquitted, inasmuch as the prosecutions would then have failed to discharge the burden imposed on it by the law of satisfying the Court beyond reasonably doubt about the guilt of the accused. The onus of proof is not shifted in these cases: it always remains on the prosecution (PLD 1962 SC 489; AIR 1964 Orissa 46; AIR 1923 Lah. 321).

Thus where a naib-patwari collected rent and paid it to the patwari who misappropriated it, and who admitted having received the amount. It was held that so far as the naib-patwar was concerned he could not be held guilty if the money collected by him had, in point of fact, been given by him to the patwari. In the absence of any such finding the naib-patwari could not be held criminally liable because it was not his duty to rebut the charge but of the prosecution to prove its case and if in the circumstances of the case it could be a resaonably possibly finding that his allegation that the amount was paid by him to the Patwari may well be true, the charge of misappropriation against him must fail (PLD 1956 SC 417 = 1956 P. S. C. R. 214 = 9 DLR (SC) 14).

23. Punishment.- A Criminal Court while awarding punishment under section 406 of the Penal Code has got an authourity to pass an order directing the accused to pay the entire sale proceeds of the property entrusted with him or over which he has dominion to the complainant. Section 406 of the Penal Code speaks of awarding punishment by a court with imprisonment of either description or with fine or both. it does not emopower a criminal court to pass an order directing the accused to pay the sale proceeds of a preceds of a property to the complainant in respect of which the charge of the criminal breach of trust is established against the accused (Md. Musa Vs. Kabir Ahmed (1989) 41 DLR 4).

Where the accused belongs to a respectable family and holds a responsible job, he should be severely punished under this section. Where the accused was a man of some position and family. He, as a secretary of a co-operative society committed criminal breach of trust with respect to Rs. 115 and the offence had been aggravated by his subsequent conduct. A fine of Rs. 175 imposed by the Magistrate should be enhanced (AIR 1944 Sind 164). But where there is strong doubt about the extent of the accused's participation in the crime, the circumstance was taken into consideration and the quantum of sentence imposed was reduced (1968 PCrLJ 419). Similarly where the accused was an old man of sixty at the time of conviction and was waiting for the decision of the petition for a period of 12 years The sentence was reduced to the period already undergone. But the fine of Rs 4,700 was not reduced (1980 PCrLJ 578). Where accused was a patient of T. B. the appellant court reduced his sentence of fine (1986 PCrLJ 2190).

24. Practice and procedure.- Where charge under S. 409 covered a period of more than one year during which the accused had misappropriated the money, it was held that the charge contravened the provisions of S. 222 (i), Cr. P. C. but the defect did not cause prejudice to the accused and did not vitiate the trial, as the charge could have been split up into two charges with respect to periods of one year or less each, and then the charges could be tried together (AIR 1962 SC 1153).

If there is a contract that the accused is to render accounts at a particular Place and he fails to do so as a result of his criminal act in reaspect of the money, he can,

without unduly straining the language of the section, be said to dishonestly use the money, at that place as well, in violation of the express contract, which he has made touching the discharge of the trust by which he has made touching the discharge of the trust by which he came by the money, and so commits the offence of criminal breach of trust at that place also (PLD 1962 Azad J & K 31 (DB).

The criminal Court at the time of awarding punishment under section 406 Penal Code has no authority to pass an order directing the accused to pay the sale proceeds to the prosecution over which the accused had dominion over (1989) 41 DLR 4).

Pending civil suits between parties.-Where offences with which the accused had been charged were under ss. 406 and 420 of the Code, but civil suit were also pending between the complainant and the accused in respect of the ornament which was the subject matter of the criminal complaint, it was held that cirminal proceedings could not be stayed till the civil cases were decided (Panna Lal (1943) All. 27).

25. Charge.- Charge should run as fallows : I (name and office of Magistrate, etc,) hereby charge you (name of accused) as following:-

That you, on or about the.....day of....., (or (if the property involved is a sum of money) between the.....day of...and the day o.(the time between the first and last of such date not being moere than one year) at....., being entrusted with certain Property, to wit., committed criminal breach of trust and that you thereby committed an offence punishable under. S. 406 of the Penal Code, and within my cognizance.

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

A complaint under s. 406 is maintainable against a registered society where it is the case of the prosecution that the society had the *mens rea* because it had acted through the second petitioner and others i. e. the office bearers of the society (Sri Aurobindo Society 1985 Cri LJ (NOC) 83 (Mad.).

If one person commits criminal breach of trust in respect of a certain amount and another commits criminal breach of trust in respect of another amount during a period of one year, they cannot be charged for the aggregate amount. Each must be charged separately for the amount defalcated by him ((1988) 40 DLR 80).

The Court can convict an accused of an offence with which he was not charged if provisions of section 236 Cr. P.C. are fulfilled (1969) 21 DLR 933).

407. Criminal breach of trust by carrier, etc.-Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of turst in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

408. Criminal breach of trust by clerk or servant.-Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal brach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope and applicability.
2. "Entrusted in such capacity with property."
3. "Or with any dominion over property."
4. Evidence and proof.
5. Punishment.

1. Scope and applicability.- In order to constitute criminal breach of trust by clerk or servant there must be dishonest misappropriation. It is incumbent on the prosecution to prove dishonest misappropriation. In the absence of any evidence of dishonesty accused can not be convicted, on basis of any presumption. When the accused has come forward with a plea which relates to settlement of accounts and where the prosecution has failed to show any dishonest misappropriation, the accused is entitled to acquittal (1957 MLJ (Cr) 535=1957 Andh LT 705).

The accused was a cashier of a co-operative society in whose books false entries were alleged being made in the hands of the petitioner but they were not proved nor were they in his writing. Held, he was entitled to the benefit of doubt and should be acquitted of the charge of its misappropriation trust (1984) 1 Crimes 191 P&H).

A person, though not himself a clerk or servant may be convicted of abetment of this offence. If, for instance, a person is charged for abetment of criminal breach of trust by a servant, it must be proved that what the accused had instigated the servant to do was criminal breach of trust and that he was aware of it (Bal Gobinda Shah Vs. State 4 CWN 309).

Where the accused had retained for some time Government money with him instead of depositing it in the Government Treasury, he could be convicted for temporary misappropriation even with regard to the amounts which, in the circumstances of the case, were alleged to have been deposited by him, if the temporary retention thereof by him was with the aforenoted intention. But if the trial Court held on good grounds that the requisite dishonest intention was not there, he cannot be convicted (1980 SCMR 402 = PLJ 1980 SC 336).

Where Account holder disowned his signatures on withdrawal slips and Handwriting Expert also found his signatures as forged ones. Accused a responsible Bank official; himself filed withdrawal forms, verfying signature of account-holder and himself took payment from cashier. His conviction was maintained (1987 P. Cr. LJ. 363 (DB).

But where ingredients of S. 471, Penal Code were not established by prosecution beyond reasonable doubt. No evidence was available on record to show that two forged cheques were used by accused. Accused could not be convicted under S. 408 (1987 P. Cr. LJ. 2006).

Where only evidence against accused was his extrajudicial confession made before accunt-holders and no direct evidence existed to connect accused with commission of crime of forgery or using forged cocuments as genuine. His conviction was set aside (1987 P. Cr. LJ 2006).

Where money was withdrawn by a Bank Official on a cheque carrying forged signature of the account-hlder, but the Bank Manager authorized payment on basis of vertification of signatures of account-holder by cashier of Bank. Accused, having acted bona fide, his conviction and sentence were set a side [1987 P. Cr. LJ. 363 (DB).

A case under S. 408 Penal Code is not compoundable (AIR 1943 Cal 47 = ILR (1943) 1 Cat. 154 = 43 Cr. L. Jour 926 (DB).

2. Entrusted in such capacity with property.-The property must have been entrusted to the accused in his capacity of a clerk or a servant (1865) 3 WR (Cr L) 12).

If it is not entrusted in such capacity the clerk or servant will be liable under S. 406 and not under this section. Where a servant fails to render accounts and to deliver up the moneys realised by him in spite of repeated demands, he uses the property entrusted to him in violation of the legal contract made by him with his master and is guilty of an offence under this section (Brij Kishore v. Pandit Chandrika Prasad (1936) 12 Luck 77; Wazir Singh (1941) 17 Luck 353).

3. Or with any dominion over property.- If a clerk or servant who has dominion over the property of his master in some way or other misappropriates or converts to his own use such property he commits criminal breach of trust. For instance, where it is the duty of a Municipal Water Works Inspector to supervise and check the distribution of water from the municipal water-works, he has dominion over the water belonging to his employers. If he deliberately misappropiates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers he is guilty of criminal breach of turst (Bimala Charan Roy (1913) 35 All 361).

Dominion over property must be as a result of entrustment, whereas dominion of a partner over partnership property is not an entrustment even when working as an employee of the partnership and he cannot be held guilty under this section (Abhai Singh v. state 1980 Cri LJ (NOC) 89 (All).

Where the funds of the society were in charge of the appellant the instructions given by him to the accountant to make a wrong cross entry can only raise an inference of misappropriation (Kantilal AIR 1974 SC 222; 1974 Cri LJ 310 (SC). However, a charge was lodged against the President of Co-operative Society along with other office-bears for misappropriation of store, on the basis that the key of store used to remain with president during the night. It was held that this circumstance was not sufficient to prove charge (Jagan Nath 1976 Cri LJ 847 (SC): AIR 1976 SC 1132).

4. Evidence and proof.- The prosecution must prove guilt of the accused beyond reasonable doubt. Where the prosecution did not do so and all available evidence was also not produced, the accused was acquitted (1969 P. Cr. LJ 975).

But where the prosecution proved the receipt of money by the accused, who could not explain why he had not accounted for it, and the Court on general grounds explained away the accusation, the Supreme Court set aside the acquittal of the accused and remanded the case for decision according to law (1980 SCMR 402 = PLJ 1980 SC 336).

Where the accused pesons were the president and the Secretary of a Co-operative Society and they had been entrusted with the monies and affairs of the society and had otherwise dominion over the monies and properties of the society, it was held that s. 408 and not s. 409 would be attracted to the case (State v. Kesari Chand 1987 Cri LJ 549 (P & H) (FB). See also somsetti Lakshmi Narsimayya 1972 Cri LJ 558 (AP).

Where a salesman of a Co-operative Society admitted shortage of cloths entrusted to him as also his liability to pay the value of the cloths found to be short and further admitted that he alone was responsible for the shortage, his conviction under section 408 was held to be proper (Ramachandran AK 1972 Cri LJ 698) (Mad).

The prosecution did not examine anyone even to show that the books of account were regularly kept in the course of business nor indeed was any attempt made to lead evidence apart from the production of books of account to prove the

entrustment of the amount to the appellant. Held, that the mere entry in the books unsuppored by any oral evidence can not prove entrustment (Dadarao Vs. State of Maharashtra AIR 1974 SC 338).

5. Punishment.- When the misappropriation committed by a young man and a law graduate appears to be his first offence, a serious notice of the lapse need not be taken. The Court must take a lenient view. Nominal sentence of one months rigorous imprisonment only and a fine of Rs. 500 is just and proper (Gurdeve Singh Vs. State of West Bengal, AIR 1979 SC 1195 (1196).

When the accused is an old man aged 70 in the normal course leniency can be shown to him (Murlidhar Yadav Patil Vs. State of Maharashtra 1978 MLJ 609 (611).

409. Criminal breach of trust by public servant, or by banker, merchant or agent.-Whoever, being in any manner entrusted with property, or with any dominion over prperty in his capacity of a public servant or in the way of his business as a banker merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope and applicability.
2. Forgery and criminal breach of trust.
3. Section 409, Penal Code and section 5(1)(c), Prevention of Corruption Act.
4. Entrustment is necessary.
5. Dishonest intention.
6. "In his capacity of a public servant."
7. Agreement to refund does not bar prosecution.
8. Criminal breach of trust by pulic servant.
9. Company.
10. Misappropriation by agent.
11. Misappropriation by banker.
12. Sanction for prosecution.
13. Evidence and proof.
14. Buden of proof.
15. Defence of, proof of.
16. Punishment.
17. Practice and procedure.
18. Charge.

1. Scope and applicability.- Section 409 is an aggravated form of criminal breach of trust when the same is committed by a public servant, banker, merchant, etc. This offence is included in the category of those offences which connot but be pubished with punishment, the court in this respect having no discretion as in the case of numerous other offences which are punishable with imprisonment or fine or with both. As a matter of fact the above categories of persons are exected to possess a very high standard of morality. A breach of trust by them in respect of the properties which are entrusted to them in full confidence may often lead to serious private and public affiction and may also have disastrous effect on the whole set up of the society. A servant acting within the scope of his employment cannot, in order to defraud his master, set up breach of his master's regulations in his own favour. A public servant is expected to dishcarge his duties honestly whether his movements be properly supervised or not, and it would be setting a very bad principle if such reprehensible conduct on the part of the accused is condoned merely on account of the negligence of those who were duty bound to control his actions (76 IC 971 = AIR 1923 All 480; 45 A 281; 21 ALJ 149; 25 Cr LJ (499 referred to) 36 Cr LJ 424).

The essential condition of an offence of criminal breach of trust is that the property, which is the subject matter of the offence must belong to some person other than the accused. In the Case of Narayan Ittivi Nambudiri v. State of Travancore-Cochin (AIR 1952 SC 478), the Surpreme Court observed that the ownership or beneficial interest in the property in respect of criminal breach of

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

trust alleged must of some person other than the accused and the latter must hold it on account of such person or in some way for his benefit (Chasiram Agarwalla v. State, AIR 1967 Cal. 568 (579).

To prove an offence under this section, it is necessary to prove that (i) the accused belonged to one of the categories enumerated in the section and that he had been entrusted with property or with dominion over property in that capacity and (ii) that he dishonestly misappropriated or converted to his own use that property or dishonestly used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract expres or implied which he had made touching the discharge of such trust. Where prosecution only proves the first ingredient, as regards entrustment of the property and the accused's intention of misappropriating the property or preparation to do so without proving at the same time that accused actually misappropriated or converted to their own use the property entrusted to them, their conviction under section 409 cannot be maintained (1985 PCrLJ 1126 ; PLD 1957 Dhaka 711). Mere disappearance of property entrusted is not sufficient to establish misappropriation unless the accused is proved to be responsible for doing himself or suffering some other person to do acts mentioned in section 405 (PLD 1959 SC 407). Therefore the accused cannot be held guilty of criminal misappropriation where no wrongful loss to government or wrongful gain to the accused is proved (NLR 1983 Cr. 543).

There can be no conviction merely for suffering loss unless accused either himself dishonestly misappropriates property or deliberately allows someone else to do so. Faildure to discharge responsibility for safe custody of property would do per se amount to establishment of an offence of criminal misappropriation within the meaning of section 409 of the Penal Code (1968 PCrLJ 358). The prosecution must affirmatively prove these ingredients of the offence unless receipt of the money is admitted and the accused offers no satisfactory explanation of what he did with it (PLD 1959 Dhaka 711).

The facts and circumstances of the under-noted case clearly establish that there was embezziement of the Government money by the accused, inasmuch as the accused had put to personal use the Government money entrusted to him, instead of depositing the same in the proper place. The fact that the accused refunded the amount when the fact of his defalcation came to be discovered, does not absolve him of the offence committed by him (Vishaw Nath v. State of Jammu and Kashmir, AIR 1983 SC 174 (176). It is not the duty of the prosecution to prove that the accused converted the property to his own use; it is sufficient if the government was deprived of the use of the money for an unexplained period, it being presumed in such a case that the accused had applied the money to his personal needs (PLD 1959 SC 309 = PLR 1959 DHaka 969; 1970 P. Cr. LJ 797).

Before conviction under Sec. 409, Penal Code, can be recorded, the prosecution must peove two essential: (1) the factum of entrustment and, (2) the factum of misappropriation of the entrusted articles (Janeshwar Das Agarwal v. State of Uttar Pradesh 1981 Bom. Cr. C. (SC) 163 (173- 174).

The words used in Sec. 409 Penal Code, are "whoever being in any manner entrusted with property or with any dominion over property in his capacity of a public servant or in the way of his business as a criminal breach of trust.....to fine." The accused may or may not be a public servant, but if the entrustment of the

property with him is on account of the way of his business as an agent, it is sufficient to invite the application of Sec. 409, Penal Code, to his case (Basant Lal Gir v. State of Uttar Pradesh, 1986 AWR (HC) 117 (119). The mere fact that the total amount was paid during the trial will not absolve him from his criminal liability (1970 P. Cr. 797).

Where the accused cashier had withdrawn money on Government account but had not paid it to the official entitled to receive the same although he had made an entry in a cash book showing disbursement in favour of the person entitled to receive it, the only legitimate inference was that he had dishonestly misappropiated the money (1970 SCMR 8080).

Even when misappropriated property is not found or treaced but the fact of misappropriation is otherwise satisfactorily established, the accused wold be liable for breach of trust if he had been entrusted with or had dominion over the property (PLD 1965 Kar. 155 = 17 DLR (W. P!) 90 (DB).

2. Forgery and criminal breach of trust.-Where accused was charged for forgery and breach of trust but convicted for offence under S. 409, Penal Code by trial Court Presumption arose that accused was acquitted of charge of forgery because proof of offence of breach of trust depended upon proof of forgery. As forgery was not proved accused could not be said to have cmmitted breach of trust in respect of consignments relating to alleged forged entires. Accused was acquitted (1985 P. Cr. LJ. 2050).

Where a sub-post master had forged the thumb impression of a party and misappropriated the money order amount he would be guilty under this section (Nanjappa DC v. State 1971 SCC (Cri) 11).

3. Section 409 penal Code and Section 5 (1) (c), Prevention of Corruption Act.- An offence under Sec. 409 and one under Sec. 5 (2) of the prevention of Corruption Act is not identical (AIR 1957 SC 592). Under Sec. 5(1) (c) of the Prevention of Corruption Act (2 of 1947), a public servant is said to commit the offence of criminal misconduct in the discharge of his duty "if he dishonestly or fraudulently misapproprates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do." Under subsection (2) of the same section the offender is punishable with imprisonment for a term which may extend to seven years, or punishable with imprisonment for a term which may extend to seven years, or with fine, or with both. It will be seen that the offence described in Sec. 5 (1) (c) is more or less similar to Sec. 409 Penal Code, execpt with respect to *mens rea* which is enlarged for the purposes of the former. For a breach of trust the act or omission of the accused should be dishonest, while under Sec. 5 (1) (c) it may be dishonest or fraudulent (K. Jayarama Lyer v. State or Hyderabad. A. I. R. 1954 Hyd. 56 (59) = ILR (1953) Hyd. 573 = 1954 Cr LJ 464).

The offence of criminal misconduct punishable under section 5(2) of the Prevention of Corruption Act is not identical in essence, import and content with an offence under section 409, Penal Code. The offence of criminal misconduct does not repeal by implication or abrogate section 409. There can be a trial and conviction under section 409 even if the accused has been acquitted of an offence under section 5(2), Prevention of Corruption Act (PLD 1952 Lah 648). Where the accused has been convicted for misconduct he can also be convicted under section 409, Penal Code if that offence is made out on facts of the case (1969 PCrLJ 1025).

Where a case was instituted under section 409 but by mistake conviction was recorded under section 5 of Prevention of Corruption Act, it was held; that this was an error on the part of the Special Judge and therefore the Court in the exercise of

its powers as a court of appeal altered conviction from section 5(2) of Act II of 1947, to one under section 409, Penal Code (PLD 1960 Kar 899).

A full bench of the Bombay High Court has held that in the case of a criminal breach of trust by a public servant, it was open to the prosecution to launch prosecution either under s. 409 or under s. 5 (2) of the Prevention of Corruption Act, 1947, even before the amendment of the latter Act in 1952. If the prosecution is launched under s. 409 and if the status of the accused is such that no sanction is required under the provisions of the Criminal Procedure Code, the prosecution is good and the conviction is proper, in absence of sanction, notwithstanding the fact that if the prosecution had been launched under s. 5 (2) of the Prevention of Corruption Act, a sanction would have been necessary. Section 409 is not repealed by the provisions of the prevention of Corruption Act (Pandurang Baburao v.State (1955) 57 Bom LR 868 (FB); Sahebrao v. state (1954) 56 Bom LR 980 (FB) = (1955) Bom 159 (FB).

The Indian Supreme Court has held that the offence of criminal misconduct punishable under s. 5 (2) of the Prevention of Corruption of Corruption Act, is not identical in essence, import and content with an offence under s. 409 of the Penal Code. The offence of criminal misconduct is a new offence created by that enactment and does not repeal by implication or aborogate s. 409 of the penal Code (Veereshwar Rao (1957) SCJ 519 = (1957) Cri LJ 892 = (1957) SCR 868).

The supreme Court has also held that the view taken by the Punjab High Court in Guraucharan Singh's case is not sound and it has approved of the view taken by the Bombay High Court in Pandurang Baburao, by the Madras High Court in Satyanarayanamurthy, and by the Calcutta High Court in Amarendra Nath Roy. In the same case it has held that s. 5 (1) (c) of the Prevention of Corruption Act creates a new offence called criminal misconduct and cannot by implication displace the offence under S. 405 Penal Code. (Om Prakash (1957) SCR 423 = (1957) Cri LJ 575).

4. Entrustment is nessessary.- In order to consitute criminal breach of trust there must be an entrustment, there must be misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract and the miaappropration or conversion or disposal must be with dishonest intention. Every payment of money by one person to another does not amount to entrustment unless there are circumstances attending it from which one can gather that it was an entrustment and not a mere payment (Vide Rex v. V. Krishnan, A. I. R. 1940 Mad. 329: (1940) Cr. L. J. 824; 824; Smt. Jairani Devi v. Krishan Kumar Jauhari, 1985 Cr. L. J. 64 (67, 68) (All).

Unless entrustment is proved, there can be no question of misappropriation. Even otherwise, the allegation qua entrustment and misappropriation is in general terms. In the absence of any specific allegation, the order of summoning the accused under Sec. 406, Penal Code is bad in the eye of law cannot be sustained (Gurmer Kavr. v. Balbir Kaur, 1989 (1) Cr. L. C. 73 (74) (P & H).

To bring home the guilt of the offence of criminal breach of trust under section 409 Penal Code the prosecution is bound to establish that the property was entrusted to the accused and that he had misappropriated it (Uma V. State of Tamil Nadu 1992 (2) Crimes 1052 (1053).

The word "entrustment of property" or "dominion over property" do not mean the entrustment has been made directly to the public servant but it includes a case where a certain property, though entrusted to some other authority, comes to the accused for transmission, disposal etc. (1973 Kash LJ 79).

Money paid to a post-master for money orders are public moneys; as soon as they are paid they cease to be the property of the remitters, and a misappropriation of such moneys will fall under this section (Juala Prasad (1884) 7 All 174 (FB).

The enturstment may arise in "any manner whatsover." That manner may or may not involve fraudulent conduct of the accused. Section 409 covers dishonest misappropriation in both cases, that is to say, those where the receipt of prpperty is itself fraudulent or improper and those where the public servant misappropriates, what may have been quite property and innocently received (AIR 1974 SC 79 = 1974 Cr LJ 678).

There can be no dubt that before a public sevant can be convicted of an offence under Sec. 409, Penal Code, the property which is said to have been misappropriated must be entrusted to him (Som Nath Puri v. state of Rajasthan, AIR 1972 SC 1940 (1943).

There is no merit in the submission that the prosecution has to prove its case of misappropriation of entire shortage. The accused is bound to account for every pie entrusted to him. A M A Wajedul Islam Vs. State (45 DLR 243 = 1993 BLD 296)

In order to prove the offnece of Criminal Breach of Trust there must be the allegation of entrustment of property and misappropriation thereof. In the absence of either of the two ingreadients the offence is not complete. Mir Amir Ali Vs. State (45 DLR 250). For an offence under section 409, Penal Code, the first essential ingredient to be proved is that the property was entrusted, and there was physical transfer of property (1986 PCrLJ 2749). There is no rational basis for drawing a line between the entrustment which takes place in accordance with the prescribed duties, and that which is made in accordance witht he accepted practice relating to the post or appointment held by the public servant. In both cases the entrustment takes place in his capacity of a public servant dealing with the property in question in relation to his official functions. Both situations would thus be covered by the provisions of section 409 of the Code (1975 SCMR 375). When section 405 which defines criminal breach of trust speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relatinship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of property to the second party still remains the legal owner of the property and the person in whose favour possession is so transferred has only custody ofthe property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtain a special interest by the other party, the person so put in possession only obtain a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him. (PLD 1964 Dhaka 368;AIR 1956 SC 575).

Whre the accused, secretary of a co-operative society obtained money from bank with the help of his co-accused by misusing his position through forgery and fraud, a clear case of criminal breach of trust, was made out against him. (1982 SCMR 745).

A person authorized to collect, might delegate his function to a subordinate of his, and in such a case that subordinate also gets legal right to collect and when acts in exercise of such delegated authority any amount that is paid to him, would

constitute "entrustment" (Vishawa Nath v. State of J & K 1983 Cr. L. B. (SC) 136 (137). Where there is failure to account for property entrusted the inference of dishonest misappropriation or conversion can be drawn (AIR 1960 SC 889).

The appellant was working as a Tahsildar at Bharni, Pande and wedhonkar were working under him as reader and clerk respectively. As Tashildar, the appellant was incharge of receipt of amounts due to the Government by way of revenue, fines, etc. He received at total sum of 824. 20 from Sixteen persons towards land revenue. The amounts were actually handed over to the reader. This amount was not credited to the Goverment in the Treasury. The Supreme Court held:

"Having regard to the circumstances of the case, we do not think that circumstances make any difference. The accused certainly obtained dominion over the amounts and it was he that was resonsible for misappropriating the amount (Vasant Mogha v. State of Maharashtra, 1979 SC Cr. R. 304 (304-05, 306 = AIR 1979 SC. 1006 (1008).

Where the prosecution eveidence leaves considerable room for doubt with regard to both the points, mamely, entrustment as well as misappropriation, there can be no conviction (1985 P. Cr. LJ86 = PLD 1964 Dhaka 368 = [illegible]). Where direct evidence of removal of articles from store and misappropriation of various items by accused was not forthcoming. Alleged shortage was successfully explained by defence evidence. Accused was given benefit of the doubt and acquitted (1985 P. Cr. LJ 836 = 1985 P. Cr. LJ 864).

Admission of entrustment.-Where entrustment is admitted, the mere fact that entrustment had not been proved by producing any official document was of no consequence in proving a charge against the accused (1968 P. C. LJ 1712 = 1968 SCMR 1126).

In a case where entrustment is proved or admitted, it would be for an accused person to account for the money enttrusted with him and the prosecution may not be in a position to show as to how exactly the money has been misappropriated or converted by an accused person to his own use, but the evidence and the circumstances must lead one to a reasonable conclusion that an accused person in order to cause wrongful gain to himself or wrongful loss to a another, has committed misappropriation. Since the appellant being a public servant recived the amounts but did not account for the same though he was bound to do so it cannot but be said that he was guilty of misappropriation (1985 Cr LJ 563 (567) Orissa).

There may be circumstances establishing that when an accused person has received money, if he fails to account for it, it can only be that he has misappropriated or converted it to his own use, and the absence of direct evidence of misappropriation or conversion, which in many cases would not be easy to obtain, may in such a case, be made good by the presumption out of the circumstances aforesaid. But in a case where no evidence of misappropriation or conversion is available and accused person was under obligation, in relation to the money in question, to deal with it in a particular way, the Court cannot reach any conclusion to the effect that the accused did not fulfil this obligation upon mere presumption, and it would be the duty of the prosecution to establish, that in fact the accused was guilty of contravening his duty in respect of the particular sum in question.

The accused when charged with having misappropriated a sum, of money impliedly admitted his liability to pay by asking for time in which to make gold the deficit, which time was extended on several occasions at his request, but he failed eventually to make up the loss and the case was reported to the police.

Held, This does not amount to an admission that he committed an offence of criminal breach of trust. He appears to have admitted that he was liable to make good the loss occurred. Much more is required than a mere acceptance of civil liability to make good an apparent loss of money, for holding that loss is the result of breach of trust by the person making the admission, in the sence of section 409, Penal Code (A. Latiff Vs. Crown; 1953 DLR WPC 40).

5. Dishonest intention.-To establish a charge of criminal breach of trust the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly misappropriated, converted, used or disposed of that property himself or that he wilfully suffered some other person to do so (PLD 1956 SC 417 = 9 DLR (SC) 14).

Dishonesty is one of the essential ingredients of offence under Secs. 403 and 409, Penal Code, Therefore, there must be evidence of dishonesty. Mere failure to pay the money or mere non-payment of the money would not amount to dishonesty. Dishonesty is the mental act of fraudulent misappropriation that distinguishes from the civil wrong. In the absence of the *mens rea* every breach of trust is not criminal breach of trust. (Bhawani Sankar Begaria v. Ratual Dutta, 1989 Cr. L. J. 1069 (1070) (1071) (Gau).

Where mens rea is completely lacking in a case the accused cannot be convicted under section 409 of the Penal Code (1983 SCMR 551). Mere retention of money entrusted to a person without any misapropriation even though he was directed by the owner to pay it to so and so, or to deal with the money in a particular way, is not a criminal breach of trust, and unless there is some actual user by him which is in violation of law or contract, there is no criminal breach of trust, and even if there is such user there must be a dishonest intention. In the case of mere retention, it is impossible to say that it is dishonest (1984 PCrLJ 605).

Where a cashier in a government offfice gave advance to employees in the office out of the cash in hand; the practice was illegal but as there was no criminal intention. No benefit was derived by any one from such advances. The benefit of the doubt was given to the accused (PLD 1971 SC 213). Where criminal intention appeared to be absent in the act of accused Manager in getting Eid-Advance of petty amount from bank. It was held that violation of instruction, if any, of bank prohibiting bank manager from getting eid advance constitute no offence under section 409 of the Penal Code or offence of criminal misconduct under section 5 of the Prevention of Corruption act (1947 PLJ 1987 Cr. C 200).Evidence establishes that there was a practice from long before the accused's assumption of office whereby the officers and employees of the department used to take advances from the cashier on deposit of chits and cheques and the advances were subsequently recouped. The amount found short was convered by such advances. No element of dishonest intention is disclosed. The accused is entitled to be acquitted of the charge (Sirajul Islam Vs. The State 25 DLR 73 (SC); 14 DLR 292).

Where there is evidence of dishonesty, the accused may be convicted under section 409. Thus where the accused who was a Khirdi Naviz and Sarbharathis Peshkar had the duties of receiving money, depositing the same in the bank and maintaining accounts relating thereto. It was also the duties of the accused to put up these papers and accounts for the signature of the Tahsildar. It was established that the entries were made by the accused in his own hand, that the entries were false, that the amounts, were embezzled by not depositing them in the bank or by making entries relating to false expenditure and that the receipts given by him were fictitious. It was held that the accused had committed criminal breach of trust within the meaning of section (409 AIR 1958 AP 29). Where accused who had keys of store

room disappeared when asked by raiding party to open the same It was held that conduct of accused pointed to his guilty conscience. Conviction of accused was upheld (1983 SCMR 288). Where accused admitted receipt of certain amount but in the account statement showed less amount and explained it as a mistake. Balance of cash was also found short. Dishonest intention was proved and accused was convicted (PLJ 1982 Cr.C. 20).

There is no offence under Sec. 409, Penal Code, even if entrustment is proved, since in the absence of intention of conversion by the accused a mere failure to account for the property would not be criminal breach of trust even though it might be otherwise a breach of trust (Ishwar Prasad Kund v. State of Orissa, 1989 East Cr. C. 178 (180) (Orissa).

Mens rea constitutes one of the essential elements of the offence of criminal breach of trust. Retention or use of property by a person having reasonble claim over it does not constitute the offence of criminal breach of trust (Bedrila Hiralal v. State of Madhya Pradesh, 1989 S. C. Cr. R. 67 (72).

6. "In his capacity of a public servant."- To constitute an offence under Section 409, Penal Code it is not necessary that the property should be that of Government, but that it should have been entrusted to a public servant in that capacity. (2 Cr LJ 515; 8 Cr LJ 160) = 15 LR38 Cr.). The offieial capacity is material only in connection with entrustment and does not necessarily enter into the latter act of misappropriation or conversion which is the act complained of (AIR 1979 SC 1841).

A Lambardar came to deposit amount collected by him as land revenue in the treasury officer was on leave. To avoid coming over again he paid the amount to the accused, a Jamadar, for depositing in the treasury. The accused did not deposit the amount. It was argued that since it was no part of the official duties of the accused to accept this type of money, hence the Lambardar wrongly paid this amount to the accused no criminal offence much less an offence under s. 409 was made out.

It was held that the requirement of the law is that a person should be a public servant and in that capacity he should receive property or dominion over property in the form of entrustment and in that situation it becomes his bounden duty to discharge that trust in the manner under taken by him or at least to deal with that property in an honest manner and, if he acts in violation of those directions or dishonestly misappropriates the same, he is guilty of the offence even if that entrustment was made to him under an erroneous assumption. The accused was thus convicted under S. 409 (State v. Wazira Ram 1986 Cri LJ 995) (HP).

7. Agreement to refund does not bar prosecution.— Even if a refund of money entrusted with is made at a latter stage it will not absolve an accused of the charge of misappropriation. (Rajab Ali Zulfiqar Vs. State 45 DLR 705). Where the facts and circumstances of the case clearly established that there was embezzlement of the Government money by the accused inasmuch as the accused had put to person use the Government money entrusted to him, intead of depositing the same in the proper place. The fact that the accused refunded the amount when the act of his defalcation came to be discovered, does not absolve him of the offence committed by him. The accused happened to be a public servant. In complete violation of the directions of law he had failed to send the amount to a proper place and with criminal intention he had not made ar y entry of the money in the Register. He committed criminal breach of trust with respect to that money over which he had completed dominion by putting the same to his own use. The refund of the amount after detection does not absolve him of the offence (Vishwa Nath v. State of J & K 1983 Cr LJ 231 (233) = AIR 1983 174).

The accused when charged with having misappropriated a sum of money impliedly admitted his liability to pay by asking for time in which to make good the deficiet, which time was extended on several occasions at his request, but he failed eventually to make up the loss and the case was reported to the police. Held, this does not amount to an admission that he committed an offence of criminal breach of trust. He appears to have admitted that he was to made good the loss occurred. Much more is required then a mere acceptance of civil liability to make good an apparent loss of money, for holding that loss is the result of breach of trust by the person making the admission, in the sense of section 409 of the Penal Code (Abdul Latif Vs. Crown 5 DLR 40 (WP).

Where accused offered to pay amount misappropriated by him. He had undergone agony of protracted trial, lost his job and remained in custody for some time. Sentence was reduced to imprisonment till rising of Court (1988 P. Cr. L. J. 2107; 1988 P-Cr. L. J. 392).

8. Criminal breach of trust by public servant.- The appellant was working as a collection amin in tehsil Shahabad. One of his duties was to receive the amounts payable to the Government. on 26thd March, 161, he is alleged to have received a sum of Rs. 200 from one and a sum of Rs. 300. 41 P. from one. Instead of crediting these amounts in the treasury, he credited 0. 25 P. and 0. only, misappropriating the balance, viz. Rs. 499. 66 P. Held that the two particular amounts were paid into the hands of the appellant not only as being due to the Government but the evidence shows that they were in fact due to the Government. The amount, therefore, belonged to the Government and the appellant would be guilty of breach of trust, if he misappropriated that amount (Shariful Islam v. State of Uttar Pradesh, AIR 1973 SC 1973 SC 82 (83, 84).

Where the accused Government servant misappropriated and converted to his own use a T. V. and some furniture belonging to the Government and those articles were recovered from his possession, he was held guilty of an offence under this section (1979 P. Cr. LJ 526). Where the accused, a public servant collected tax and fine as public servant from a land holder and misappropriated it, he was guilty of an offence under this section even if the government is not entitled to enforce payment (S. K. Roy v. State AIR 1974 SC 794 = 1974 Cr LJ 678).

Even if the misappropriated property is not found or traced, but the fact of misappropriation is other wise satisfactorily established, the accused would still be liable for breach of trust if he had been entrusted with or had dominion over that property (PLD 1965 Kar 155=17 DLR (WP) 90(DB).

Where the accused Food Department officials failed to account for shortage of wheat in their custody responsibility of shortfall rested on the accused persons. Their conviction was upheld (1984 PCrLJ 2382).

Money paid as Government dues.- Where government dues are paid to a persn authorized to receive it, and he does not deposit the oney in the treasury as prescribed by the Rules, he is guilty of an offence under section 409 (AIR 1939 Lah 340 (DB).

Where a Naib-Tehsildar recovered Tacavi money from a Zamindar and did not deposit it in the treasury, he was held guilty of an offence under S. 409, Penal Code, (PLD 1951 Bal. 36).

Deposit in Post office Saving Bank.-Where accused sub-Post Master admitted entry of amount in his own handwriting in Pass Book of witness who deposited that amount in her account. Amount deposited as such was not shown by accused in the

Saving Bank Journal or sub-Office Slip and was misappropriated. Prosecution was held to have proved its case against the accused (1983 P. Cr. LJ. 1910).

Admission of civil liability by accused.-For conviction under S. 409 entrustment and dishonest misapropriation must be proved. Where that was not proved but the accused when charged with having misappropriated a sum of money impliedly admitted his liability to pay by aking for time in which to make good the deficit, which time was extended on several occasions at his request, but he failed eventually to make up the loss and the case was reported to the police. It was held that much more is required than a mere acceptance of civil liability to make good an apparent loss of money, for holding that loss is the result of breach of trust by the person making the admission, in the sense of section 409, Penal Code (PLD 1952 Lah. 648).

Temporary misappropriation.-Conviction based on admission of temporary retention of money. Even if it was under misconception was unexceptionable (NIR 1986 SCJ 218). For a conviction for tempoporary missapropriation what is most essential to be proved is not only the retention of money over the period but also the criminal intention behind it. Unless, such *mens rea* is established, the offence would not be taken to have been committed (Rabindra Kumar Mahalick v. State of Orissa, 1989 Cr. L. J. 2020 (2022) (Orissa); relied on Achutananda Dassh v. State of Orissa, 1978 (45) Cut. L. T. 5110; 18 DLR (SC) 512).

Where money standing to the credit of the Union Council was not produced by the Chairman when demanded. The money was not kept in the bank account of the Union Council in spite of instructins. Temporary criminal misappropriation of the money was proved (1971 SCMR 57).

Where accused was entrusted with some money for deposit in Bank. But the amount not deposted in Bank in due time. It was deposited after registration of case. Defence version was not satisfactorily proved to rebut prosecution case. Trial Court was held to have rightly convicted accused (1986 P. Cr. LJ. 2369 = NLR 1986 Cr. LJ. 2550). But where accused did not pay salaries to prosecution witnesses in time but paid the same before registration. Accused was acquitted (1985 P. Cr. LJ 914; 1985 P. Cr. LJ 2089).

Mere retention of entrusted amount for some time does not amount to criminal misappropriation. Therefore where accused a booking clerk was found to have not deposited sale proceeds of tickets. But there was no evidence of criminal misappropriation or conversion to his own use. There was nothing on record to show any direction of law prescribing mode for depositing sale proceeds. Since accused had already paid alleged shortage, criminal breach of trust, could not be said to have been committed by him (1986 P. Cr. LJ. 1621).

Manner of misappropriation and conversion.-After the prosecution discharges the burden of proving entrustment, it is not necessary for it to prove in what manner the money alleged to have been misappropriated was spent by the accused. If it is shown that money entrusted to the accused for a particular purpose was not returned by him in accordance with his duty, it lies on him to prove his defence. It may well be that the retention may be for a short preiod and this would be consistent with his innocence. But it cannot be said that the retention can under no cricumstances amount to dishonest misappropiration unless prosecution proves active dishonest conversion. The question is one of fact in each case and unexplained retention of money for a long time might well be sufficient to raise an inference of guilt (1983 P. Cr. LJ. 122 (DB); PLD 1951 Bal. 36; AIR 1955 Sau. 100 (DB).

Negligence.- Negligence negatives *mens rea* on part of accused. Disappearance of judicial files in the custody of Ehlmad of Court though his negligence does not

constitute dishonest misappropriation within the meaning of S. 405 (NLR 1987 Cr. 90 = PLJ 1968 Cr. 567). Mere irregularity in purchasing articles by a public servant will not attract the breach of trust. To bring some charge under section 409, Penal Code the prosecution must prove not only entrustment of or dominion over property but also that the accused, either dishonestly misappropriated, converted used or disposed of that property himself or that he wilfully suffered some other person to do so (Alauddin and others Vs. The State, 4 BLD 75).

Allegation regarding entrustment of colour T.V to accused had no doubt been proved, but no evidence was available on record to prove that accused either himself had misappropriated the same or had allowed someone else to take it away. Case might be of negligence but that would not be enough to convict accused for a criminal offence. Cirmustances of cases also showed that accused could not possibly keep an eye on the article lying in a wagon from his guard van. Extending benefit of doubt accused was acquitted in circumstances (ALLah Rakha v. State 1990 P. Cr. LJ 834).

In criminal cases, there must be *mens rea* or guilty mind, mere carelessaness is not enough, secondly, the principle of avoidence of liability when there is contributory negligence may be a good defence to civil action (AIR 1970 Puj 1370 Punj 137 (141, 151).

Offence by servant of accused. *Mens rea* is the essence of the offence or criminal breach of trust. The mere fact that the 2nd accused was employed by the 1st accused, a Government licensee for purchasing paddy and issuing receipt cannot make the first accused vicarioulsy liable for the offence of criminal breach of trust and forgery committed by the 2nd accused in the course of his employment. The first accused may by answerable to the Government for the misappropriation of paddy committed by the 2nd accused, but that does not mean that he will be criminally liable for the offences committed by his employee. According to the definition of the offence of criminal breach of truse, the first accused will be a criminally liable for the offence of the second accused only if it is proved that he wiflully suffered the second accused to commit the offence. So long as there is nothing to show that the accused wiffully anowed the second accused to commit the offence of dishonestly misappropriating paddy, it cannot be said that the first accused has committed the offence of criminal breach of trust (AIR 1952 Trav-Co. 158 = ILR 1931 Trav-Co. 605).

Public servant ceazing to hold office.- Where a public servant commited an offence under this section when he was in office, his prosecution under this section coupled with prosecution under S. 5 (2), Prevention of Corruption, Act, 1947 was competent even after his removal from public service (1971 P. Cr. LJ. 959; Hussoin Mohammed Ershad v. State. 45 DLR (AD) 48).

9. Company.-Where it was argued that a company could not be guilty of criminal breach of trust. It was held that a company can only act through its directors and officers, therefore, an allegation of a criminal offence against a company can only mean that the company's directors and/or officers have committed the alleged offence and in order to decide, who has committed that offence, the Court has always to piecree the veil of incorporation and to decide who he has not been referred to by name in the complaint (1981 SCMR 573 = PLJ 1981 SC 227).

10. Misappropriation by agent.- The term 'agent' in section 409 is not restricted only to those persons who carry on the profession of agents. What section 409 requires is that the person alleged to have comitted criminal breach of trust with respect to any property be entrusted with that property or with dominion over

that property in the way of his business as an agent. The expression "in the way of his business" means, that the property is entrusted to him in the ordinary course of his duty or habitual ocupation or profession or trade. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he isentrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of section 409 if any breach of trust is commmitted by that person. Entrustment of property in the capacity of agent will not, by itself, be sufficient to make criminal breach of trust by the agent a graver offence than any of the offence mentioned in Ss. 409 to 408. Criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent (AIR 1962 S. C. 182 (2) Cr. L. 805).

The question whether the accused is a servant or agent of a firm must be decided with reference to the nature of his work. Where the substance of the charge against the accused was that as the promotor of a society he lawfully received amounts paid by some persons but after its incorporation he failed to hand over the amunts to the treasurer and to include their names as shareholders in the minute books. It was held that having regard to the nature of the duties of the accused, as the Secretary of the Society his status was that of an agent and not servant, he should be charged under section 409 and not under S. 408 (AIR 1956 SC 149 = 1956 Cr. L. Jour 322).

11. Misappropriation by banker.- The word "Banker" includes a Cashier (8 Cr. L. J. 492). The word "Banker" in Section 409 of the Penal Code has not been used in the technical sense of the Banking Companies Act but signifies any persons who discharges any of the functions of the customary business of banking and the word also inludes a firm or company of banking and the word also includes a firm or company that carries on such business (1993 BLD 287).

The word 'banker' has not been used in section 409 in the technical sense of the Banking Companies act, but signifies any person who discharges any of the functions of the customary business of banking and would therefore include a firm (AIR 1960 All 103). But person working in a bank are not bankers. Therefore, section 409 has no application in respect of an alleged criminal breach of trust b such persons (AIR 1950 Cal 57 = 16 Cr LJ 473)

Section 409 presupposes entrustment. When a person opens a current account in a bank, there is no question of entrustment. Hence there can be no case against a bank or its officers for committing an offence under section 409 in respect of the money deposited by the customer (AIR 1950 Cal 57). But where the manager of a bank being entrusted with the property of the bank dishonestly uses and disposes of some of the property contrary to the articles of association fo the bank causing the share holders to declare a dividend larger than the profits warraned, he is guilty of an offence under section 409 of the Penal Code (AIR 1915 Lah 471).

Where bank officer unauthorisedly paid from government account bills which were not mentioned in original Drawing schedule sent to the bank by District Accounts Officer. It was held that such poayments were unauthorised and fictitious. Accused having dominion over the bank amount, made fictitious payments and thereby misappropriated bank money and committed criminal breach of trust (1986 PCrLJ 2078).

Where loan was advanced to a fictitious person on the guarantee of one of the biggest landlords of the Province, it cannot be said that there was acriminal breach of trust by the Manager merely because the sanction of the Controlling Officer was not obtained for granting the loan (1976 PCrLJ 235). But where a loan was advanced by a Bank Manager without any guarantee and without the sanction of the Controlling Officer, an offence under section 409 was committed even when the loan was repaid later on (1976 PCrLJ 235).

Bank guarantee, unauthorised issue of.-Where a Bank Manager issued a Bank Guarantee dishonestly when he was not authorised to do so. The Bnak made payment to beneficiary of the Bank gurrantee. Payment by Bank against Bank guarantee would not amount to ratification of act of accused and would not wash off his criminal liablility, because, only civil liability created by act of agent could be ratified and not his criminal liability (1987 P. Cr. LJ. 1096 = NLR 1987 Cr. LJ. 153). Similarly issue of Bank guarantee by Bank Manager without securing hundred per cent margin amount does not constitute an offence under section 409 unless it is proved that Bank Manager knew that amount of Bank guarantee was to be misappropriated (NLR 1988 Cr. 217 (DB).

Eid advance, uauthorised drawing of.-Where a Bank Manager drew Eid Advance of a small sum of Rs. 800 under impression of such privilege being available to him. The amount was also liable to be returned by him through deductions from his future monthly salaries. It was held that the acused being actuated by no criminal intention to proceure wrongful gain to himself and cause wrongful loos to the bank the mere fact of his having taken the said sum from cash of bank by way of Eid Advance by itself did not bring his act within the mischief of S. 409 of penal Code (PLJ 1987 Cr. C. 200).

Violation of statutory provisions of law.- No person may be convicted of offence of criminal breach of trust unless violation of direction of any statutory provisions of law be made by him. Any instruction prohibiting Bank Manager from drawing any money from bank as Eid Advance had no force of law violation of the same may be dealt with in departmental proceedings only as it does not incur penalty under S. 409 Penal Code (PLJ 1987 Cr. C. 200).

12. Sanction for prosection.-Where a public servantis sought to be tried for criminal breach of trust, it is necessary that sanction for his trial should be obtained. Where trial is held without obtaining sanction from a competent authority, it is illegal and conviction and sentence imposed must be set aside (1988 P. Cr. LJ. 1681). Sanction to prosecute is an important matter. It constitutes a condition precedent to the institution of the prosecution and the Government has an absolute discretion to grant or with hold their sanction. The prosecution are merely to see that the evidence discloses a *primafacie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them (1992 BLD 400).

In Case of an elected chairman of a Union Council appropriate department of the Government is the sanctioning authority. A sanction given by the Controlling authority is not valid and his coviction in pursuance of such sanction is invalid (1968 P. Cr. LJ. 332).

The offence of criminal breach of trust not being an offence under the Co-operative Societies Act, previous sanction of the Registrar was not necessary (The State Vs. Abdur Rashid Meah, 22 DLR 373).

Even when the charge is one of misappropriation by a public servant, whether sanction is required under Sec. 197 (1), will depend upon the facts of each case. If

the acts complained of are so intergally connected with the duties attaching to the office as to be inseparable from them, then sanction under Sec. 197 (1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required (Amrik Singh v. State of Pepsu, AIR 1955 SC 309 (312) = (155) 1 S. C. R. 1302; Chimanbhai Kashibhai Patel v. Jashbhai Motibhai Desai, AIR 1961 Guj. 57; Matagoj Doby v. HC Bhari, AIR 1956 SC 44; (1955) 2 S. C. R. 925; Vishnu Tatyaha Naik v. Emperor, AIR 1941 Bom. 85; 42 Bom. L. R. 1193: 42 Cr. L. J. 441: Satwantsing v. State of Punjab, AIR 1960 S. C. 266).

See also appropriate note under section 161.

13. Evidence and proof.- To establish a charge of criminal breach of trust distinct proof of criminal misappropriation is necessary. Entrustment or dominion over property implies handing over the property (1989) 39 DLR 414). In a case of criminal breach of trust the prosecution must prove that the accused received the amount which was paid to him actually and the accused misapropriated that. In absence of such proof conviction is bad in law (1973) 25 DLR 131). In order to prove an offence under section 409, Penal Code, the three ingredients of the section one is to prove i.e. entrustment or dominion over the property (b) the accused dishonestly misappropriated it and (c) the mode or direction of discharging the trust also is to be violated (Shamsul Haque Vs. State (1987) 39 DLR 393; (1959) 11 DLR 222; Sushil Gupta Vs. Joy Shanker (1970) 2 SCJ 461; 1979 CrLJ 885).

In order to convict an accused under Section 409 of the Penal Code, it is essential that three ingredients of the said section must be proved before convicting an accused. Firstly, the entrustment in question or dominion over the property must be proved by the prosecution, secondly, the person having dominion over or entrustment over the property must dishonestly misappropriate the same for his personal gain or for the gain of somebody else. Thirdly, the direction, rule or Regulation prescribing the mode in which such trust should be discharged need aslo to be violated. Here in the instant case, although the prosecution has proved the first ingredient, namely, entrustment, the second and third ingredients have not been proved or established at all. That the accused dishonestly misappropriated the money for his own gain or for the gain of somebody else has not been proved at all. Thirdly, theprosecution also totally failed in proving that the postal peon in instant case has violated the provision of Postal Manual in any manner. In the absence of fulfilment of the three ingredients of section 409 of Penal Code, the order of conviction and sentence as passed by the learned Special Judge appears to be not sustainable in law. The ingredients of Section 467 Penal Code or for that matter that of Section 5 (2) of Act 11/1947 have not been proved in any manner (Shamsul Haque Vs. The State (1987) 39 DLR 393 (para 7). In an offence under section 409, Penal Code, prosecution must prove two things (1) that the accused has been entrusted with property or with dominion over said property and (2) that he had dishonestly misappropriated or converted to his own use in violation of any direction of law (State Vs. Marcel Carvelho 1988 (2) Crimes 820 (Bom).

In the case of criminal breach of trust, once it is shown that money was entrusted to the accused or was received by him for a particular purpose was not used for that purpose and the same was not returned by him in accordance with his duty or if he failed to account for it he will be presumed to have misappropriated the same. In every case, the prosecution is not under obligation to prove the manner of misapropriation or convertion to his own use by the accused the property entrusted

to him, when the accused does not discharge the trust in consequence of which he comes to have dominion over the property, then the misappropriation can legitimately be referred against him (1984 Cr LJ (NOC) 153 (P & H).

Where in a case the Investingating officer was not examined, and neither the khird register was produced at the trial nor any extract from the khird was produced and the accused contended that he has paid or remitted the amount it was held that acquittal was justified as it was not sufficient merely to prove the entrustment of the amount, but the prosecution must also prove by reliable and acceptable evidence that the amounts so entrusted which ought to have been remitted or paid into the accounts of the Government have not been so paid or credited (State of Karantaka v. H. Somashekhariah, (1985) (1) Crimes 811 (812) (knt.) = 1985 M. L. J. (Cr). 6= (1985) 1 Knt. L. J. 135 (Knt.).

To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion, which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted if proved may, in the light of other circumstances justfiably lead to an inference of dishonest misappropriation or conversion. Covnviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property enturested to him or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made (1960 Cr LJ 1250 = AIR 1960 SC 889; 1959 Cr LJ 1508 = AIR 1959 SC 1390; (1975) 41 CLT 130; 1976 Raj Cr C 250).

Case against accused was regarding shortage of goods but papers relating to handing and taking over charge were not brought on record casting serious doubt on prosecution case. Prosecution was bound to prove that stock in custody of acused not only suffered from shortage but that the same was misappropriated personally and physically by accused alone. Evidence on record indicated that except shortage of goods nothing else was proved against accused. Prosecution, held, had failed to establish its case against accused beyond any shadow of doubt. Order of Trial Court was not arbitrary. Appeal against acquittal was dismissed (State v. Attaullah 1990 P. Cr. LJ 163).

Where a person is charged under Section 409 and it is seen he is in possession of property or income which he could not have acquired legitimately the Court is entitled to presume that the moneys could have been dishonestly acquired (AIR 1957 SC 458 = 1957 Cr LJ 575).

The prosecution examined some witnesses who deposed that although they had signed the receipts, they did not receive any payment from the appellant. The prosecution did not produce the criginal complaints made by them. These witnesses kept quite and slept over the matter for over seven years. It was held that it cannot be held that the prosecution has proved the charges against the appellant beyond reasonable doubt (om Prakash v. State of Haryana, 1979 Cr L. R. 694 (695) (S. C.).

If it is proved that the appellants have committed irregularity in purchasing the batteries in that case they may be prosecuted in accordance with proper law. The learned Advocate for appellants referred to a decision reported 9 DLR page-14. In the case of Shakir Hussain Vs. the State their Lordships of the supreme Court of Pakistan held" Where the charge against an accused person is that of criminal beach

of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly misappropiated, converted, used or disposed of that property himself or that he wilfully suffered some other person to do so" In the present case it appears that the prosecution failed to prove that the appellants dishonestly misappropriated or converted or used or disposed of the government money for their own use and thereby they wilully suffered loss to the goverment (Alauddin Vs. The State 1984 BLD 75 (para-7).

Where the accused was charged for inflating contingency bills, presenting the same to treasury, and getting them passed for payments. The Court found that there were material discrepancies in the evidence of witnesses and no reliable evidence was produced as to the appellant having prepared the inflated bills in question even though bills were presented by him to the Treasury Officer for Sanction. He could not be convicted in the absence of proof of payment under such bills having in fact been received by the appellant (1981 SCMR 152 = PLJ 1981 SC 320).

Where the accused, a public servant was entrusted with funds for purchased the articles the allegation against the accused that he had secured the bills reqgarding the purchase of the articles but the supporting vocuhers were not produced is not a sufficient ground for proving criminal misappropriation of amounts because the payments could be made without vouchers or the vouchers could be misplaced 1983 Cr LJ 1896 (HP).

Where the saving bank clerk stated that he paid the amount alleged to have been misappropriated to the S. P. M. by hand to hand receipt book. Such book was not produced by the prosecution. The accused was acquitted for want of proof (PLD 1977 Lah. 1195 = PLJ 1977 Lah 5540.

Where prosecution failed to pinpoint any particular amount which accused had received but had not deposited, and as such failed to prove guilt of accused beyond any shadow of doubt. Accused was acquitted (1984 P. Cr. LJ 605); Muslim talukder v. State (1990) 42 DLR (Ad) 103).

Where statement of prosecution witness was not straightforward and threw doubt on alleged missing of Government property. Chances of theft and/or loss in transit were not ruled out. Accused was given benefit of doubt and acquitted (1984 P. Cr. LJ. 366).

Where accused, a bank employee was charged for misappropriating amount entrusted to him by customer for return of pledged ornaments. It was found that the accused was holding only one key of double lock of safe wherein ornaments were kept and other key was with officer Incharge of bank on relevant day when ornaments were taken out and returned. There was entry in ledger in the hand of accused but it was not sufficient evidence that he alone returned ornaments to customer. Explanation of accused that he had made entry in ledger under order of his officer appeared plausible, It was held that evidence had not proved case conclusively against the accused (1987 P. Cr. LJ. 1874 (DB).

The accused charged wtih an offence of criminal beach of trust gave an explanation which was found to be entirely false and it appeared that the keys of the record room were in a stranger's possession with the connivance and complicity of the accused for the purpose for which they were used, that is to say, for giving access corruptly to records. It was held that the fact that the accused himself did not misappropriate or use or dispose of any record in violation of his trust was immaterial and the second part of the definition of Section 405, brought home the offence to the accused (AIR 1936 pat 108; 37 Cr Lj 219).

Where it was alleged that school fans were used by accused Headmaster in his house and shop. Such fans were not produced in Court. Recovery witnesses were declared hostile. Accused claimed fans to be his own. Fans did not bear any special mark of Municipal Corporation or Primary School. They were of usual shape and were easily available in the market. Benefit of the doubt was given to the accused (1984 P. Cr. LJ. 445).

Where the accused, President of a Union Board was charged for misappropriating amounts deposited with him by Tax Collectors, the accused being illiterate, all office work was performed by his Clerk, fell ill and offered to hand over collection books and some money to the accused's successor-in-office, but the latter refused to accept the same. Receipt of money by accused was not proved beyoud reasonable doubt and the accused was acquitted (1970 SCMR 709).

When the accused was charged with misappropriation of money by purchasing less blankets than shown in record. It was held that the recovery of less blankets from the accused does not prove misappropriation of money (1971 SCMR 4).

Proof as to the precise manner in which the accused had dealt with the money is not necessary. The question is one of intention and the fact of his giving a false account of what he has done with the money is a strong circumstance against the accused. The prosecution need only prove entrustment of goods for a specific purpose and the accused's failure to account for them which he is bound to do (Brahmananda v. State (1967) Cri LJ 1168 = (1967) AIR (Orissa) 135).

The circumstance that there was shortage on verification of the stock is relied only as a corroborative piece of evidence (Lal Bahadur Shriramdatta Chaudhari v. State of Maharashtra, AIR 1991 SC 34).

Confession does not necessarily imply defalcation or misappropriation. Discrepancy due to non-reconciliation of accounts and accounting errors may not always lead to the conclusion of misappropriation (State v. Bhagaban Das 1983 Cri LJ (NOC) 183 (Gau). Temporary retention of money by itself is not sufficient to hold person guilty (1968 Raj ILJ 601).

Prosecution must prove not only that there has been some sort of misappropriation but also that specific item of property has been misappropriated resulting in loss of such property (1971 Cut LT 1130 1972 UJ (SC) 23 = (1972) 2 SCJ 280 = AIR 1972 SC 312 = 1972 SCC (Cr) 700 = 1970 UJ (SC) 545; 1970 Cut LT 39).

Wher the accused at the relevant time was performing the duties of an accuntant and charges were levelled against him that many T. A. bills remained unpaid although receipts had been taken and the Assiatant Registrar was the disturbing officer against whom on charge were, it was held that the prosecution case was not proved byond doubt (AIR 1980 SC 476 = 1980 Cr LJ 311 = 1979 UJ (SC) 914).

In the case of charge under Section 409 and 477-A against Cashier of a Bank. The evidence of an expert or that a person conversant with the handwriting is ordinarily desirable and acted upon in proving the entries in accounts. It is also desirable to get entries in accounts proved by the person who wrote the account. But the above are not the only ways making out a case of misappropriation. It can be made out be circumstantial evidence as well. In the instant case, letter card was admitted by the accused as written in his handwriting. There was clinching circumstantial evidence to show that no amount was withdrawn by the person whose account was and which was sufficient to show that withdrawal slips contained forged signature of that person (1982 Cr LJ 780 (Ker).

Irregular or erroneous accounting may not always lead to the considerations of misapropriation (1983) Cr LJ (NOC) (Goa). Where the accused was charged with breach of trust and falsification of accounts but the document alleged to have been falsified was foud to be missing from the office record, it was held that in the absence of the document it would be impossible to hold that the accused comited criminal breach of trust and the charge of falsification of accounts also failed (Rasul Mohammed Hanif Gulandaj (1972) Cri LJ 313 (SC).

Where in prosecution for offence of criminal breach of trust, there is absence of legal and independent evidence with regard to the entrustment of the different sums with the accused, a question with regard to that entrustment put to him would be improper and an answer to a a question improperly put partially admitting entrustment does not establish any case of entrustment. If the finding as to entrustment is unreasonable and perverse then conviction on such concurrent finding is unsustainable (Md Ishaque v. State 1982 Cri LJ (NOC) 183 (Ori).

To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The prinicipal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Coviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when, a duty to account is imposed upon him, but where he is unable to account or renders and explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made (Jaikrishandas Manohardas Desai v. State of Bombay, AIR 1960 SC 889 (891): 1960 NLJ 750: 62 Bom. LR 893: 1960 Cr LJ 1250: 2 Ker. L. R. 297; Banamber Maharana v. State, 32 Cut. L. T. 31 (34). Simidari Nanda v. State, 1967 Cut. L. T. 201 (205). See. also Vishwa Nath v. State of J and K, 1983 Cr. L. R. (S. C.) 136 (137).

As direct evidence o dishonest conversion to the accused's own use of the money entrusted to him can seldom be found, such dishonest intention and conversion have to be inferred from the proved facts and circumstances of each case (NLR 1988 AC 145 (DB).

If the fact of misappropriation was otherwise satisfactorily established, accused could be held guilty of criminal breach of trust, even though misappropriated property was not found or traced (1987 P. Cr. LJ. 2290 (DB).

In the absence of evidence to show that the cashier had parted with the keys of the outher door of the safe at the relevant time, he is under a duty to account for the contents of the safe including the cash. This duty not being discharged, he is either a party to the extraction of the cash from the safe and the charge under Sec. 409 is therefore duly brought home to him (Surendra Prasad verma v. State of Bihar, AIR 1973 S. C. 483 (490).

Where the accused Station Master, released consingnments of goods to consignments concerned against freight receipts but omitted to make necessary entries in the relevant Retisters. Series of such omissions lead Trial Court to believe that it was an intentional omission on the part of appellant so as not to disclose, independent of freight receipts issued to consignees, the arrival and disposal of goods received at the railway station with a view not to account for the money thus

received. Conviction of appellant under S. 409, Penal Code read with S. 5 (2), Prevention of Corruption Act, 1947 was upheld (1987 SCMR 894).

It must however be noted that conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders and explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily by made (AIR 1950 S. C. 889 = 1960 S. C. R. 319 = 1960 Cr. L. Jour 1250).

14. Burden of proof.- The onus is on the prosecution to prove beyond reasonable doubt that money was entrusted to the a accused in his capacity as a public servant and the accused dishonestly misappropriated the same in violation of the express or implied contract which he had made, touching the discharge of such trust (1974) 41 CLT 1300).

This case belonged to that exceptional class of cases in which, in the words of thier Lordships of Supreme Court in AIR 1966 SC 404 = 1956 SCR 199 = 1956 Cr LJ 794. "It would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especitally' withing the knowledge of the accused and which he could prove without difficulty or inconvenience." it is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him; if these facts are within the knowledge of the accused then he has to prove them; of course the prosecution has to establish a *prima facie* case in the first instance; it is enough to establish facts which give rise to a suspicion and then by reason of section 106 of the Evidence Act to throw the onus on him to prove his innocence. This indeed is the legal position as laid down by their Lardships of the Supreme Court in a decision in AIR 1959 SC 1390 which was a decision on Section (5) (1) (c) of the Prevention of Corruption Act of 1947, a provision which in pari material, is the same as Section 409, Penal Code (1962) 1 Cr LJ 658).

The Federal Court in the case of Shakir Hossain v. the State, (1957) 9 DLR (E. C.) 14, observed as follows:-

"Subject to certain exceptions, the most important of which is to be found in section 105, Evidence Act, the admitted and otherwise firmly established principle being that, before the prosecution case asks for a conviction of a criminal offence, it is its duty to prove each ingredient of the offence byond a reasonable doubt, it is obvious that where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused either dishonestly misappropriated, converted, used or disposed of that property himself or that he was wilfully suffered some other person to do so." (Followed in Afsar Ali v. State (1973) 25 DLR 131).

It is not the duty of the prosecution to prove by evidence that the money received by the accused was actually converted to his own use; it is sufficient if the party aggrieved was deprived of the use of the money for an unexplained period, it being presumed in such a case that the accused had applied the money to his personal needs (The State, Vs. Abu Raza, 18 DLR 512 (SC).

The onus is on the prosecution to establish beyond reasonable doubt that noney was entrusted to the accused in his capacity as a public servant and that the accused dishonestly misappropriated the money in violation of the express or implied contract which he had made touching the discharge of such trust (Kalluvedan E v. State of orissa, (1976) 41 Cut. L. T. 130 (134).

In Criminal breach of trust where receipt of money by accused is proved, the onus is on him to show that he has not converted it for his own use (AIR 1927 P. C. 409). Where a property is entrusted to a servant, it is the duty of severant to give a true account of what he does with it and if he cannot give account, reasonable inference is that he misappropriated it (26 Cr LJ 267; AIR 1950 Raj 37).

Section 409 can be invoked only if it can be shown that the accused being in any manner entrusted with property or with dominion over property in his capacity as public servant committed criminal breach of trust in respect of that property. The offence of criminal breach is defined in 405 and an essential ingredient of this offence is that the accused being in any manner entrusted with property or with dominion over property dishonestly misapproprites or converts to his own use that property or dishonestly uses or dispose of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract express or implied, which he has made touching the discharge of such trust. The appellant was admittedly entrusted with the receipt-book or in any event with dominion over it, but there is no evidence to establish that he dishonestly misappropriated the receipt book or converted it to his own use or dishonestly used or disposed of the receipt-book. it is quite possible that the appellant might have lost or mislaid the receipt book and hence he might have been unable to return it to the suprior authorities. What the section requires is something much more than mere failure or omission, to return the receipt book. The prosecution has to go further and show that the appellant dishonestly misappropriated or converted the receipt book to his own use or dishonestly used or disposed of it (Sardar Singh v. State of Haryana 1977 Cr l. J. 1158 (1159; 1160) (SC).

In a case where entrustment is proved or admitted, it would be for an accused person to account for the money entrusted with him and the prosecution may not be in a position to show as to how exactly the money has been misappropriated or converted by an accused, person to his own use, but the evidence and the circumstances must lead one to a reasonable conclusion that an accused person in order to cause wrongful gain to himself or wrongful loss to another, has committed misappropriation, Since the appellant being a public servant received the amounts but did not account for the same though he was bound to do so, it cannot but be said that he was guilty of misappropriation (1985 Cr LJ 563 (567) Ori).

Where entrustmet to the accused is proved and shortage is not denied, if the accused fails to give any satisfactory account for the shortage, the presumption naturally will be that the accused has dishonestly converted, used, or disposed of that property. Where the accused has given an explanation, if the explanation given by him is vague, unreasonable and not supported by any evidence or circumstances, then the law will make a presu;ption of guilt against the accused. But if the explanation is reasonable and if there is no circumstance or evidence of dishonest conversion or disposal, the accused cannot be held liable for misappropriation (1970 P. Cr. L. J. 612 = 22 DLR 339 = 1970 DLC 292).

If knowledge of certain facts is as much available to the prosecution on exercise of due diligence as to the accused. Section 106, Evidence Act would not absolve the prosecution from the duty of proving that a crime was committed even though it is established that the accused chooses to give is not proved beyond doubt, he cannot claim to be innocent; if his explanation throws any reasonable doubt of the prosecution story, he would be entitled to acquittal not because he proves the facts and circumstances referred tom, but because the prosecution has failed to establish his guilt beyond reasonable doubt (AIR 1964 Orisa 46 (DB); AIR 1936 P.C. 289; (1915) 48 LJKB 36).

Where the accused stated in his defence that the had handed over to his superior money entursted to him and produced in support of his plea receipts bearing genuine signatures of his superiors. Mere remissness in duty, if any, on the part of the accused would not make him an accomplice, and he should be acquitted (1968 P. Cr. L. J. 1533 = 1968 SCMR 963).

15. Defence plea, proof of.-It is for the defence to prove the plea raised by it. Where entrustment was admitted but no evidence was produced in support of the plea that money was spent on contigency expenses, the conviction was uphled (1975 SCMR 162). Where explanation offered by accused in his examination under S. 342, Cr. P. C. was not only absurd but contradictory. He was convicted (1987 P. Cr. L. J. 2290 (DB).

Where the accused Post Master stated under S. 342, Cr. P. C. that some amount belonging to Post office was in his possession out of which he duly deposited Rs. 50, 000 with Post Office whereas blance of such amount was left behind at village Post office for distributing money orders but before he could do so his village was occupied by Enemy Forces and as a such not only Government money but his personal money as well as other belongings and documents were lost on account of such ocupation. Explanation given by accused having been corroborated by deposit of Rs. 5,000 in Post Office, the defence plea was accepted as plausible (1983 P. Cr. LJ 1211).

The provision of law under section 94 Penal Code provides that a person is excused of the consequences of an act except murder and offenes against the state punishable with death done under fear of instant death. Even if such order or instruction could be established that was not sufficient in the absence of threat of instant death to exonerate the appellant from the charge brought against him under section 409 Penal Code (45 DLR 243=1993 BLD 296).

Where there was shortage of goods un Utility Store. Record produced showed that weight which was written on bags was weight at time of packing and by passage of time when moisture dried up wight became less. It was held, where accused was able to show that there was no shortage or was able to give satisfactory explanation for the shortage, he could not be held guilty of offence under section, 409, Penal Code (1988 P. Cr. L. J. 852).

16. Punishment.- Awarding of sentence of fine along with sentence of imprisonment for life can not be said to be illegal in view of the provision of section 409 Penal Code (1993 BLD 296 (305). Where the accused deposited misappropriated amounts during pendency of appeal, it was held that it would meet the ends of justice if the sentence of imprisonment is reduced to the period already undergone by him (AIR 1974 SC 2336=1974 SCC (Cri) 632=(1974) 4 SCC 596).

In the case of State Vs. Abdul Muttaleb Khan (1994 BLD (AD) 12) while setting aside the order of acquittal passed by the High Court Division, the Appellate Division took a lenient view in the matter of sentence and reduced it to the period already undergone on the ground that the respondent faced two trials and he had to take two appeals until he was acquitted by the impugned judgment.

Where the accused was likely to loose his service and he had already undergone imprisonement of 6 1/2 months, in the ends of jusice the substantive sentence was reduced for the period already undergone. (AIR 1979 SC 825). Where the accused a new and inexperienced hand was made a scapegoat and he had already gone five months in jail, sentence of three years was reduced to the period already served but fine was mainained (AIR 1979 SC 1120).

It is no doubt true that it was his sacred duty as Cash Oficer-in-charge of the Bank to protect hard earned money of customers deposited with the Bank and ultimately entrusted to his custody. For violation of such a sacred trust, undoubtedly a server sentence is called for in public interest. But we are also not obivious of the fact that justice should be tempered with mercy. In a modern society purpose of imposing sentence on a person found guilty of an offence is not only deterrent but also reformative. A long period of sentence such as imprisonment for life debases a person. When law does not provide for imposition of minimum sentence of imprisonment and discretion is left with the Court, it is for the Court to decide the quantum of sentence of impresonment in consideration of the facts and circumstances of the case and interest of justice. In our view, an educated young man like the appellant should be allowed to purge his guilt and be rehabilitated in society as a useful citizen by reducing his sentence of imprisonment for life and ends of justice will be met if the appellant is sentenced to suffer simple imprisonment for 6 (six) years apart from the sentence of fine (1993 BLD 296 (305) = (1993) 45 DLR 243).

Punishment must be commensurate with the gravity of offence. Public servant being custodian of and having dominion over public property, should not, with impunity, commit misappropriation of public property. Such acts of delinquency should be dealt witha heavy hand (1987 SCMR 1943=PLD 1986 SC 548). When in case of misappropriation by a bank employee *modus operandi* of accused was found to be most dangerous for banks and likely to have most serious consequences for them if accused was allowed to go with a short sentence. The situation called for deterrent sentence of two years R.I. and a fine of Rs. 5,000 without benefit of section 382-B Criminal Procedure Code (NLR 1987 CrLJ 371).

The accused must be given the benefit of any extenuating circumstance in his favour. Where the amount involved is very little and the trial has lingered on for six years, a sentence of 5 years R. I. may be reduced to one year R.I. (1959 Kar LR 847). Where there was an embezzlement of rupees ten and the accused process server was thrown out of his job. The sentence was reduced to the imprisonment already undergone (1973 PCrLJ 366). Where the amount misappropriated was Rs. 194 only and besides losing service accused remaining in jail for more than 1-1/2 months after conviction. Sentence of one year's R.I. was altered to fine of Rs. 500 (1984 PCrLJ 3095).

An offence under Sec. 409 Penal Code, is punishable up to imprisonment for life or imprisonment up to 10 years. The measure of the sentence is usually governed by the nature of the offences committed and the circumstances of their commission and it cannot be held as a hard and fast rule that a sentence is not to exceed a certain priod of imprisonment when the law has itself laid down the extent up to which a sentence can be inflicted for a certain offence and has left discretion to the Court to adjust the sentence according to the circumstances of each case (Ranchod Lal v. State of Madhava Pradesh, AIR 1965 SC 1248 (1251).

In the undemoted case in view of the fact that the amount of Rs. 18, 000/-said to have been defalcated has been restored to the Kerala State Financial Corporation and the accused has remained in jail after he surrendered till he was released on bail, it was held that this is a matter where the sentence deserves to be reduced (Diannatius v. State of Kerala, 1988 Cr. L. R. 100 (SC).

Public worker who misuse their official position and misappropriate large sum of public money should be dealt with severely (Asutosh Roy v. State, AIR 1959 Orissa 159 (165); 1959 Cr LJ 1197; 25 Cut. L. T. 269; see also Venkata Rao, 17 Mys. L. J. 496).

Where the appellant was acquitted of the charge under Secs. 409 and 477-A, Penal Code, but the Hig Court sentenced him on each count to four months, rigorous imprisonment, and in an appeal by the appellant in the Supreme Court it was found that the appellant had after his acquittal secured employment and was working and he had served out 19 days of the sentence awarded to him it was held that these circumstances were sufficient to justify the Supreme Court to consider the sentence already undergone by him as sufficient (Ganeshbhai Shankarbhai v. State of Gujarat, AIR 1972 SC 1613 (1620).

The appellant was a Junior cashier and was disbursing the provident fund of retired oficers. A sum of Rs. 2, 196 which was meant to be disbursed to Venugopal Nadu was withheld by the appellant and money was not paid to him on account of some mistake. Venugopal Naidu then made complaint to the Divisional Pay Master and the mistake was ultimataly detected the appllant disbursed the entire amount to Venugopal on account of withdrawal of provident fund. The accused lost his service. It was held that it was merely a case of temporary retention of money for a short while. Sentence of the accused under Sec. 409 was reduced to the period already served (Natsrajans v. State of Mysore, 1979 Cr. L. R. 173 (174) (S. C.).

The accused lost their jobs and had undergone through a lot of mental and financial strain during the prolonged proceedings before the courts lasting for over forteen years. Substantial sentence of imprisonment was remitted (State of Orissa v. Nakula Sahu, 1979 Cr. L. R. 64 (74) (SC).

The accused was new recruit to the department and was inexperienced appeared to have been made a scapegoat. The accused has already gone five months in jail. It was held that ends of justice did not require that the accused should be sent back to jail. The sentence of impprisonment was reduced from three years to the period already served but fine was mantained (Bhagwan v. State of Maharashtra (1979) Cr. L. J. 924 (924) (SC): (1980) 1 S. C. C. 610).

When the accused, an inexperieneced officer, not only deposited the entire amount said to have been misappropriated but also made some over-payment, the supreme Court, in the appeal by special leave against conviction under Sec. 409 Penal Code, and sentence of six months, R. I. and a fine of Rs. 500 and in default of payment of two months, S. I. took a lenient view and having regard to the peculiar circumstances of the case did not send the accused back to jail, it upheld the conviction of the accused by reducing the sentence to the period already undergone and mantained the fine as also the sentence in default of payment thereof (Kassim Pillai Abdul v. State Kerala, 1978 Cr. L. J. 994 (995) (S. C.).

Fine.- In a case of criminal breach of trust sentence of fine is compulsory and is not less than the amount misappropriated(1993) 45 DLR 243).

17. Practice and procedure.- Where the commission of an offence under S. 409, is not proved, there can be no conviction for abetment of the offence because conviction for abetment would imply a definite finding that another was guilty of the offence under S. 409 (AIR 1954 SC 621 = 1954 Cr. L. Jour 1645).

Several acts of misappropriation.- Where thirtyone acts of misappropriation are cmmitted in one year, it is sufficient, in view of S. 222 (2), Cr. P. C. to charge the accused with the misappropriation of the entire sum and it is not necessary to separately specify all the sums misappropriated (PLD 1963 Kar. 26; 1969 P. Cr. LJ. 1594; 1969 SCMR 810).

Where accused was charged for dishonestly issuing a bank guarantee but facts of case proved forgery of valuable security. Accused could not be convicted of additional offence for which no charge was framed (1987 PCrLJ 1096).

Where trial for offence under Sec. 409 covered various items and sentence in trials were passed and separate sentence were passed to run consecutively, it cannot be attacked on the ground that if they were tried together, the sentence could have been lighter (Ranchhad Lal v. State AIR 1965 SC 1433= (1965) 2 Cr Lj 431).

Offence under Ss. 469 and 468.- Where an offence under S. 468, Penal Code, was committed to cover one under S. 409, Penal Code, both the offences were held complementary to each other and therefore, were committed in the course of the same transaction. It was held that joint trial, in the absence of prejudice to the accused, was not illegal (1969 P. Cr. L. J. 142 = 1968 SCMR 1379).

Joint trial of public servant and other person.- Where public servants alongwinth non-public servants were tried by Special Judge, Anti-Corruption. Public servants competent jurisidiction. It was held that after acquitting public seravnts, Special judge could not direct retrial of nonpublic servant co-accused. Judgement relating to nonpublic servant accused was, therefore, set aside (1968 P.Cr. L. J. 1424).

Cognizance.- A Magistrate has no jurisdiction to take cognizance of an offence under section 409, Penal Code against the public servant (1987) 39 DLR 412).

18. Charge.- The charge should run thus:

"I (name and office of the Magistrate, etc.), hereby Charge you, (name of the accused), as follows:

"That on or about the.....day of.....at .....you being in any manner entrusted with property, to wit.....(or with any dominion over property, to wit.....) in your capacityof a public servant (or in the way of your business ans a banker, merchant, factor, broker, attorney or agent) committed criminal breach of trust in respect of that property, and that you thereby committed an offence punishable under Sec. 409 of the Penal Code, and within my cogizance.

'And I here by direct that you be tried on the said charge'

If a person is charged with the commission of several criminal breach of trust he may be tried in lump in one charge in respect of the total sum of money misappropriated without specifying the items of which it is composed or the dates on which those were misappropriated. But such misappropriation must be within a period of one year (Monsur Ali Vs. State 1987) 39 DLR 184).

Of the Receiving of Stolen Property

410. Stolen property.-Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropiated or in respect of which [2]* * criminal breach of trust has been committed, is designated as "stolen property," [3][whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without [4][Bangladesh]]. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then cases to be stolen property.

2. The word "the" before the words "offence of" was repealed by the Amending Act, 1891 (Act XII of 1891), and the words "offence of" were repealed by s. 9 of the Indian Penal Code Amendment Act, 1882 (Act VIII of 1882).
3. Ins. by Act VIII of 1882, s. 9.
4. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Sch. (with effect from 26th March, 1971).

411. Dishonestly receiving stolen property.-Whoever dishonestly receives or retains any stolen property knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Scope and applicability.
2. Stolen property.
3. Dishonestly receives or retains any stolen property.
4. "Knowing or having reason to believe the same to be stolen property".
5. Presumption under illustration (a) to section 114, Evidence Act.
6. Extent of presumption, thief or receiver.
7. Explanation of accused.
8. Possession must be recent.
9. Possession must be exclusive.
10. Joint possession.
11. Possession by head of family.
12. Possession by wife.
13. Recovery at the instance of accused.
14. Recovery of articles on information given by accused.
15. Recovery from place to which public has access.
16. Hidden property.
17. Witnesses of recovery.
18. Identification of stolen property.
19. Burden of proof.
20. Evidence and proof.
21. Punishment.
22. Practice and procedure.
23. Charge.

1. Scope and applicability.- A conviction under section 411 is possible only if the petitioner received stolen property with the requisite intention. He could receive stolen property if there was someone other than him to offer it. The property should be stolen before he received it. He also should have received it knowing or having reason to believe that it was stolen property. These are necessary ingredients of the offence (Shahadat Ali Vs. State AIR 1957 Assam 35 (38)=1957 CrLJ 349).

A conviction under section, 411 is possible only if stolen property is received with the requisite intention. It is the duty of the prosecution to prove -(1) that the stolen property was in the possession of the accused; and (2) that some person other than the accused was in possession of that property before the accused got possession of it: and (3) that the accused had knowledge that it was stolen property (Rimbak v. State AIR 1954 SC 39).

Section 411 clearly shows that besides dishonest possession of stolen proprty there must also be the knowledge of or at least reasonable belief in the property being stolen property; but when some property is proved to be stolen property and the person who is found in possession of it can not account for its possession, especially when he is found in possession of it soon after the theft of the property, it is only reasonable to conclude not only that he was in possession knowing or having reason to believe it to be stolen property but also that his possession of it was dishonest (Shakur Vs. State, 36 CrLJ 1206; (1965) 17 DLR 228).

It is essential not only to show that the properties were stolen and somebody else had possession of it prior to its discovery from the possession of the accused but that the accused had also knowledge or reason to believe that the property was stolen. Until the prosecution proves the property recovered from the accused as stolen and believed by him to be stolen, the ingredients of Sec. 411 Penal Code, cannot be said to have been proved (Laiban Naik v. State of Orissa, 1989 (1) Cr. L. C. 670 (671) (Orissa).

Section 411 of the Penal Code deals with 2 classes of offence, those of dishonestly receiving stolen proeprty and the other of retaining stolen property

knwoing it to be stolen. The prosecution, therefore, must prove that -(i) the accused was in possession of stolen property, possession may be actual or constructive, (ii) he dishonestly received or retained it, (iii) he knew or had reasons to believe that it was stolen property. If any of the ingredients are missing or are not proved, the conviction will be bad (PLD 1976 Lah 28). The prosecution may prove these three ingredients either by positive evidence or by certain presumptions (PLD 1961 Lah 603). Where there was no evidence that the accused was habitually dealing in stolen property or that he received any specific articles knowing them to be stolen or that he was in possession of stolen property, it was held that no offence was committed under sections 411, 413. (1867 Pun Re. (Cr.) No. 8, p. 13 DB). It is further to be noted that the mere intention and preparation to misappropriate property are not sufficient to constitute an offence under section 411, Penal Code. (AIR 1938 Mad 172).

This section prescribes the punishement for dishonest receipt and retention of stolen property knwing or having reason to bliteve it is stolen property. Mere possession of stolen property is not an offence. There can be no offence under Sec. 411, unless property in question falls with the definition of stolen property (Chand Mal, AIR 1976 SC 917 = 1976 Cr LJ 679).

The law, therefore, puts the receiver of stolen property on the same footing in the manner of punishments as a person who commits theft. There cannot be an offence under Sectin 411 unless property in question falls within the definition of stolen property under Section 410 (AIR 1976 SC 917 = 1976 Cr LJ 679). If the accused melts stolen ornaments and prepares an ingot of gold, it still remains stolen property. But the stolen property is converted into cash, such cash is not stolen property (AIR 1952 Cr LJ AIR 1952 Punj 178).

The accused can be said to have committed an offence under this section in respect of only property recovered from him. The Court is not concerned with the rest of the property stolen which has not been recovered from the accused (AIR 1953 All 752).

Section 411 regards two distinct classes of offenders; first, persons who dishonestly receive stolen property and secondly persons who not dishonestly receiving stolen property, dishonestly retain stolen proeprty knowing it to be stolen. This last class of offenders is not elsewhere provided for in the code. The specific offence which most nearly resembles this is the offence of criminal misappropriation. The latter offence may be committed in respect of property that is not stolen property and which becomes so when the misappppropriation converts it into stolen property; whereas the offence of dishonestly retaining stolen property can be committed in respect of stolen property only (1889 Pun Re. (Cr) 23, p. 85). It follows that a person who is proved to ahve dishonestly misappropriated property cannot be convicted of the offence of dishonestly retaining it under section 411. Section 414 applies when a person has come honestly into possession of property, and he retains it after discovering that it is stolen property (5 CrLJ 413).

2. 'Stolen property.-The essential requirement of the offence of receiving stolen property is that the property seized from the possession of the accused must be proved by the prosecution to be stolen. And where the Courts failed to apply their mind to this essential requirement of the offence before convicting the appellant, the appellant is entitled to a cquittal (Mahabir Sao v. State Cri LJ 458 (SC).

Where the property was not proved to be the subject matter of the offence. It should be restored to the person from whom it had been taken (1974 PCrLJ 129). But where the accused neither claimed property recovered from him to be his own

nor offered any explanation as to how to he came into possession of that property he may be convicted under this section (1968 SCMR 469=1968 PCrLJ 417).

Where a stolen bullock is recovered from the house of accused after about a little less than a year of the theft no presumption that either the petitioner was a thief or a receiver of stolen property could be drawn against him. Moreover, it is a matter to be decided according to the facts and circumstances of each case. The bullock is a property which changes hands quite frequently (Shangara Shing Singh Ladha Singh Vs. State AIR 1964 Punj 400 (401).

The accused cannot be convicted of offence punishable under Sec. 392 read with Sec. 397 of the Penal Code, inasmuch a the whole of the robbed property had not been recovered from the accused and only some of the case property had been recoverred. They were liable to be convicted offence punishable under Sec. 411 of the Peal Code only (Shankar v. State, 1989 Cr. L. J. 1066 (1069) (Del).

When receipt or retention of property, not necessarily for disposal is dishonest, section 411 is the appropriate section. If, on the other hand, dishonest receipt or retention cannot be proved but only dishonest concealment or disposal is proved, section 414 is more appropriate (AIR 1926 Bom 71). But where the allegation is that of receiving and concealing stolen property, there can be conviction under section 411 only, and section 414 does not apply to the case, because the act of receiving and concealing form one transaction and the accused can be convicted only under section 411 (4 Mad H.Cr. 13). On the same principle where a person had been convicted under section 411 in respect of certain propertytransferred to the accused (AIR 1958 Ori 51 (DB). Stolen on a particular occasion from a particular person, he could not be subsequently tried for an offence under section 414 in respect of other property stolen on the same occasion from the same person (3 CrLJ 207).

Dacoity : Where a person is found in possession of property taken in a dacoity, and is unable to give any reasonable explanation for its being with him, it may be presumed that he knew the property to have been stolen, but not that he knew or had reason to believe that it was the proceeds of a dacoity rather than of a burglary or a theft. To justify his conviction on the more serious charge under section 412 of the Penal Code there must be evidence, cricumstantial or oral, to show that the knew or had reason to believ that a dacoity had been committed and the property had been taken in it, or that the person from whom he obtained it belonged to a gang of dacoits and the property was stolen property taken in a dacoity. In the absence of such evidence, he can only be convicted under section 411, of the Penal Code (NLR 1980 AC 346). Where in a dacoity the dacoits had taken away a gun which was recovered from the possession of the accused. There was nothing on record to show that the accused knew or had reason to believe that possession of the gun had been transferred by commission of dacoity. There was also no evidence on record to indicate that the accused received the gun from a person whom he knew or had reason to believe to belong to a gang of dacoits. The accused was convicted under section 412. It was held that the offence made out against the accused was one under section 411 and not under section 412. (AIR 1950 All 398).

Murder : It is quite unnecessary in a case of murder for gain to frame separate charges under section 392 and section 411 (AIR 1953 Mad 100). From the mere possession of the property taken from a murdered man it does not necessarily follow that the person in possession participated in the murder. It is quite within the bounds of possibility that a murderer might have handed over the property to a person who was found in possession of it and he was in guilty possession of the

property to the extent of knowing that it was stolen (PLD 1956 Lah 117). Therefore where the accused who was found in possession of stolen articles was not on the evidence found guilty of murder, it was held that he should be convicted under section 411 (AIR 1955 NUC 3649). But where there is no evidence to show that the accused is not the mruderer and he is found in possession of property stolen from the murdered man, the presumption is that the accused is either the culprit himself or a person who has received the property from the real culprit. If the evidence of robbery had been disbelieved, that evidence could nevertheless be relied upon as corroborative evidence of murder. Its corroborative value would therefore, be much more in a case where the evidence of robbery had not been disbelieved (PLD 1959 Dhaka 226). Where the accused was found in possession of articles belonging to the deceased soon after the murder, and his conduct this disappearing from his house shortly after the murder - showed that he was the murderer, conviction should be under section 302 and not under section 411 (AIR 1954 SC 704).

Theft : Where a person was immediately after theft found in possession of stolen goods. Presumption would be that either he was a thief or in possession of goods with the knowledge that those were stolen (PLD 1984 SC 29). In certain circumstances an offence under section 411 and one under section 379 of the Penal Code may come within the purview of section 236, Criminal Procedure Code and the accused may be charged with having committed one or of the two offences and by virtue of section 237, Criminal Procedure Code even if the accused is charged with an offence under section 379, Penal Code he may be convicted of an offence under section 411 of the Penal Code. But that would depend upon the circumstances of the case. If the case put forward by the prosecution is that the accused actually committed theft and he is not given an opportunity to meet a case under section 411 of the Penal Code, which requires proof of several ingredients to constitute the offence, conviction for the latter offence is not proper (AIR 1961 Mys. 158). Where however the accused had an opportunity to meet the case under section 411, he could be convicted under that section, even when the charge framed against him was one under section 379, Penal Code (Madh BLJ 1954 HCR 309).

3. Dishonestly receives or retains any stolen property.- The expression 'dishonestly retains stolen property' is not exactly equivalent to the expresion 'whoever dishonestly prossesses or is in possession of stolen property (1889 Pun. Re. (Cr.) No. 26, p. 85). Dishonest retention is distinguished in section 411 from dishonest receiption. In the former dishonesty supervenes after the act of acquisition of possession while in the latter dishonesty is contemporaneous with the act of such acquisition. Every person who retains possession of property dishonestly possesses and continues to possess it dishonestly so long as he retains it dishonestly, but every person who possesses and continues dishonestly does not retain dishonestly (1884 Pun. Re. (Cr.) No. 18 p. 29). Guilty knowledge at the time of receipt of stolen property is necessary for a charge of dishonest receipt of stolen property. But the offence of dishonest retention of stolen property may be complete without any guilty knwoledge at the time of receipt 4 Mad HCr. 42).

To constitute dishonest retention, there must have been change in the mental element of possession, from an honest to a dishonest condition of the mind in relation to the thing possessed (1884 Pun. Re. (Cr.) No. 18 p. 29). Therefore if receiption of the property was innocent. Then it clearly would be for the prosecution to show at what stage guilty knowledge of the receiver supervened to make the retention dishonest (AIR 1937 Lah 700).

To constitute the offence of receiving there must be some proof that some person other than the prisoner had possession of the goods before the prisoner got

possession of them. (15 Cal 511 DB). But it is not necessary that the prosecution must invariably estabish affirmatively that the stolen property was first in possession of some other person and then was transferred to the accused (AIR 1958 Ori 51 (DB).

4. Knowing or having reason to believe the same to be stolen property".- What this section contemplate is "Dishonest receipt of stolen property or dishonest retention of stolen property knowing or having reason to believe that such property is stolen property". In order to establish an offence under section 411, the question which is subjective has to be established whether the accused was award of the theft or did he believe that the goods are stolen or did he suspect the goods to be stolen deliberately shut his eyes to the circumstances (Santnarain Sao v. State AIR 1972 SC 1561 = 1972 Cr LJ 1048).

Being in possession of stolen property is in itself no offence. If being in possession of stolen property was itself a crime, then an innocent purchase of an article would render the purchaser liable to conviction for a serious offence. Being in possession of stolen property is only a crime if the person in possession either knows that the property is stolen property or has reasonable grounds for believing that the propoerty had been stolen. In a prosecution under section 411 of the Penal Code the prosecution must not only prove that the property had been stolen, but they must also establish facts from which the Court can properly infer that the person charged with being in possession of stolen property either knew the property to be stolen or had reasonable grounds for believing the same to have been stolen. Unless there was some prima facie evidence of the knowledge of the accused, the =latter was liable to be acquitted (PLD 1971 SC 725).

In a case of receiving stolen property the correct test of a person's guilt is whether when the property came into his possession he knew or had reason to believe that it was stolen property. Mere suspicion is not enough (14 CrLJ 591). The knowledge or belif which is required to be established in order to bring the case under section 411, implies the existence and the presence of facts or circumstances from which the accused was either made aware or ought to have been made aware of the nature of the property. It may be sufficient to show that the circumstacnes were such as to make him believe that property was stolen. The word knowledge means a mental cognition and not necessarily visual perception. It implies a notice to the receiver of such facts as could not but have led him to believe that the property was stolen and could not but have been dishonestly obtained. (AIR 1927 Rang 40). The word 'believe' in section 411 is stronger than the word 'suspect' and involves the necesity of showing that the accused must have felt convinced in his mind that the property with which he was dealing was stolen property (AIR 1929 Oudh 213).

The court may draw an inference as to the knowledge of the accused from the facts of the case. When some property is proved to be stolen property and the person who is found in possession of it cannot account for its possession especially when he is found in possession of it soon after theft of the property, it is only reasonable to conclude, not only that he was in possession knowing or having reason to believe it to be stolen property, but also that his possession of it was dishonest (AIR 1935 Oudh 475). Where the accused has hidden stolen property in his loft, (6 Bom 731 (DB), or where a calf belonging to another person was sold by the accused for an inadequate price only a day after it was stolen from the owner and the accused was unable to give any account as to how he came to be in possession of it, an inference that the accused knew it to be stolen property can be reasonably drawn (AIR 1952 All 481). But the inference should not be drawn lightly. Thus where the accused

bought a shipkeeper's weights from a beggar boy without making any inquiry, (5 Bom LR 877 DB), or the accused sold certain ornaments more than a month after their theft, the fact should not be used to draw an inference that the ornaments were the proceeds of a burglary (AIR 1933 Lah 987). Similarly from the bare fact that the accused was residing in the complainant's village, his knowledge that the ornaments were stolen property cannot legitimately be presumed (AIR 1954 SC 39 = 1954 Cr LJ 335).

5. Presumption under illustration (a) to Section 114, Evidence Act.- Possession of stolen property recently after the commssion of a theft raises a prima facie presumption that the possessor either the thief or the receiver of stolen property knowing it to be stolen, according to other circumstances of the case (AIR 1934 All. 455; AIR 1974 SC 334 = 1974 Cr LJ 277; AIR 1978 SC 522).

Section 114 does not relieve the prosecution of the onus of proving the guilt of the accused in respet of a charge under section 411, Penal Code, the onus is there just in the caes of any other charge but under certain circumstances a psesumption may arise to alleviate it (AIR 1937 All All 47 = 38 Cr LJ 196 = 1970 Mad LJ (Cr) 461 (DB).

The condition precedent for the application of illustration (a) section 114, Evidence Act is that the accused must be in possession of stolen goods. The production of property by itself would not necessarily prove his possession. In the absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from a place which was accessible to the public would not be sufficient to establish his possession. The possession of the article must be clearly traced to him in order to justify the presumption under the illustration (Jumma vs. Azad J and K. Government 6 DLR 8 (WP).

Illustation (a) itself shows that the presumption will not arise unless the accused is in possession of the goods soon after the theft and is unable to account for his possession. (38 Cr LJ 196; 21 Cr LJ 545 - AIR 1920 Cal 342; AIR 1972 SC 1561 = 1972 Cr LJ 1048 = (1974) BLJR 32 = ILR (1973) 52 Pat 716; (1972) SCD 58 = 1972 UJ (SC) 9471 Jumma v. State (1954) 6 DLR (W. P) 8.

The presumption under illustration (a) to Section 114 is one of fact and not of law. It is a permissive inference which a court may logically draw the facts proved, including the natural events and human conduct in their relation to the particular facts. It is not a presumption of law, in which case the court will be required to each that conclusion in the absence of evidence is to the contrary. No doubt, when a person denies altogether his pssession of stolen goods not in common circulation which possession the Court finds to be proved, it is mormally easier to draw an adverse inerence as to the person's guilty knowledge (1957 Cr 1393 (Andh Pra).

Evidence Act, section 11, Illustration (a) does not relieve the prosecution of the onus of proving the accused's guilt in respect of a charge under section 411 of the Penal Code. The onus is there just as in the case of any other charge but under certain conditions a presumption may arise to alleviate it (AIR 1937 All 47). When stolen property is found in possession of a person soon after a theft, the court is under section 114, entitled to presume that either that person is himself the thief or he has received the goods knowing them to be stolen, unless he can account for their possession (1969 PCrLJ 43). Where stolen goods belonging to the oil and gas corpooration were found from the truck of the petitioner (in which he was travelling). It would attract to his case the presumption of guilt as per clause (a) of section 114 of the Evidence Act, unless he was able to account for his poossession. Where the accused not only offered no explanation for his possession but even

denied the recovery of the goods from his truck, he was convicted under this section (1979 SCMR 316).

Possession simplicitor of stolen property is no offence and conviction under section 411 penal Code shall not be sustainable unless the prosecutionnot only prove the property to be stolen but also establish facts from which court could properly infer that the person charged with offence either knew or had reasonable ground for believing the property to be stolen. The expression "soon after theft" in illustration (a) indicates that possession of stolen property must be recent tojustify the inference constituting proof of offence. There is no inflixible rule however that efflu of time could negative a charge under Section 411 Penal Code. Whee a cycle, in possession of accused, was alleged to have been stolen more than two years ago an inference under section 114, illustration (a) Evidence Act could not be drawn (PLD 1971 SC 725 (727, 729).

It is now well settled that such a presumption is not confined to cases of theft but extends to all charges, however grave,including even murder or dacoity and generally speaking, presumption of the fruit of crime is the perpetrator of the crime itself unless he can account for his possession (AIR 1972 SC 2501; AIR 1978 SC 522). The two deceased had gone to the fields with the bufaloes and did not return. It was also found from the evidence that buaffleos also did not return but were seized from the possession of accused Nos. 1 and 2. It was also proved from the evidence of P. Ws. that the buffaloes belonged to the deceased persons. In these circumstances it was held that although there was no evidence to support the conviction of the appellant there was no evidence to support the conviction of the appellant under Sec. 302/ 34, 394 and 412 of Penal Code, but the prosecution had undoubtedly proved that the appellant was in possession of stolen property, namely the bufaloes belonging to the deceased persons. In the circumstances, therefore, the appellant coult not escape conviction under Sec. 411, Penal Code (Joga Gola v. State of Gujarat, A. I. R. 1982 S. C. 1227 (1228).

The presumption from recent possession of stolen property, is an optional presumption of fact under Sec. 114, Evidence Act. It is open to the Court to convict an appellant by using the presumption where the circumstances indicate that no other reasonably hypothesis except theguilty knowledge of the appellant is open to the prosecution. In this case the appellant had given a fairly acceptable explanation. The prosecution had been unable to repel the effect of it. Held, that the explanation which the appellant had given was good enough to raise serious doubts about the sustainability of a charge under Sec. 411, Penal Code, So the appellant was entitled to an acquittal (Karnal singh Uttam Singh v. State of Maharashtra, 1976 Cr. L. J. 842 (845): A. I. R. 1976 S. C. 1097 = S. C. C. (Cr). 204).

In the Case Virumal v. State of Gujarat (A. I. R. 1974 SC 334 (335), the accused were found in possession of stolen property within two days after theft. Presumption under Sec. 114, Ilustration (a), Evidence Act was drawn against them and their conviction under Sec. 411, Penal Code was upheld.

The question whether appellant was found in possession of the stolen property cannot arise when the discovery itself was not reliably proved by the prosecution (Ajayakumar v. State of Maharshtra, 1982 (2) Bom. Cr. 1976 (182).

The identity of the ornaments recovered at the instance of the appellant which beloged to the deceased had been fully established. It was also proved that she had been wearing these ornaments when she left the house on the night of 10th April, 1973. The recoveries were made on 13th April, 1973 that is to say within three days of the occurrence. It was held that there was nothing to connect the appellant with

the murder of the deceased or even with any assault the accused might have committed on the deceased or having robbed her of her oranaments. At the utmost as the ornaments had been proved to be stolen property received by the appellant knowing that they were stolen property, the accused could thus be conivcted on the basis of presumption under Sec. 114 of the Evidence Act and under Sec. 411 of penal Code as a receiver of stolen peroperty knowing the same to be stolen (Nagappa Dondiba Kalal v. State of Karna aka, 1080 Supp. S. C. C. 336 (336, 337).

Under Illus (a) of Sec. 114 of the Evidence Act before a presumption could be drawn against the accused he has to be asked to account for his possession. The answer may be furnished by the accused on his own accord and if he does not do so the trying Magistrate has to ask under the provisions of Sec. 342 of the Code to explain the circumstances appearing in evidence against him (Satchidanada Haldar v. State, AIR 1985 Cal. 414 (415): 1958 Cr. L. J. 1012; (1965); Cr. LJ 746).

In Sunder v. Rex (A. I. R. 1950 All. 398 (399), Raghubar Dayal, J. observed that Illus. (a) to Sec. 114 does not limit the scope of the section and it is possible to raise a presumption in certain circumstance that a person found in possession of property stolen in a dacoity was either a dacoit or had received the property knowing it to have stolen in a dacoity. Such a presumption, however, cannot be raised merely on account of a person being found in possession of property stolen in a dacoity. There was no evidence either of identification of the accusd or his being seen near the place at the time of dacoity or of joining a gang. The only evidence was that some ornaments which were stolen in dacoity were recovered from the possession of the accused. It was held that it was safe to convict him neither under Sec. 395 nor under Sec. 412 but only under Sec. 411, Penal Code (Sobha Ram Kachhi v. State of Madhya Pradesh, AIR 1959 M. P. 125 (127), 128: 1959 Cr LJ 406; 1958 M. P. L. J. 752; 1959 Jab. L. J. 112; 1958 M. P. C. 702).

The presumption permitted to be drawn under illustration (a) to Section 114 has to be read with the important time factor. If ornament or things of the deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. But if several months expire in the interval, the presumption may not be permitted to be drawn having regard to the circumstance of the case (1954, Cr 225 (SC).

The drawing of a presumption under illustration (a) to Section 114 of the Evidence Act, is discretionary and a Court may refuse in the special circumstances of a case to draw such a presumption. 91958 Cr LJ 534 (Orissa). Illustration (a) to section 114 of the Evidence Act enables a presumption to be drawn regarding a person in possession of stolen goods, depending upon its likelihood of its changing hands, unless a fairly acceptable explanation is forthcoming. In respect of rare books painting or idols or a barrel of gun, presumption can be drawn even after a lapse of longer period (Chandmal v. State AIR 1976 SC 917 = 1976 Cr LJ 679).

6. Extent of the presumption; thief or receiver.— According to illustration (a) of section 114, Evidence Act a man who is in possession of stolen goods soon after the theft is either the theif or has received the goods knowing them to be stolen, unless he can account for his possession. It would depend upon the facts and circumstances of each case whether the court should draw the presumption that a person found in possession of stolen goods soon after the theft and who has not been able to account for his possession is the thief or whether he is the receiver of the goods knowing them to be stolen (AIR 1972 SC 2501 (2504).

When there is no evidence of accuseds making a disclosure statement recoveries of some articles concealed at a place which might have been within the

knowledge of the accused cannot by itself be sufficient to hold that the accused must have been within possession of those articles (1986) 1 Crimes 199). When the booty is recovered soon after the occurrence on the showing of the accused persons in consequence of a dacoity, the accused persons are to be found guilty not only of the charge under section 412 but also under Section 395 Penal Code with the aid of Section 114 (a). Evidence Act (AIR 1985 SC 486= 1958 Cr LJ 753).

It is true that under section 114, Evidence Act, recovery of stolen goods from the person of an accused soon after a theft leads to two presumptions either that he is a thief or that he has received the goods knowing them to be stolen. But that rule of presumption in the first place, has to be weighted in the light of the circumstances of each case, and secondly, the proper inference to be drawn is that he was one of the dacoits and not that he was its receiver. The latter inference ought not to be drawn unless there is some particular circumstance as for instance, that the person is a pawanbroker or a woman, indicating that he or she could scarcely have taken part in the dacoity and must, therefore, have received the stolen property from someone else, who did (AIR NUC (Pat) 3235 ; AIR 1954 Tripura 54).

Where the field from which stolen ornaments were recovered on beings pointed out by the accused was an open one and accessible to all and sundry, it was difficult to hold positively that the accused was in possession of those articles. The fact of recovery by the accused was compatible with the circumstances of somebody else having kept the articles there and of the accused somehow acquiring knowledge about their whereabouts, the fact of recovery cannot be regarded as conclussive proof that the accused was in possession of those articles (AIR 1954 S.C. 39). Similarly where the accused was found siting over one of the stolen properties, Viz, a chair with the other stolen properties by the roadside. It was, held, that this would not amount to possession (53 Mys. H.Cr. 162 (DB).

If it can be shown that stolen property was in exclusive possession of the accused when he was living jointly with others in the house, he can be convicted under S. 411, Penal Code (1965) 17 DLR 228). Where two or more persons are charged with joint illegal possession, it is incumbent on the State to prove (a) that each of the accused had either physical or constructive possession, or (b) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter (AIR 1953 Mad. 594 = 1953 Cr L! Jour 1048;)

7. Explanation of accused—Possession of stolen property, even if accompanied by failure to give an account of how such possession was acquired, or by a false account, or by accounts which are contradictory, would raise not a violent or strong presumption, but a probable presumption merely. The expression "Unless he can account for his possession" in Illustration (a) of S. 114, of the Evidence Act does not mean that the accused must prove affirmatively by aducting substantive evidence that he received stolen property in the way indicated by him. The adverse presumption is rebutted if the explanation of the accused reasonably appears to be probable Alimullah v. state, (1969) 21 DLR 644 ; 6 DLR 518 ; 4 DLR 212).

The onus of proof in a case of this nature cannot shift from the prosecution to the accused and it is not necessary for an accused person to prove affirmatively that he came by the goods innocently. If he can give an explanation which might raise a doubt in the mind of the Court as to his guilt, he will be entitled to the benefit of the doubt (PLD 1951 Bal. 14; 6 DLR 518). Where woollen goods and bedsheets were despatched by Railway and were found missing and large quantities of similar goods were recovered and there was no explanation for such large quantities being available and recovered goods answered the description of goods lost the finding that

property recovered were stolen goods as they answered the description of goods lost was justified (AIR 1964 SC 170).

If the explanation given is one which the Court might think reasonable to be true, then the accused is entitled to acquittal even though the court may not be convinced of its truth. This is for the reason that the prosecution would then have failed in its duty to bring home the guilt of the accused beyond reasonable doubt. Inference under Illustration (a) should never be reached unless it is a necessary inference from the circumstances of the given case, which cannot be explained on any other hypothesis save that of the guilt the accused (1976) 1 SCC 828). Section 114 provides that the court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and private and public business, in their relation to facts of the particular case. When the explanation offered appears reasonable true, beyound doubt, the accused is entitled to be acquitted inasmuch as a the prosecution would be deemed to have failed to discharge the duty by establishing beyond reasonable doubt the guilt of the accused (AIR 1972 SC 1561= 1972 Cr LJ 148).

Nature of explanation by the accused.— What Illustration (a) to Section 114, Evidence Act means is that in the circumstances mentioned therein the Court may draw a presumption and may act upon it if the accused cannot account for his possession, but this illustration does not mean that the burden of proof is shifted on the accused, and that the accused must prove affirmatively that he came by the goods innocently. It is sufficient if he can give an explanation which may raise doubt in the mind of the Court as to the guilt of the accused. If the accused gives any explanation which, in the opinion of the Court, may possibly be true, although they do not necessarily believed it, then the prosecution cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case (35 Cr LJ 621= 56 All 250 = 38 Cr LJ 129= 1958 Cr LJ 34= 1958 Cr LJ 657= 49 Cr LJ 147= 1955 Cr LJ 1553 = 1957 Cr LJ 393= ILR (1945) All 11= 45 Cr LJ 241 (PC). It is worng to suppose that when the distance of time betwen the theft and the recovery of the stolen property from the possession of the accused is short, then the burden shifts on the accused to prove affirmatively that he came by the possesson of the property in an innocent manner (35 Cr LJ 621= 56 All 250; 38 Cr LJ 129= 1958 Cr LJ 534= 1958 Cr LJ 657= 49 Cr LJ 147= 1955 Cr LJ 153 =1957 Cr LJ 393 (1945) All 11= 45 Cr LJ 241 (PC).

The words "unless he can account for his possession" in Illustration (a) to Section 114 of the Evidence Act do not mean that any sort of explanation in regard to possession would be acceptable. The explanation must be a reasonably explanation. The Court of course is not barred to draw it; but it does not in any way shift the burden of proof to the accused. The words "can account for his posession" do not mean that the accused must prove it positively that he had received the property in the manner indicated by him (1955 Cr LJ 1553 (All).

Under Illustration (a) Section 114 of the Evidence Act, before presumption could be drawn against the accused, he has to be asked to account for his possession.The answer may be furnished by the accused on his own accord and if he does not do so, the trying Magstrate has to ask him under section 342 of Cr. P. Code, 1898 to explain the circumstances appearing in evidence against him, i.e. to account for his possession (1958 Cr LJ 1012 (Cal).

Where the only evidence against an accused is possession of property recently stolen, a Court may infer guilty knowldge (a) if the accused offers no explanation or (b) if the Court is satisfied that the explanation is untrue; but if the explanation leaves the Court in doubt the accused should be held not guilty (1958 Cr LJ 534) (Orissa).

No explanation given by accused.— Where stolen property is found in possession of the accused soon after the theft and no explanation for his possession is offered, an inference of guilt under S. 411, Penal Code, is justified (NLR 1988 Cr. 584 (DB) ; AIR 1933 All. 461).

Where, therefore, coper wire used in telephone lines was found in posession of the accused and the accused gave no satisfactory explanation of its possession but merely denied recovery from their custody, the legitimate inference is that they received the stolen property, having reason to believe the same to be stolen property. They are liable to be convicted under S. 411, Penal Code (AIR 1965 Orissa 123).

False explanation.— Where the accused who is found n possession of stolen property soon after a theft gives a false explanation for his possession, he can be convicted under S. 411, Penal Code (AIR 1941 Pat. 175 (DB) ; AIR 1950 All. L. Jour 738). The fact that a false explanation is given by the accused renders the prosecution case stronger (AIR 1950 All. 631; AIR 1954 Manipur 13).

8. Possession must be recent.— Possession of stolen property must be 'recent' to lead to the inferene constituting proof of offence. Delay of two months in production of property does not justify inference of guilty knowledge (Raza Muhammad Vs. The State 15 DLR 122 (WP). Presumption under Section 114 Illustration (a) does not arise until the prosecution establishes recent possession of the stolen goods by the accused (PLD 1971 SC 725 ; PLD 1963 Kar. 1010; Air 1949 East Punj. 315). Delay of two months in production of property does not justify inference of guilty knowledge (Raza Muhammed V. State, (1963) 15 DLR (W.P) 122). If ornaments or things of the murdered person are found in the possession of person soon after his murder, a persumption of guilt may be permitted (AIR 1954 S.C.1).

As the time between the recovery of property and the time of its loss increases, the presumption which ordinarily arises under Section 114, Illus (a), Evidence Act will get meagre and meagre (AIR 1935 N. U. C. (All) 3528). Where there is considerable lapse of time between theft and recovery of a stolen article form the accused, it is sufficient to destroy the presumption (PLD 1971 S.C. 725.

9. Possession must be exclusive.— To invoke the presumption that the accused is either the receiver of the stolen property or the thief himself, another ingredient is that such possession must be an exclusive and conscious possession. In a case some incriminating articles were found inside an almirah in joint possession of the accused and his father. The Court refused to invoke the presumption emanating from section 114, illustration (a) in view of the fact that the incriminating article was not in exclusive possession of the accused (AIR 1963 SC 822= 1963 All LJ 397).

Where the fields from which stolen ornaments were recovered on pointing out by the accused was an open one and accessible to all and sundry, it is difficult to hold positively that the accused was in possession of those articles. The fact of recovery by ther accused is compatible with the circumstance of somebody else having kept the articles there and the accused somehow acquiring knowledge about their whereabouts and that being so the fact of recovery can not be regarded as conclusive proof that the accused was in possession of those articles (AIR 1954 SC 39= 1954 Cr LJ 335).

If it can be shown that the stolen property was in the exclusive possession of the accused when, he was living jointly with others in the house, he can be convicted (17 DLR 228). When the stolen property is recovered from the house jointly occupied by accused and his father and no evidence to show that recovery was from

the part occupied by the accused exclusively, recovery of article cannot be considered to be from the possession of the accused (AIR 1963 SC 822; AIR 1972 SC 1899).

Stolen goods discovered at pointing out by the accused from a place not within his domain but close to his house and the accused explaining how he came to know of the same, court's presumption in circumstances is that the stolen goods were planted and possessed by the accused (1970) 22 DLR 99).

It has been said that the accused is only called upon to offer an explanation when there is a *prima facie* case against him (AIR 1952 Cal 616). If incriminating facts or circumstances are established by the prosecution and the accused fails to offer an explanation or gives a false statement, the court would be entitled to draw an adverse inference against him (AIR 1957 S. C. 211).

10. Joint possession.— If the circumstances are such as to raise a presumption that two or more persons are in joint possession of stolen property, both of them may be convicted. There is no justification for the view that there cannot be joint criminal possession (34 Cr LJ 604= AIR 1933 Lah 143 IC 463).

Where, in the absence of the accused in his house, his wife produced the key of the box in the house which box was found to contain stolen property, the accused cannot be held guilty, in the absence of any evidence to show that the incriminating articles were held by the wife on account of the accused (1961) 1 Cr LJ 152= AIR 1941 Mad. 694= 42 Cr LJ 738= AIR 1922 All 83= Cr LJ 386).

Joint possession of several persons.— In a case under S. 411,if the circumstances are such as to raise a presumption that two or more persons are in joint possession of stolen property. all of them may be convicted. There is no justification for the view that there cannot be joint criminal possession (AIR Lah. 148(DB).

11. Possession by head of family. — In the case of a family living jointly in the same house, the head of the family is presumed to be in possession of any illicit article found in the houese (AIR 1961 Mad. 162 ; AIR 1953 Mad. 534 ; AIR 1914 Cal 396 (DB).

Where a bag containing stolen goods is recovered from a house, it is not enough to show that the accused were co-owners of the house, But where, one of the accused who was the eldest member of the family was present at the time of the recovery and the bag as recovered from such a place that he must have been aware of its existence, it can be presumed that he had control over the bag and was, therefore, in law, in possession of it either exclusively or jointly with other members of the household. The other accused, who were co-owners of the house, but were not present, cannot be fixed with criminal liability (AIR 1951 Pat. 296; 52 Cr.L.J. 154 (DB).

It must however be noted that there is no presumption that a father or head of a family is in possession of every thing found in his house; neither can it be presumed that he is in control of any thing so found (AIR 1914 Lah. 339= 46 Cr. L. Jour 1 = ILR 1945 Lah. 137 (FD).

Therefore it is wrong to assume that property found in a house occupied by several male and female members residing therein should be considered to be in possession of the head of the family. This assumption can have no place in cases in which possession and criminal intent form essential elements of an offence. It is

equally unwarranted to assume that everyone residing in the house should be deemed to be in possession of an article recovered from it (6 Sau. LIR 488 (DB) ; 1955 Raj. L.W. 267).

Merely because the accused is the head of joint family or the owner of a house, he cannot be credited with constructve knowledge of a hidden thing. Possession implies knowledge of a hidden thing. Possession implies knowledge. Mere physical presence of accused in proximility to an incriminating article without his knowledge is not an incriminating circumstance (AIR 1957 Andhj Pra 758= 1957 Cr. LJour 1091 (DB).

12. Possession of wife.— Where the wife is found in possession of the stolen property, it cannot be presumed that possession of the wife was per se the possession of her husband (AIR 1922 All 83; AIR 1955 Ajmer 10; AIR 1941 Mad 694). In the Indian rural society, particularly among the illiterate, the wife being a passive partner in life, has merely to acquiesee in the property being kept in the house even if she knows that the property was obtained in the course of docoity. Bare acquiescence in the receipt of stolen property is not the adoption of receipt so as to constitute receiving or retaining within the meaning of section 412, Penal Code (1963) 1 CrLJ 344).

Thus where, in the absence of the petitioner from his house, his wife produced the key of a box in the house which box was found to contain stolen articles, the petitioner cannot, in the absence of any evidence to show that the incriminating articles, were hold by the wife on account of the petitioner, be convicted under section 411 (AIR 1961 Punj 30; AIR 1944 Lah 329FB; AIR 1944 Lah 239 (FB).

13. Recovery at the instance of a accused.— Stolen property discovered at the pointing out of the accused from a bush at calls distance from his house without any explanation as to how he came to know the property presumes to be his possession (1962) 14 DLR (WP) 34 ; Ainul Hag v. State, (1970) 22 DLR 99).

In the absence of any incriminating statement made by the accused leading to the discovery of property, its production alone from another man's property would not be sufficient to establish the possession of the accused. It may at the most show his knowledge that the property was concealed there. Mere knowledge that stolen property is lying hidden somewhere is not incriminating circumstances for the offence of theft or receiving stolen property, and such knowledge cannot be itself raise a presumption or possession. It is the prosecution that has to establish the possession of the accused apart from his knowledge and it is only when his possession is proved that the accused has to account for it in order to escape from the presumption under Illustration (a) to Section 114, of the Evidence Act, 47 Cr LJ 51 (Bom)= 18 LJ 409 (Punj)= 1935 MWN 1342).

Where the goods were recovered at the instance of accused, who had the keys of room and who was present at the time of recovery but there was no evidence to show that the room wherein the stolen articles were found was in exclusive possession of the accused, it was held that conviction for offence under Section 411 was illegal (1967 Cr LJ 237 =AIR 1967 Pat. 1966 BLJR 133).

Where the alleged recovery of the stolen property from the possession of the accused is not relied upon ; held the conviction under Section 411, Penal Code would fail (198) 1 Crimes 556 (All) = 1984 Cr LJ 797 (All).

The factum of recovery of articles at the instance of the accused persons in the presence of police officers and panch witnesses who have deposed to the same is itself sufficient to bring the case not under the provisions of Sections 412, Penal

Code but also under Section 395 Penal Code with the aid of Section 114, of the Evidence Act, because recoveries were made very soon after the occurrence (AIR 1985 SC 486(488).

14. Recovery of articles on information given by accused.— Where the only incriminating circumstance against the two accused was that the stolen property was recovered from places not belonging to any of the accused as a result of simultaneous statements made by them to the police; it was held that in the absence of any other incriminating factors, mere discovery of articles from a place not belonging to the accused would not raise a presumption under Section 114, Illustration (a) either of the theft or of receipt of stolen property by the accused knowing it to be such (AIR 1955 Nag. 71 (DB); AIR 1934 Nag, 54). But where there are other facts which throw suspicion on the accused such recovery may be sufficient to raise a presumption under the Section. Thus where the accused produced stolen property but subsequently denied having done so, an inference can be drawn that the accused knew that property in their possession was stolen property (PLD 1967 Kar. 233).

Where in a theft case the accused who was declared an absconder surrendered and while in police custody, made a disclosure statement in consequence of which he discovered certain articles which were later on identified to have been stolen. It was held that the evidence conclusively established that the accused was found in possession of stolen property. The failure of the accused to account for his possession gave rise to a presumption against him that he was retaining the articles knowing them to be stolen. This presumption, against him was strengthened by fact, that he had absconded after the theft hidden copper linings of the ornaments, after extracting gold from them, in a forest. The intention of accused in retaining stolen property was nothing but dishonest (AIR 1964 H.P. 27).

Where in a case of murder, ornaments worn by the deceased at the time of her murder were recovered on the information given by the accused in the absence of any satisfactory explanation by the accused as to how he came in possession of articles, the Court can draw an inference that the accused committed murder or took part in its commission (PLD 1969 Dhaka 504 (DB): AIR 1949 Nag. 277= ILR 1949 Nag. 200).

15. Recovery from place to which public has access.— When a place in which the article is found is one to which several persons have equal right of access the article cannot be said to be in the possession of any one of them (PLD 1951 Bal. 30 ; 6 DLR W.P. 8 ; AIR 1954 S.C 39).

Where stolen articles are recovered from a well, the mere knowledge of the accused who is prosecuted for an offence under Section 411, Penal Code, about the stolen property (ornaments) being in the well, will not be sufficient to lead to the inference that he was in possession of those ornaments in the absence of any evidence as to who had kept the ornaments in well (AIR 1959 Pat. 54= 38 Pat. 151 = 1959 Cr. L.Jour 219 (DB).

16. Hidden property.— In cases of pointing out, especially stolen properties, the real question is not so much where accused was in physical possession of properties hidden some where or buried in some field as whether he was the person who so hid the properties, for a person who buries treasure in a spot unknown to others person is really in possession of it and it does not matter whether it is in a field not in his occupation or in his own house (AIR 1958 Mad. 384 = 1958 Cr.L.Jour 1042).

If it is established that the property was so secreted that no body else could have normally had access to it or would have known of it and if in those circumstances the accused takes the police party and produces the article from the place where it is securely hidden, then if no explanation is forth coming either in the statement of the accused or from other circumstances of the case, the conclusion must follow that the accused was in possession of that property which would give rise to a presumption under Section. 114 of the Evidence Act provided other conditions are fulfilled (1970 P.Cr. L.J. 293= 22 DLR 99; PLD 1962 Kar. 288; 1969 SC MR 867).

Where stolen articles were dug out from the house and given to the Investigating Officer by the accused himself, the accused must be considered to have knowledge that the articles, if they were stolen articles, were in the house. Even if the house was in joint possession of two or more persons, the others may not be held liable for possession of the stolen articles except on proof of their knowledge. Any person. who is proved to have knowledge of the stolen articles concealed in the house, cannot escape liability under the law for possession of the stolen articles (AIR 1955 N.U.C (All) 2735), because when a man points out unknown matter to others one may presume under Section 114, that he is connected with the crime unless he can give some satisfactory explanation as to how he came by that knowledge (AIR 1923 Bom. 183 =26 Cr. L.Jour·339).

If the evidence satisfactorily shows that the stolen articles were secreted in a bush and they were brought out by there accused themselves, in the eye of law the properties where in the possession of the accused because they themselves had concealed the stolen properties in the bush (59 Cal. W.N 1028 (DB).

Similarly stolen articles discovered on pointing out by the accused from a sugarcane field just close to his house soon after the occurrence and on the accused not explaining how he came to know of the same, must be presumed to be planted and possessed by the accused. It makes litle difference whether the stolen articles are discovered form the house of the accused or have been discovered at his pointing out from a ditch, pond, bush, jungle, sugarcane filed or similar other places which may not be in his direct domain (1970 P.Cr. L.J. 293 = 22 DLR 99=1970 DLC 37).

It is not necessary for conviction under Section 411, Penal Code, that the stolen property should have been physically produced from the actual possession of the accused. All that is necessary for the prosecution to show is that the accused person after the property was stolen came into control of the property and that he did so dishonestly or having reason to believe that it was stolen. Where the accused had pawned the stolen property, it was held that it satisfied the condition that the accused had come into possession of or had received the stolen property although at the time it was actually produced, it was produced not from the physical possession of the accused but from that of the pawnee (1957 Raj. L.W. 167).

17. Witnesses of recovery.— Where witnesses of recovery were not independent, and accused alleged enmity with them. Investigation Officer could give not explanation for no picking up independent and respectable witnesses. Prosecution witness was unable to identify the accused. It was held that statement of prosecution witness for alleged recovery of statement of prosecution witness for alleged recovery of rifle at pointation of accused was not reliable. Accused was acquitted (1984 P.Cr. L.J. 2630).

18. Identification of stolen property.- The accused cannot be convicted under section 411 unless the identity of the stolen property is established (Mahabir seo, AIR 1972 SC 642 = 1972 Cr LJ 485 = 1972 UJ (SC) 500.

If the stolen property cannot be identified, conviction under section 411 is untenable (1987 PCrLJ 1936). Where the owner of ornaments could not identify them because of weak eyesight and the other prosecution evidence of identification was not reliable; the accused was acquitted (1981 PCrLJ 296). Where case property was not got identified by recovery witnesses at time of their cexamination in court accused was given benefit of doubt and acquitted (1986 PCrLJ 402).

In the absence of any special identification marks, no absolute inference can be drawn from the mere similarity in size between the articles Where in such a case no identification proceedings are conducted before a Magistrate, the accused would be entitled to benefit of the doubt AIR 1951 Ajmer 50

Where no property whatever was produced before the trial court; the applicants were entitled to the benefit of doubt. (1985 PCrLJ 1260). Where cattle allegedly recovered from accused were not produced in court and shown to witnesses in order to fix identity of stolen property. Trial was vitiated (1985 PCrLJ 1575). Where the stolen cycle which was the subject matter of the prosecution was not produced in court or shown to the witnesses or to the petitioner during the trial. Only the number and make of the cycle which has been cited in the FIR and in the recovery Memo. Ex. P.A. had been put to the petitioner in his examination under section 342, Cr. P.C. This obviously was not enough, for the cycle being the case property, the same should have been produced and proved in court. In fact there was nothing to show that on the cycle. In this view of the matter the case property could not be held to have been properly identified. the accused was acquitted (PLJ 1976 Lah 201).

19. Burden of proof.— Initial burden to prove recovery of stolen property from possession of accused is on prosecution but once this is proved, burden shifts to accused to account for possession of stolen property (Shafithulls Baig (A—3) *v.* State of A. P. 1993 (2) Crimes 122 (A. P.).

20. Evidence and proof.— To sustain a conviction under section 411 it must be proved, inter alia that the stolen article was in possession of the accused. The intention is a necessary ingredient of the offence and the retention of the stolen property must also either be with the knowledge that it was stolen or that retention must be having reason to believe the same to be stolen property. Unless the article is in possession of a person, it cannot be said that he received the same or retained the same in his possession with the intent as visualised in the Code (Sultan Ahmed Vs. The State 17 DLR 228; AIR 1937 Lah 700).

A person in possession of the stolen property entering into an agreement with the owner thereof for restoration of such property without helping to bring the thief to justice cannot be convicted both under sections 411 and 215 of the Penal Code. No finding that the properties recovered were dishonestly retained by the accused knowing them to be stolen. He cannot be convicted under section 411 Penal Code (Peru Mia Vs. The State 16 DLR 574). The essentials to be established for a prosecution under this section are to bring him to the accused that, (a) that the stolen property was in possession of the accused ; (b) that some person other than the accused was in possession of it before the accused got possession of it ; and (c) that the accused had knowledge that such property was stolen property (Trimbak v. state, AIR 1954 SC 39 : 1954 Cr J 335).

The mere recovery of certain property from the house in which the two accused lived is not sufficient by intself to attribute guilty knowledge to either of them unless there are some other circumstances connecting them with the possession of the property. The mere fact of such production in those circumstances

shows nothing and does not establish any connection of either of the accused with the possession of the stolen properties (48 Cr LJ 720 = AIR Mad. 195 = 1946 MWN 732).

Where the stolen articles recovered from the accused's shop were "four bronze churis" but the Circle. Inspector has noted them as "four brass bangless" in the seizure memo, it was held that the accused cannot be concivcted even when the Circule Inspectior explained that he had entered them wrongly. (AIR 1974 SC 777 = 1974 Cr LJ 572).

Where the accused was convicted under Section 412 as the stolen articles were recovered from his possession but it was not quite clear from the evidence that five or more persons had committed robbery and the victimes of robberty had made clear and definite statements that three culprits robbed them, in the absence of evidence to indicate that a dacoity had been committed, the accused could not be convicted under Section 412 but could be properly convicted under Section 411 (1983 Cr LJ (NOC) 215 (Orissa).

Prosecution should prove that the accused had received or retained the stolen articles knowing or having reason to believe or having reason to believe the same of the stolen property for causing his conviction (1982 (2) Crimes 425 (Orissa). Where in the case of recovery of stolen property from accused, the independent witnesses turned hostile, the conviction cannot be based solely on the evidence of police constables (1984 Cr. LJ 797 (All).

To succeed in a prosecution under this section the prosecution must not only prove that the property was stolen property but must also establish facts from which the court can infer that the person charged with being in possession of stolen property either knew that the property was stolen or believed that same to have been stolen (AIR 1952 Cal 616 ; 'AIR 1950 Assam 193). The crucial points for consideration in a case under this section are, (a) whether the property before the court was stolen property; (b) whether the same had been in the possession of the appellant. If either of these points are not proved, the offence cannot be brought home. When the stolen property is pipe which does not bear any distinct marks it will be difficult to say whether the property before the court is the seolen property (AIR 1972 SC 642).

Where the accused was found in possession of stolen preperty within two days of theft the presumption that the accused received the goods knowing it to be stolen is proper and coupled with the absence of explanation from the accused regarding possession, the conviction will be proper (Virumal Mulchand, AIR 1974 SC 334 ; 1974 Cr LJ 277). Where stolen property was recovered after 2 years after murder and alleged theft, no presumption of theft or dishonest reception of stolen property can be drawn. There can be no offence of dischonestly receiving of stolen property unless the property answers the description of "stolen property" given in section 413 (Chandmal, AIR 1976 SC 917 = 1976 Cr LJ 679).

Where the accused failed to prove a document in support of the transaction of pledge and apart from the alleged stolen cycle, several other cycles were found in possession of the accused which he claimed to have been pleadged with him by the numbers of his family and in the absnece of account books or documents evidenceing the pledge to the case of pleadge cannot be believed and the acused was rightly convicted (Satnarain Sao, AIR 1972 SC 1561 : 1972 CR LJ 1048).

Where there was recovery of cloth, stolen in dacoity, from the accused three days after the occurrence, but no other stolen articles where recovered from him, his name not mentioned as one of the participants in dacoity either by any eye

witness or in dying declaration of person killed in dacoity and there was no evidence to show that in the village in which the accused lived, it was known that dacoity took place and goods were stolen, it was held that the only pesumption that could be drawn was that the accused knew that the goods were stolen but he did not know that they were stolen in daoity and he could be convicted only under section 411 (Sheo Nath v. state 1970 Cri LJ 601 (SC).

Where, a bullock was recovered from the possesion of the accused after a lapse of one month 17 days the recovery cannot be termed a recent recovery. If the recovery was not a recent one, then it was necessary for the prosecution to prove that some person other than the sccused has possession of the disputed bullock before the accused acquired it, as the change of hands was not proved by the prosecution, the case against the accused was dismissed (Nakali v. state 1978 Cri LJ 379 (All).

Where articles of a kind commonly used by ordinary peple, e. g. silver buttons and small bangles of silver, are found in possession of the accused about 9 months after the commission of a robbery and none of the articles bear any special mark of identification it would hot be safe to draw that presumption that the accused is either the thief or is retaining the property dishonestly (Phul Khan v. Emperor, A.I.R. 1937 Lah. 246 (246) : 38 Cr LJ 671; Charan v. State, 1958 Jab L. J. 264).

In Noba Kumar Das v. State of West Bengal (A. I. R. 1974 S. C. 777 (778), it was one Dr. Harendra Nath Mondal who porduced the wrist watch, handed it over to the appellant in the presence of the police and it was thereafter that the police went through the formality of seizing it from the appellant. The seizure list in regard to the watch was attested apart from Dr. Mondal by three witnesses. None of these witnesses supported the discovery of the watch. The churis were discovered from the appellant's shop and that seizure was attested by the same three witnesses. The witnesses did not support the seizure x of the churies either. It was held that the evidence failed to inspire confidance. The appellant could not be held guilty.

The patna High Court has held that in order to prove the property is stolen property, it is not necessary that the stolen property should have been proved to have been in possession of a particular person and in a particluar locality before it was stolen. It is enough that possession of property has been transferred by theft, or by extortion or by robbery or by criminal misappropriation (Raghu Nath v. state (1965) Cri LJ 570).

Thus where the accused was found in pessession of stolen goods within two days of theft the presumption by the court that the accused had received knowing them to be stolen was not improper, especially as the accused also failed to furnish an explanation for possession. (Virumal Mulchand v. state 1974 SCC (Cri) 431). However, where stolen property was recovered after two years of murder and alleged theft, no presumption of the theft, no presumption of theft or dishonest reception of stolen property can be drawn (Chandmal 1976 SCC (Cri) 120).

If the stolen article recovered from the accused is one which frequently changes hand, in such a case a much shorter period would be required before the court would be entitled to draw a presumption under Section 114 illustration (a) of the Evidence Act. However, if it does not normally change hands the court may draw presumption even after lapse of several months (Alisher 1974 Cri L J 897 (SC)).

Similarly when a barrel of gun was recovered from the accused either of nine months after the date of dacity, as a barrel of gun does not normally change hands the accused was held liable under the section (Alisher 1974 Cri LJ 897 (SC). Where the two deceased had gone to the fields with buffaloes and did not return and the

buffaloes were seized from the possession of acused, the accused could not escape conviction under Section 411 though he could not be convicted for murder (Joga Gola 1982 Cri LJ 1579 (SC).

Where the accused was found in possession of stolen property two months after the theft was committed, and gave no account of how he become possessed of it, but denied that he was ever in possession of any of the articles stolen, it was held that the accused should be convicted under this section and not under Section 379 (Madappa Tenvan (1981) 1 Weir 471, Jamna 1986 (2) Crimes 529). It the only evidence against the accused is his recent possession of the stolen property the better presumption would be that he was a receiver of stolen property (Udaya Padhan (1965) 1 Cri LJ 746. Nagappa 1981 SCC (Cri) 278).

The presumption from recent possession of stolen property is an optional presumption of fact under Section 114, Evidence Act. It is open to the Court to convict an appellant by using the presumtpion where the Circumstances indicate that no other reasonable hypothesis except the guilty knowledge of the accused is open to the prosecution. Where the explanation given by an accused raises serious doubts about sustainablity of charge, he is entitled to be acquitted (Karnal Singh Uttam Singh 1976 Cri LJ 842 (SC).

A year after the theft in the temple the accused came to the house of S. As the accused was a proclaimed offender, S called certain people for apprehending him. The accused was apprehended by these people. On search of his person five pieces of gold were recovered. While in police custody the accused made a disclosure statement that he had stolen six gold—plated moharas, and two gold—plated galpatas and a sankh from temple and that after extracting gold from moharas and galpatas hadburied their copper linings and the sankh under a tree in the forest and dug out, from under a tree copper linings of galpatas and copper linings of moharas and the sankh. Held that evidence of discovery of articles in consequence of the statement and recovery of five pieces of gold from the possession of the accused conclusively established that the accused was found in possession of stolen property.

The failure of the petitioner to accont for his possession gave rise to a presumption against him that he was retaining the articles; knowing them to be stolen, vide Section 114, Illus (a) Evidence Act, This presumption, against the petitioner was strengthened by the facts, that he had absconded after the theft, and had hidden the copper lininges of glapatas and moharas, after extracting gold, and the sankh in a forest. The intention of the petitioner in retaining stolen property was nothing but dishonest (Chunilal v. Union of Indai, AIR 1964 H. P. 27 (28).

21. Punishment.— Where the property found is the property stolen from a railway train, deterrent punishment should be given. In such a case a sentence of nine months regorous imprisonment does not err on the side of servity (1953 AIJ 173 = 1953 Cr LJ 1125).

Mere fact that person found in possession of stolen property was not the thief himself is no justifiction for not awarding appropriate sentence under Section 411 (1969 All Cr R 188 : 1969 All WR (HC) 73). Where the accused was convicted and sectenced to 3 years R.I. by High Court in 1973 and the appeal was heared by the Supreme Court under Article 136 of the Constitution in 1983 it was held fact was not by itself a ground to interfere with the sentence (1983 Cr LJ 683 = AIR (1983) 397).

On the question of sectence a long period for a boy may not be good for the future of the boy (AIR 1980 SC 636 = 1980 Cr LJ 494).

22. Practice and procedure.- Under section 239 of the Criminal Code, 1898 (Section 223 of the 1973 Code) serval accused can be tried jointly for offences under this section, provided the property was originally stolen on one occassion (Lakha Amra (1931) 34 Bom. LR 301 = 33 Cri LJ 394 = AIR 1932 Bom 201). Several accused can be jointly tried for offences under Section 411, Penal Code, provided the property was originally stolen on one occasion. Sub-section (f) of Section 239, Cr. P. C. 1898 permits such joint trial (33 Cr LJ 394 = AIR 1932 Bom. 201; 1955 Cr LJ 1553 = AIR 1955 All 696).

If more than one offence of theft has been committed in respect of certain property which could be designated as stolen property, within the meaning of Section 410, then the persons in possession of such stolen property which has been secured by means of the commission of several offences of theft or robbery, etc, cannot be tried jointly according to the provisions of clauses (f) of Section 239 (Section 223 of the 1973 Code) of the Code of Criminal Procedure (Bhaggan (1935) 11 Luck 70).

A persons accused of an offence under Section 457 can, by virtue of Section 239 (e) Criminal Procedure Code, 1898 (Section 233 (e) of the 1973 Code) be legally charged and tried with persons accused receiving or retaining the stolent property (Nawab (1936) 18 Lah. 62).

Where the evidence establishes an offence of dacoity and two offences under Section 412, Penal Code, all the offence must be held to have been committed in same transaction and a joint trial of several persons participating in such offence is permissible under Section 239, Cr. P. C., (24 Cr LJ 149 = AIR 1923 All 126 = 20 ALJ 981).

Where a person has been charged only for murder but the evidence disclose that he was gulity of the offence under Section, 411, it is open to the Court to convict him of that offence as he could have been charged under Section 411, Penal Code (23 Cr LJ 414 = AIR 1922 All 248 ; 20 All 96). But a person cannot be convicted both under sections 380 and 411 of the Penal Code, and sentenced separately under both the sections, if the accused is convicted under section 380, he cannot be convicted under section 411 as well (Muslim Mondal Vs. The State, 14 DLR 595).

Offences under Sections 457 and 436, Penal Code, with which a person is jointly charged cannot be tried along with offence under Sectiosn 411 and 414, Penal Code, of which other persons are charged, inasmuch as section 436, does not include theft or extortion though Section 457 does (29 Cr LJ 1080 ; AIR 1929 Lah. 142).

A person cannot be convicted both under sections 380 and 411 of the Penal Code, and sentenced separately under both the sections (Muslim Mondal v. State, (1962) 14 DLR 596).

23. Charge.— The charge should run as follows :—

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

That you, on or about the ..... day of ..... at ....., dishonetly received (or retained) stolen property, to with ....., belonging to one AB, knowing or having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under Section 411 of the Pens Code, and within my cognizance.

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

An omission to state in the charge under Section 411 that the accused received or retained stolen property knowing or havig reason to believe the same to be stolen property is not fatal to the case and if salient features in evidence were put to accused and defence taken by the accused in his statement under Section 342, showed that he understood the charge quite well, and therefore the accused, had not be prejudiced, conviction under this section need not be set aside (1970) P. Cr. L. J. 293 (Dhaka) = 22 DLR 99 = 1970 DLC 37).

412. Dishonestly receiving property stolen in the commission of a dacoity.— Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged a gang of dacoits, property which he knows or has reason to to believe to have been stolen, shall be punished with [1][imprisonment] for life, or with rigorous imprisonment for a term whcih may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope and applicability.
2. Recovery of stolen property.
3. Joint possession.
4. Section 412 and dacoity
5. Presumption under section 114(a) Evidence Act.
6. Evidence and proof.
7. Procedure.

1. Scope and applicability.— For the purposes of conviction under Section 412, Penal Code, the Court must come to the conclusion that the dishonest receiver of the stolen property should be in possession of the same knowing or having reason to believe that its possession had been transferred by the commission of dacoity (Moinuddin Mazumdar v. State of Assam, A.I.R. 1972 S.C. 635 (637). To sustain conviction for dishonestly receiving property stolen in the commission of a dacoity the property stolen in the commission of dacoity must be received or retained by persons other than the dacoits (Kashem Molla Vs. State (1990) 42 DLR 453.

For the applicability of Section 412, Penal Code, it is necessary for the prosecution to prove (i) that the property was transferred by stolen property, (ii) that the possession of such property was transferred by commission of a dacoity, and (iii) that the accused received or retained such stolen property (Balya alias Balaram v. State of Rajasthan, 1977 C. Raj. Cr. C. 289 (291); Amar Singh V. Staste of M.P., 1982 Cr. L.J. 610 (611).

In order to bring home the charge under Section 412 Penal Code it must be shown that the accused was in exclusive and conscious possession of the stolen property and that he knew or had reason to believe that possession of the same had been transferred by commission of dacoity (P.K. N V. The State of West Bengal (Cal). 1988 (1) Crimes 425 (Cal). None of the witnesses was able to identify the appellant at the T.I. Parade. However, the articles which were recovered at the instance of the appellant were the subject-matter of dacoity and properly identified by the owner of the articles :-It was held that in these circumstances there will be a presumption that the appellant was a receiver of the property, transferred to him, in the Course of dacoity. The conviction of the appellant was altered from one under section. 397, Penal Code, to that of one under Section 412, Penal Code (Chhote Lal Singh, V. State of Madhya Pradesh 1978 Cr. LJJ 1411, 1412) = A.I.R. 1978 S.C. 1390, 1978 Cr L.R. 147 (SC).

Recovery from the possession of the accused of certain ornaments identified as forming part of the proceeds of a dacoity within three weeks of dacoity was sufficient to bring the case under this section (Roshen Behari, 1957 Cr LJ 678). If a person is charged under Section 395 and also under this section, there are usually circumstances for presuming the knowledge of the accused. It may not, however, be appropriate to convict a man under this Section when he is not charged under section 395, in the absence of circumstances indicating or suggesting that he had knowledge that the property for the possession of which he has been charged has been obtained by dacoity (Chandra Pal AIR 1954 All. 648 (687).

For the purposes of conviction under Section 412, Penal Code, the Court must come to the conclusion that the dishonest receiver of the stolen property should be in possession of the same knowing or having reason to be believe that its possession had been transferred by the commission of dacoity. Having regard to the fact that the studio camera was unlikely to change many hands before it was traced to the appellant must have received the same knowing that it had been stolen in a dacoity. In the instant case the High Court did not give a clear finding on the fact though it reduced the sentence imposed by the Trial Court and had observed that the accused purchased the camera obviously knowing it to be a stolen Property because he got it cheap. Held that it would appear that the High Court felt that the offence must be one under Section 411, Penal Code, in which case, it would have been only fair if the conviction under Section 412, Penal Code, was changed to the under Section 411, Penal Code. In these circumstances, the conviction should be regularized by convicting the accused under Section 411, Penal Code (Moinuddin Mozumdar V. State of Assam, (1972) 1 SCWR 99 (101, 102).

The recovery was made within three days after the commission of the dacoity. The accused belonged to a neighbourning village. It was held that there was a presumption that he must be knowing about the commission of dacoity and also knowing that the article which was in his possession had been looted in a dacoity (Ishwari v. State 1980 Cr. L.J. 571 (574).

2. Recovery of stolen property.- Whered stolen property was recovered from the shop of a goldsmith at his pointing out within such time of dacoity that it could be safely inferred that he had retained it knowing it to be stolen and there was no explanation forthcoming as to why the police should have picked up only the accused for recovery fo the article and to fasely implicate him as alleged; the court convicted him of an offence under this section (PLJ 1980 Cr C. 258).

No man can be convicted under section 412 for 'receiving or retaining' stolen goods unless he is shown at the material time to have been in possession or control of the place where they were discovered or at least to have had some knowledge of their deposit there (AIR 1950 All 291). The mere pointing out of a stolen article in a public place is not sufficient to hold that he himself concealed the article in the palce where it was found Where there was nothing to show that the accused and no one else had concealed the goods at that place the accused cannot be convicted under this section (PLD 1966 Dhaka 98).

3. Joint possession- Where stolen ornaments are recovered from a house in which the accused and his brothers lived jointly, it is impossible to hold that the ornaments were in exclusive possession of the accused and so even if the property has been proved to be the proceeds of dacoity, it is not possible to convict the accused under section (412 AIR 1950 All 180). Where in a case of dacoity no stolen property is recovered from the accused but some of it is given up by his stepfather with whom he was living, the accused cannot be convicted under section 412 of the

Penal Code in the absence of sufficient proof that the property had been taken to the house inhabited by the accused and his stepfather (AIR 1933 Oudh 423). The stolen article was produced by the accused from an unlocked box lying in a house where the accused with his father and brother lived together. Held, this is not sufficient for a finding that the accused was in possession of the stolen article (Khan Vs. The Crown, 9 DLR 5 (WP).

Where stolen articles were recovered from an open trunk inside the room of a house occupied by several persons not being members of a hindu joint family and the prosecution led no evidence to show as to whom that particular trunk belonged, no one of them can be convicted under section 412. (Asmat Fakir v. state, (1958) 10 DLR 201 = PLD 1958 Dhaka 419). Even where the room is in joint possession of a husband and wife no one can be convicted unless it is shown to whom the box actually belonged (1950 All LJ 335). Similarly where dacoity is committed by the son the mere fact that the article taken in dacoity is found in a house jointly occupied by the son and his father is no ground for convicting the father under section (412. AIR 1941 Pat 223).

4. Section 412 and dacoity.- Where a person is not guilty under section 395 of the Penal code for committing a dacoity but where the looted propoerty is found in his possession, and he has knowledge that it is looted property, he can be held guilty under section 412; but where he is convicted under section 395 for committing a dacoity and it is in the course of that dacoity that the property which is found in his possession came to him, he cannot be held guilty both under sections (395 and 412. PLD 1966 Lah 643). Where certain property stolen in a dacoity is recovered from the houses of the accused at their instance 8 days after the dacoity but the court disbelieved the evidence relating to identification of the accused as those involved in the commission of the dacoity,(1958 Andh L.T. 476) or where it is found that the accused was not present at the scene of dacoity but was waiting at a distance in a lorry, AR 1955 NUC 4191 or where the article taken away by the dacoits was found in possession of the accused after about two months of the dacoity and he was convicted under section 395. It was held that it would not be either fair or safe to draw the presumption that he took part in the dacoity, but that the circumstances of the case and his association with the other accused justified the presumption that he received the article with the knowledge that it had been removed in a dacoity and therefore his conviction should be altered to one under section (412. AIR 1957 Tri 48).

5. Presumption under Section 114 (a) Evidence Act.— Presumption under Section 114 (a) of the Evidence Act can arise only if the prosecution has, by clear and cogent evidence, established that an accused person has been in possession of the stolen property (1984) 1 Crimes 909 (Orissa).

Stolen articles were recovered from the accused soon after the dacoity. Held, he is liable for dacoity under Section 391 and 412, Penal Code, in terms of Section 114 of Evidence Act (1958 CR LJ 753 (SC) = 1985 Cr LR (SC) 186 = (1985) 1 Crimes 165 = AIR 1985 SC 486).

6. Evidence and proof.— The points requiring proof are :

(1) That the property in question is stolen property.

(2) That its possession was transferred by the commission of dacoity.

(3) That the accused received or retained such stolen property.

(4) That he did so dishonestly.

(5) That he then knew that-

(a) the property he received had been transferred by the commission of dacoity

or

(b) that the transferor was a dacoit or belonged to a dacoity gang, in which case, prove further that he knew or had reason to belived that the property he received was stolen property (Abdul Sukkur v. State of Assam, 1976 CR. L.G. 378 (379).

In criminal cases the burden always lies on the prosecution to establish its case in respect of a charge by substantial and independent evidence and beyond reasonable doubt. Where the only two prosecution witnesses were witnesses of recoveries and they did not support the prosecution. On the mere word of the Investigating Officer, it can hardly be said that the charge under Section 412, Penal Code has been established (1968 P.Cr. L.J. 596).

Whether stolen property recovered from a persons possession has been subject of a mere theft or that of dacoity is question depending upon the facts and circumstances of each case (PLD 1966 Dhaka 98= 17 DLR 64 ; AIR 1955 N.U.C. (Bom) 6095).

Where the accused was living at K and the stolen property was recovered from the house of his mother who was living at F whereupon he was convicted under Section 412. It was held that the mere fact that the person from whose possession the recovery was made happened to be his mother or that the house concerned belongs to him is not sufficient to warrant a conclusion that A must have kept the said articles there or may be regard as having been in possession of the same. The conviction of the accused was set aside (PLD 1965 Dhaka 204 = (1965)17 DLR 15 (DB).

For a charge under Section 412 an accused person cannot be convicted under this section if it has been proved by the prosecution that the petitioners knew or had reason to believe that the property recovered from their possession was the proceeds of the decoity (1968 P. Ce.L.J. 1704 ; 1969 P.Cr. L.J. 1278; 1969 P.Cr ; L.J. 1077).

For the purposes of conviction under Section 412 the Court must come to a conclusion that the dishonest receiver of stolen property should be in the possession of the same knowing or having reason to belive that its possession has been transferred by the commission of dacoity. But where the only finding was that the accused bought the property knowing it to be stolen the conviction should be under Section 411 (AIR 1972 SC 635). For a charge under Section 412, along with the proof of knowledge or belief that the articles were stolen articles, it must also be proved that the accused had knowledge or belief that the possession of the articles had been transferred by commission of dacoity. The cannot be proved by presumption under Section 114, illustration (a), Evidence Act. Similarly merely showing that the accused had reason to suspect that the articles have been removed by dacoity would not suffice (ILR (1946) 2 Cal 619 ; AIR 1970 SC 535).

Where stolen property was recovered very soon after the dacoity had taken place and had been proved to have stolen in the course of the dacoity the case of the accused clearly fell within the ambit of Section 412, Penal Code. This was not a fit basis of presumption (under Section 114 of the Evidence Act) under Section 395, Penal Code (1982 Cr LJ 610= AIR 1982 SC 129). Where stolen property was found with the accused 4 days after the commission of dacoity, conviction was modified by the Supreme Court to one under Section 411 (AIR 1972 SC 635).

The evidence of the investigating officer as also the panch witnesses shows that the articles recovered were kept concealed either under a stone or under a bridge or at other places which cannot be said accessible to any ordinary person without prior knowledge (1985 (Cr) LR (SC) 186= (1985) 1 Crimes 611= (1985) 2 SCC 533=

1985 (Cr) 263= AIR 1985 SC 486). The accused was prosecuted for having received a stolen Hasuli which was recovered from him. The description of Hasuli did not match with what was stated in the FIR. Held, recovery is not proved and does not appeal to reason (1984) 1 Crimes 34 (All).

Along with the proof of knowledge or belief that the articles were stolen articles, it must also be proved that the accused had knowledge or belief that the possession of the articles had been transferred by commission of dacoity. This cannot be proved by presumption under Section. 114, Illus. (a) Evidence Act (ILR (1946) 2 Cal. 619 (DB). When a person is found in possession of property taken in dacoity and is unable to give any reasonable explanation for its being with him, it may be presumed that he knew the property to have been stolen but not that he knew or had reason to believe that it was the proceeds of dacoity rather than of a burglary or a theft. In order to justify his conviction on the more serious charge, there must be evidence, circumstantial or oral to show that he knew or had reason to believed that a dacoity had been committed and the property had been taken in it or that the person form whom he obtained it belonged to a gang of dacoits and the property was stolen property (PLD 1957 Lah. 261 ; AIR 1941 Pat. 223; AIR 1945 Bom. 392).

For a charge under this section along with proof of knowledge or belief that the articles were stolen articles, it must be proved that the accused had knowledge or belief that the possession of dacoity (AIR 1970 SC 535). Where stolen property was found with the accused after 4 days after dacoity conviction was modified by the Supreme Court to one under Section 411 (AIR 1972 SC 635 : See also 1958 Andh LT 476).

Where a person is found not guilty under section 395 for committing dacoity but where looted property is found in his possession and he has knowledge that it is looted property he can be held guilty under section 412. But where he is found guilty under Section 395 and in the course of that dacoity that property which is found to be in his possession came to him, he cannot be held guilty under both section 412 and section 395 (AIR 1956 All 336 = 1956 Cr LJ 622

Where articles were recovered very soon after the dacoity had taken place and had been proved to have been stolen in the course of the dacoity the case of the appellants clearly fall within the ambit of Section 412, Penal Code. This was not a fit case in which the appellants could have been convicted on the basis of presumption (under section 114 of Evidence Act) under Section 395 of the Penal Code. Therefore, the conviction of the appellants was altered from one under Section 395, Penal Code, to the under Section 412, Penal Code, and the sentence was reduced from four years to two years rigorous imprisonment (Amar Singh and others v. State of M.P. 1982 Cr LJ 610 (610, 611) = AIR 1982 SC 129).

7. Procedure.- It is quite meaningless to convict the accused both under Sections 395 and 412, Penal Code, with regard to the evidence about the finding of certain articles in their possession. If the Court is prepared to draw an inference from the fact that particular person is a thief, there would be no difficult in convicting him under Section 395. When it is proved that actually the property was stolen in the course of a dacoity. If the Court is not so satisfied ; The position becomes very different because, there being no evidence to prove that the accused knew or had reason to believe that the stolen properties were transferred by the commission of dacoity. If the charge under Section 395, Penal Code failed, the only alternative would be one under section 411, penal Code, (45 Cr LJ 468 ; AIR 1944 Cal 39).

Where a person is convicted under Section 395, Penal Code, for committing a dacoity and it is in the course of that dacioty that the property which is found in his possession came to him, he cannot be held guilty both under Sections 395 and 412, Penal Code, (1956 Cr LJ 662= AIR 1956 All 336).

Retaining stolen property is a continuing offence if an accused is previously acquitted of an offence of retaining articles of stolen property, subsequent prosecution under section 412 in respect of greater number of articles is not barred though they might have been received at the same time as those in question in the previous trial (Ashutosh Tokdar Vs. The State, 14 DLR 590).

413. Habitually dealing in stolen property.- Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

414. Assisting in concealment of stolen property.- Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Applicability.
2. Concealing or disposing of, or making away with.
3. Voluntarily assists in concealing etc.
4. "Knows or has reason to believe"
5. Proof.

1. Applicability.— This Section seeks to bring within its scope persons who are not thief's or receivers of stolen property; who have no custody or possession of stolen property but those who assist in concealing or disposing of or making away with such stolen, property. The section, therefore, will apply only to persons who voluntarily assist those who conceal or dispose of or make away with such property (Ram Bharosey v. state AIR 1952 All 418 =52 Cr LJ 904). The prosecution has to establish that the property recovered is stolen property and that the accused provided help in concealing and disposal of the said property (1964) 1 Cr LJ 129 = AIR 1964 SC 170).

Neither the thief nor the receiver of stolen property can come under this section (AIR 1952 All 481 = 1952 Cr LJ 904). It is not necessary for a person to be convicted under this section that another person must be traced out and convicted of an affence of committing theft. The prosecution has simply to establish that the property recovered is stolen property and that the accused provided help in its concealment and disposal (1964) 1 Cr LJ 129 = (1964)1SCJ 407).

The object of section 414 of the Penal Code clearly is to punish a person who assists in the traffic of stolen goods Section 379, Penal Code punishes a thief. Section 411 punishes a receiver of stolen property and section 414 punishes a person who assists in the disposal of stolen property (AIR 1952 All 481). Where the evidence shows that the part played by the accused consisted in his disposing of stolen property and not in receiving any of the stolen articles, the offence committed by him is one under section 414 of the Penal Code (AIR 1957 AP 482). Such persons may voluntarily asist in sellign or disposing of or making away with property (AIR 1952 All 481). They either conceal the property or make away with it by destroying or otherwise disposing of it. Persons, who deal with stolen property in

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

such a way that it becomes impossible to identify it or use it in evidence, are penalised by the section (AIR 1935 Lah 587). Section 414 aims at bringing within its scope persons who have not been proved to be in possession of the property. The thief naturally is in possession of the property. So is the receiver of the stolen property. But there may be a third category of persons who never get actual custody or possession of the stolen property and yet assist in its disposal. It is to that category of persons that section 414 of the Penal Code would be applicable. (AIR 1952 All 481).

For the application of this section it is necessary that the accused should have assisted someone else in the disposal of the property and does not cover a case where a person receives and then disposes of stolen property entirely on his own account. AIR 1926 Bom 71 DB Thus section 414 cannot apply to the case of a man spending money stolen by another, (AIR 1935 Lah 587) or to the person who restors stolen property to the owner (1948 Bur LR. 103).

This section applies only to a person who not having such possession of the property as would sustain a charge of himself concealing, disposing, or making away with it, voluntarily renders assistance in such dealing with it. It is necessary to allege and to prove assistance on the part of the acused person, and when there is no assistance, but sole possession in the character of owner and the act of disposal is done in such character and not otherwise, the section does not apply (1881 Pun Re. (Cr) No. 39 p. 97 DB). The word assistance, as used in section 414 of the Penal Code means that there must be a person assisted. Except in the colloquial sense, a man cannot be said to asist himself (AIR 1952 All 481). Therefore where a person sells a truck knowing that it was stolen property, it amounts to assisting in the disposing of and making away with the stolen truck within the meaning of section 414 of the Penal Code (1948 Bur L.R. 103).

2. Concealing or disposing of or making away with.- The words 'knows or has reason to believe to be stolen property' mentioned in the section indicate that the person voluntarily asisting in concealing or disposing of or making away with property must have definite knowledge that such property was stolen property. The word 'believe' found there is a very much stronger word than 'suspect', and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. It is not sufficient to show that the accused was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. The fact that the property dealth with is stolen property may in some instances be inferred indirectly from circumstantial evidence as from the way in which it is dealth with by the party dealing with it, but the circumstances must be such as would justify the conclusion that the property is actually stolen property (1969 PCrLJ 1563).

3. Voluntarily assists in concealing etc.— The words "disposing of" cannot be divorced from their context and the intention of the section is to punish person who subsequent to the commission of the offence either conceal it or make away with it by destroying or otherwise disposing of it. The Section is intended to penalise persons who deal with stolen property in such a way that it becomes impossible to identify it or use it as evidence. The section cannot apply to a case of a man spending money stolen by another (35 Cr LJ 1459 = AIR 1935 Lah 587).

4. "Knows or has reason to believe".- The word "believe" is much stronger than the word "suspect" and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convicted in his mind that the

property with which he was dealing was stolen property. It is not sufficient in such a case to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired (33 Cr LJ 764 = AIR 1932 Lah 434; 14 Cr LJ 591 (Mad); 17 r LJ 312 = AIR 1917 Mad 418; AIR 1927 Nag 40 = 27 Cr LJ 1144).

To render assistance in regard to a property known or believed to be stolen, in concealing or disposing of in a sinister manner is an offence and the prosecution is not bound to prove that it is stolen property (Hastimal Asaldas, 1975 r LJ 983). Where the accused did not participate in the dacoity or have received any article but it was established that he threw a bundle containing stolen property into a well at the request of the dacoits, it was held that the accused was guilty of an offence under this section (In re Boddu Sanyasi, AIR 1957 AP 482 = 1957 Cr LJ 393).

Where the driver of a taxi stoped the taxi to enable its occupants to quick and rob a person and driver drove away the taxi very fast, the driver of the taxi was held liable under this Section (Hari Singl V. State ILR (1940 2 Cal 9). In order to attract this Section it is necessary to show that the property in question is stolen property, that the accused knew it or had reason to believe that it is stolen property and the accused voluntarily assisted in concealing or disposing of such property (AIR 1924 Mad 350: 25 Cr LJ 590).

5. Proof.— In a criminal case the onus of proof is always on the prosecution. To bring case within the ambit of section 414 of the Penal Code, the prosecution must come to a clear finding in those points. Without a clear finding on those elements of the section, a conviction under section 414 of the Penal Code cannot be maintained (1969 P.Cr. L.J 1563 = 20 DLR 700).

Of Cheating

415. Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.-A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean. to pay. A cheats.

(b) A by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which a keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which he knows are not diamonds intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending or repay it. A. cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A. at the time of obtaining the money, intends to deliver the indigo plant and afterwards break his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys and estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

Synopsis

1. Ingredients.
2. Scope and applicability.
3. Intention
4. Cheating, criminal breach of trust and criminal misappropriation
5. Deception
6. Fraudulently or dishonestly induces.
7. Concealment of facts- Explanation
8. False representation
9. "Damage or harm to that person in body....."
10. Attempt to cheat
11. Abetment
12. Evidence and proof

1. **Ingredients.-** The ingredients of cheating are deception of one person by another person and fraudulently or dishonestly inducing the person so deceived to deliver any property. It is therefore clear that the acts of deceiving and thereby dishonestly or fraudulently inducing the person deceived are acts which must precede the delivery of any property. Consequently if the delivery of the goods is made not as a result of any dishonest inducement then no offence of cheating is committed. In a case of supply of goods on promise to pay its price the all important question to be determined is whether the intention not to pay the price was there when the promise was made. For subsequent failure to keep the promise to pay does not constitute cheating. This will be mere breach of contract for which the person breaking it is liable for a civil action (Md. Anwar Ali Vs. State (1958) 30 DLR 327; (1958) 10 DLR 325; Akamuddin Vs. State (1975) 27 DLR (SC) 175).

The main ingredient of the offence of cheating as defined in Section 415, Penal Code, is that there should be fraudulent or dishonest inducement to the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentional inducement to the person so deceived to do or omit to do any-thing which he would not do or omit if he were not so deceived (State of Uttar Pradeh V. Ram Dhani Pandey, 1980 All. LIJ. 1067 (1069); Akamuddin Ahmed V. State (1975) 27 DLR (SC) 175).

Where the accused gave a post dated cheque to the complainant for a certain sum when in actuality he did not have sufficient amount in the bank to meet the cheque and there was not a word in the written complaint or in the complainant's evidence in Court to show that he parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonored by the bank, it was held that the accused could not be held guilty of cheating (R.S. Ratra V. Ganesh Dass, AIR 1940 Lah. 93 (94) =187 I.C. 123).

The offence of cheating under Section 420 of the Penal Code as defined in Section 415 of the Code has two essential ingredients, Viz (1) deceit, i.e. dishonest or fraudulent misrepresentation to a person, and (2) the inducing of that person thereby to deliver property (Mubarik Ali Ahmad v. State of Bombay, AIR 1957 SC 857 (867) = 1958 SCJ 111).

2. Scope and applicability.— Section 415 consists of two parts, Deception by fraudulently or dishonestly inducing a person to deliver any property to any person or to consent that any person shall retain property is cheating under the first part of the definition. Deception of any person by intentionally inducing that person to do or omit to do anything which he would not do or omit to do if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is cheating under the second part of the definition. Under the first part, one of the important ingredients of cheating is that the act of the accused must be done fraudulently or dishonestly and the act must result in inducing the person deceived to deliver property or consent to retention of property. For the application of second part, two conditions must be fulfilled: (i) a person must be intentionally deceived to do or omit to do something which he would not other wise do, and (ii) such at or omission causes or is likely to cause damage or harm to the person deceived in body, mind, reputation or property (1952) Cr LJ 812= AIR 1960 Bom 268= 61 Bom LR 1648 ; 2 Cr LJ 422).

The section deals with three kinds of inducements, i.e. fraudulent inducement, dishonest inducement and intentional inducement. The first two kinds of inducements come into play when the case against the accused fails under the first part of the definition, while intentional inducement is recovered by the second part of the definition (1960 Cr LJ 812=AIR 1960 Bom 268 = 61 LR 1648; 2 Cr LJ 422).

Under the first part, the moment a person is deceived and by the practice of such deception a property is fraudulently or dishonestly obtained from him or the deceived person is induced consent to the retention of that property by the person is induced consent to the retention of that property by the person who obtained it, the offence of cheating is committed. The prosecutor in this case need not prove that damage was caused or was likely to be caused. (1961 Mys. LJ 1070 = (1962) 2 Cr LJ 559).

The section contempaltes that cheating may be affected either by (i) fraudulently or dishoenstly inducing a person to deliver property, etc. or (ii) by intentionally inducing a person to do or omit to do something which causes damage to such person. Whereas the words 'whoever by deceiving any person apply to the whole section, the words which act or omission, etc. apply only to the second method of cheating (AIR 1933 Cal 336). The word 'manner' in section 223, Criminal Procedure Code, could fairly be interpreted as including every ingredient by virtue of which the act ceases to become one of the mere non-criminal deception and becomes one of 'cheating' within the meaning osection 415 of the Penal Code and the effect of the deception upon the victim's body, mind, reputation or property would thus be a part of the manner of cheating. (AIR 1938 Lah 828 = 40 Cr LJ 371)

3. Intention.- In order to constitute cheating it must be established that some one is made to part with some property on the promise of another to return something in lieu thereof which the latter had no intention to give. The initial intention to deceive, therefore must be established in order to justify conviction for cheating (1984) 36 DLR (SC) 14). Where there was a reasonable possibility that accused may be acting without dishonest intention there can be no conviction under this section (1982 SCMR 788). Intention to cheat can be gathered from surrounding circumstances. (AIR 1960 All 103). Thus where the accused advertised sale of a book

which was not in existence, by a fictitious author, and made elaborate arrangements to receive remittances from persons ordering the book so that the receipt of the same may not be traced to him, his conduct clearly showed his intention to defraud (13 Mad 27 DB). But where the act is such that it cannot eb definitely said to be the result of criminal intention though it may point in that direction, no inference as to criminal intention can be drawn from it. Thus mere taking of thumb impression on ablank piece of paper is not sufficient to prove an intention to use the paper dishonestly and does not constitute an offence under section (415 AIR 1926 Pat 267).

Where the accused had an intention to pay against delivery of goods and no intention to cheat at the initial stage the fact that he did not pay would not convert the transaction into one of eheating. On the other hand where there was no intention to pay but payment was promised in order to induce the complainant to part with the goods then in that case cheating would be established (Manoranjan Haldar v. Mech-fab Engineering Industries 1984 Cri LJ 1265 (Gau).

In a case of cheating the intention of the accused at the time of the offence is to be seen and the consequence of th act or omission itself is to be judged PLD 1959 Dhaka 88. Subsequent conduct may only be evidence to show what the intention of the party at the time of the act was. Taking money one day and absconding sometime later, by itself, cannot show that the intention at the time of taking the money was necessarily to cheat (AIR 1934 Pat 231).. Where the accused had, at the time when he promised to pay cash against delivery of goods sold to him by the complainant, no intention to deceive, the fact that he did not apy would not convert the transaction into one of cheating. But if on the other hand, he had no intention whatsoever to pay but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating would be established (AIR 1954 SC 724 = 1954 Cr LJ 1806).

4. Cheating, criminal breach of trust and criminal misappropriation.— Cheating differs from the last two offences in the fact that the cheat takes possession of the property by deception. There is wrongful gain or loss in both cases and in both cases there is an inducement to deliver property. Cheating is a complete offence by itself and is not a form of criminal breach of trust. A person who thinks another into delivering property to him bears no resemblance to a trustee in the ordinary acceptation of that term (37) Cri LJ 637 = (1936) AIR (M) 353 (FB).

Further, in case of cheating the dishonest intention starts with the very inception of the transaction, But in case of criminal breach of trust the person who comes into possession of the movable property receives it legally but illegally retains it or convets it to his own use against the terms of the entrustment (Thomak K.C. v. Avirah Varghese 1974 Cri LJ 207 (Ker).

5. Deception.— The result of the deception is to induce, fraudulently or dishonestly, the person deceived any property etc. to any person or intentionally inducing that person to do or omit to do anything etc. Where the prosecution case is that persons who granted the permit as well as the person who obtained the permit were all in the conspiracy, there can be no question of one deceiving the other (1953 Cr LJ 1289 = AIR 1953 (225).

Where the complainant who a businessman had every opportunity to find out all about the business and did in fact participate in it , no offence of cheating was committed, if the complainant invested money on certain representations of the accused (43 Cr LJ 73 = AIR 1941 Sind 198 = ILR (1941) Ker 345). A fraudulent representation got made through a person acting as an agent against for the accused

amount to fraudulent representation by and on behalf of the accused (1962) Cr LJ 722).

Deception is the quintessence of the offence. It must be caused by the accused to generate inducement in the mind of the complainant. It may be caused by the express words or by conduct. The false representation must relate to a certain future event. It must be desceptive in nature and character and the accused must know it to be fake, or false at the time of making it. A mere failure to honour a promise does not by itself constitute the offence of cheating (1982 Cr LJ 2266 (Goa).

There was no evidence that the accused person had lifted the cement quota of the complainant who was refused issue of process. Held, refusal was justified. (1984) 2 Crimes 880 (Orissa)

The essence of a charge of cheating is that the complainant should have been deceived (AIR 1941 Sind 198). The acts of deceiving and thereby dishonestly or fraudulently inducing the person deceived are acts which must precede the delivery of any property (1978 DLR 327 DB). There can be no cheating unless by reason of deception, the person deceived was induced to part with any property to do or omit to do anything that he would not do or omit to do but for the deception (PLD 1959 Lah 372). If the person sought to be deceived already knew real facts and was therefore not deceived by the misrepresentation, it cannot be said that the accused who made those misrepresentations was guilty of an offence under section (415. PLD 1959 Lah 372).

6. "Fraudulently or dishonestly induces."- Whenever the words "fraud" or "with intent to defraud" or "fraudulently" occur in the definition of a crime, two elements are essential to the commission of a crime viz, (1) deceit or an intention to deceive or, to some case, mere secrecy, and (2) either actual injury or a risk of possible injury, and intention to expose some person either to actual injury or a risk of possible injury by mean of that deceit or secrecy. The term "fraudulently" may be defined to imply an intent to deceive in such a manner as to expose any person to loss or risk of loss. The term "dishonestly" implies a deliberate intention to cause wrongful gain or wrongful loss, and when an intention is proved, and is coupled with cheating and the delivery of the property, the offence is punishable under Section 420, penal Code, in Which the term "fraudulently" finds no place. A, for example, may by a false representation induce B to advance him a sum of money in such circumstances that A is aware that he is exposing wrongful loss. A would be acting fraudulently, and if he intended to cause wrongful loss. would be acting dishonestly. In the former case, he would be punishable under Section 417, Penal Code and in the latter under Section 420, Penal Code (22 Cr LJ LT 721; AIR 1922 LoW Bur 10 = 13 Bur LT 239).

Where there is no evidence of criminal intention at the time the offence is said to have been committed, the offence cannot be said to have made out (1973 Cut LT 579 = 1964 Ker LT 724 = 1971 LW (Cr) 252; (1964) 1 Cr LJ 374 = 1969 Pat LJR 360 = 1972 SCC (Cr) 705). Mere error of judgment or breach of duty is not to establish means mens rea (1974 Cr LR (SC) 457; AIR 1974 SC 1560 = 1974 Cr LJ 1026).

Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false (AIR 1951 Nag 315). Where a woman was fraudulently induced to believe that she was executing a conveyance deed for Rs. 13,000 when the conveyance was for Rs. 7,500 only; it was held that the signing of conveyance and handing it over to the purchaser would come within the latter parts of sections 415 and 420. (6 SAU L. R. 466 DB).

The provisions of section 415 require that there should be fraudulent or dishonest inducement. Further the person induced should be deceived. Finally the deception should be of the nature to prompt the person induced to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property (PLD 1981 SC 607). Where there is no element of deception or of dishonest inducement there can be no conviction under this section (1976 PCrLJ 22). Thus where the accused honestly believed that he was god incarnate, and induced others to believe it and there was nothing to show that he was practising deception, he could not be held guilty under section 415 (AIR 1952 Ori 149).

The accused obtained loans from the bank by making fraudulent representations. Even though each advancement of loan was made on the security of property and thus there had been no loss to the bank yet as each of the borrowers had made a wrongful gain to himself by making dishonest representation to the bank in getting the loan amount they were held guilty of the offence of cheating (State v. Ramds Naidu 1977 Cri LJ 2048 (Mad).

The accused consigned small quantities of goods but subsequently tempered with the railway receipts by showing that the consignments were of large quantities. The accused then endorsed the railway receipts in favour of one of the firms belonging to them. Those firms drew large sums of money commensurate with the large quantities of goods specified in the forged receipts and on the security of these receipts drew demand drafts or hundis in favour of varioud banks. It was held that where a consignment on some firm and supports that hundi with the railway receipts obtained by him in respect of the consignment, the party in fact pledges the consignments to the bank discounting the hundi and, therefore, in such a transaction the railway receipt cannot be regarded as any thing else than a security for that transaction. If that security turns out to be worthless or practically worthless because the value of the consignment, is only a fraction what it was represented to be, the discounting of the hundi by the party in drawing it must necessarily be regarded as unlawful. It was held that the accused by obtained credits for large amounts on the strength of hundis supported by froged railway receipts had made a wrongful gain and, therefore, was guilty under Section 420 Penal Code (1963) 1 Cr LJ 623= AIR 1963 SC 666).

7. Concealment of facts-Explanation.— The accused executed a hypothecation bond in favour of the complainant for a sum of Rs. 350 in respect of a certain property on the representation that the property belonged to him and was without any encumbrances. Relying upon these representations, the complainant parted with the amount. It was discovered that on the date of hypothecation the accused was not entitled to the property as he held gifted the said property to his wife and prior to the gift deed, he had assigned and sold away his half rights in the property to his wife. But there was a covenant in the hypothecation bond to the fact that the complainant would make good any loss suffered by the accused. It was held that merely because there is a covenant in the hypothecation bond to make good the loss if any, would be wholly an inadequate ground to throw out the case. When there is clear evidence of a criminal offence being committed and that the existence of a civil remedy would not necessarily include the trial by criminal court of a criminal offence (1962) 1 Cr LJ 649= 1961 Ker LT 318).

Where accused gifts his land to his son and it is in his sons' possession and also mutated in his name and subsequently against sells if for consideration to the complaint without disclosing the gift, he is guilty of cheating. (1959 Cr LJ 740 = AIR 1959 Manipur 26).

where a woman after about five months of her marriage gives birth to a child by another person, her husband cannot have her punished under Section 417 for dishonest concealment of fact of pregnacy, as there was no wrongful loss to the complainant of any property (76 Bom LR 424 = 1974 Mah LJ 659 = 1975 r LJ 173).

8. False representation.- A false representation will come within the mischief of section 415 only if it is false to the knowledge of those making the representation (1964) 16 DLR 23). Delivery of property must rate to false representation. The false pretence must be of a fact that exists or has existed (1969 Mad LJ (Cr) 100 Ker). A statement purely affecting the future will not be sufficient (1965) 2 CrLJ 499=1969 Mad LJ (Cr) 100=1969 Ker LT 155).

Where the accused falsely represented that the property in question was not encumbered and got an advance of money against it, and the previous charge against the property was not registered, the representation was not merely concealment but was false representation amounting to the offence of cheating (PLD 1965 Lah 675; AIR 1937 Sind 56).

Where a government servant by false representation secured orders from his superior for disbursement of salary to him for the period during which he was absent without leave and was not entitled to any salary, it was held that a case of this type therefore, would seen fairly to fall within the four corners of section 415 (PLD 1960 SC 168). If it can be established that the accused made a false representation at the time when he entered into an agreement with the complainant and induced him to part with money, then certainly his act would be cheating (AIR 1952 J&K 26=1952 CrLJ 1230).

False representation need not be addressed to a specific individual. It may be addressed to the public in general (M.F.N. Rewail Vs. The State, 8 DLR 569).

9. "Damage or harm to that person in body".- Damage or harm in mind covers both injury to mental faculties and also mental pain or anguish (1961) 2 Cr LJ 759). The expression "harm" connotes hurt, injury, damage, impairment, moral wrong or evil (AIR 1966 SC 1773= 1966 Cr LJ 1489).

Though the oath commissioner was induced to attest the affidavit by wrong identification made by the appellant, there was no likelihood of any damage or harm to him in body, mind reputation and property and therefore the oath commissioner was not cheated (1970) SCC 407; 1971 Cr LJ 12; 1970 SCC (Cr) 516= (1970) 2 SCWR 612).

The accused who was at the time serving as a Civil Assistant Suregeon on a temporary basis, applied for the permanent appointment to the post notified by the Public Service Commission. He made false representation as to his name and qualification in his application. The accused was appointed and drew his salary for several years. He was convicted for the offence under Section 415, Penal Code. It was held that as the accused had served efficiently and obtained good reports from his superiors, he had not committed an offence under Sections 415, Penal Code, even though he had deceived Public Service Commission leading to as offence under Section 419, Penal Code (1965) 1 Cr LJ 355= AIR 1965 SC 333).

Where a wrong identification was made before the oath Commissioner in getting an attestation to an affidavit for being sworn to by reason of a deception practiced by accused in wrongly identifying some person but no damage or harm was caused to the oath Commissioner it was held that in the absence of the main ingredient constituting the offence the accused could not be convicted (AIR 1977 SC 1174).

10. Attempt to cheat.- There is a wide difference between preparation and attempt to commit an offence. Preparation consists in divising or arranging means necessary for the commission of an offence; an attempt is direct movement towards the commission after preparations are made (AIR 1923 Pat 307). An attempt to deceive by a false representation of facts involves that the person charge should have taken some step towards the communication of the presentation to the person whom it was his intention to decive (8 Cal WN 278 FB). Thus where the accused borrowed from P.W. 1 a sum of Rs. 800 and executed a pronote. He paid Rs. 36-8-0 on a certain date. according to an arragement , a few days later the accused and P.W..1 met at the house of P.W. 2 and the accused represented that he was going to pay a sum of Rs. 13-8 to make up Rs. 50, placed the money near P.W2 and wanted the complainant to endorse on the back of it this payment or Rs 50 but instead of that entered a payment of Rs 750 and when he was questioned, asked P. W.s. 1 and 2 to come to his house to get the entire sum of money and went away on his bicycle and was chased in vain by them. When he was finally cornered he stated that what had been entered as payment had been entered as a payment and he would not give any further satisfaction. It was held, that what the accused intended and did not achieve went beyond the stage of preparation and constituted a criminal attempt at cheating (AIR 1953 Mad 609).

11. Abtement.- A person who aids or helps another in the commission of an offence under section 415 may be held guilty of abetment of the accused. Thus a broker selling on behalf of the principal saccharine adulterated with bicarbonate of soda as genuine saccharine and receiving brokerage was held guilty of abetment (AIR 1924 Bom 303). Where the principal accused has already been acquitted by the court, it is not proper to make an alleged abettor a scapegoat and convict him on the basis of the same evidence (1968 PCrLJ 50).

12. Evidence of proof.- The principal accused printed false receipts and collected donations for a relief fund. The co-accused however was neither shown to have knowledge that the receipts were forged or to have derived any benefit from the funds so collected and nor did he share any fraudulent intention along with the main accused. It was held the conviction of the co-accused was improper as merely moving along with the main accused was not sufficient to indicate his complicity (Darathlal Chanderlal joshi v. state 1979 SCC (Cri) 974).

Giving of cheque in lieu of money due with the knowledge that the drawer had no funds with the bank does not amount to an offence of cheating in the absence of any evidence to show that the person to whom the cheque was issued parted with any property or that he did anything which he would not have done had he known that the cheque would be dishonoured (Nagarajan V. Chitibaina Yerraiah 1985 Cri LJ 1839 (Ori).

The dishonouring of a cheque for an antecedent debt does not amount to cheating (Eswara Reddy v. state 1986 Cri LJ 207 (AP). In order to make out an offence of cheating the presence of the dishonest intention from the beginning is necessary (Madhu Gangadharadas Punjabi v. state 1979 Cri LJ (NOC) 205 (Cal).

416. Cheating by personation.- A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.-The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

417. Punishment for cheating.- Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.— Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

419. Punishment for cheating by personation.- Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property.- Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Synopsis

1. Scope and applicability.
2. Cheat.
3. Dishoestly.
4. Dispute, when can be said to be a civil nature.
5. Section 420 and other allied offences.
6. Fraud.
7. Misappropriation.
8. Concealment of facts.
9. Valuable security.
10. Failure to pay price of goods purchased.
11. Dishonouring of cheques.
12. Partnership firm.
13. Breach of contract.
14. Preparation and attempt to commit the offence of cheating.
15. Burden of proof.
16. Evidence and proof.
17. Punishment.
18. Practice and procedure.
19. Charge.

1. Scope and applicabillity.-The offence of cheating is made up of two ingredients, namely : (1) deception of any person and (2) fraudulently or dishonestly inducting that person to deliver any property to any person or to consent that any person shall retain any prperty (Public Prosecutor v. K.M. Vendantam, AIR 1952 Mad. 183 (183). Where the facts do not disclose any criminal offence against the accused, only a civil remedy is open ot the complainant and there can be no criminal prosecution PLD 1958 Lah 738. Where it is doubtful whether a civil suit or criminal complaint would be the proper remedy the matter should preferably be taken to the civil court, and not to the criminal court. 37 CrLJ 38. Where a civil suit and a criminal complaint are both pending in the same matter, and it appears that the

matter can best be decided by the civil court, criminal proceedings should be stayed pending disposal of the civil suit. (AIR 1930 Lah 664). But criminal proceedings were not stayed where criminal conspiracy to cheat was found present. (PLD 1975 Cr. C 29).

Where the respondent pursued his remedies in civil court involving transaction entirely civil in nature but his suit was dismissed on merits and he resorted to criminal prosecution of the petitioner after dismissal of the civil suit, the proceedings against the petitioner amounted to an abuse of process of the court and were quashed. (NLR 1981 Cr. 198). Where the liability of the accused was civil but criminal proceddings were commenced against him only to bring pressure to bear on him, such proceedings must be quahsed (1981 PCrLJ 767).

Same points as those for Section 415 Penal Code. The only difference is that the latter part of Section 420 is confined to cases of cheating where the injury caused is the delivery of porperty, or the making, altering or destroying wholly or partially, a valuable security or making or destroying anythings signed or sealed which is capable of being converted into a valuable secutiry (1973) Cut LR 1073 = AIR 1963 SC 666 = (1963) 1 Cr LJ 623 = 1-72 All Cr R 23 = 1969 LW (Cr) 37 = (1974) 40 CLT 57).

For establishing an offence under this section it is necessary there should be direct connection between the false representation and the delivery of the property for the doing of something by the person deceived. It is also necessary that the act or the omission complained of should cause or is, likely to cause damage or harm to the person in body, mind, reputation or property, An application for loan with false particulars is not likely to cause any damage to the property of the bank (Public Prosecutor v. Thalla Gangaharudu, (1956) 2 Andh. W. R. 805 (807) = 1956 Andh. L.T. 678).

The offence of "cheating" under section 415 of Penal Code does not include the case of a woman who is made to surrender her chastity to a man on a false promise to marry (Joleswar kalita v. State of Assam & anr. 1988 (1) Crimes 632 (Gau).

Where there is no allegation in the complaint petition or the statement on oath that the petitioner deceived the opposite party, nor there is any allegation that he fraudeulently or dishonestly induced the opposite party to part with the money, no offence under Section 420 Penal Code, is made out. Incurring a debt with a promise to pay back within a certain period and failure on the part of the contractor to pay back within the stipulated period does not make it a criminal offence. It is a pure civil liability enforceable through the Civil Court (Satyabrata Bhattacharyya v. Jarnal Singh, 1976 L.J. 446 (447-48).Money realised for works done on contract but done imperfectly and with materials other than these agreed to by presenting a voucher certified by two Union Council's members which voucher not signed by the accused but some one else in his (accused) name does not make out case of cheating under section 420 (Lutfar Rahman Vs. The State, 25 DLR 101 SC; 21 DLR 933).

2. Cheating.- In order to constitute an offence under section 420 of the Penal Code some one is to part with some property and promise of another to return on to give something in lieu of that which later had no intention to give. The initial intention to decieve must be established to justify conviction for cheating (1975) 27 DLR (AD) 175 ; 1987 BLD 164).The intention to cheat must be proved to have existed at the time when the offence was committed. Subsequent conduct is not a valid criterian (1960) 12 DLR 520).

According to the language of Section 415 which defines cheating there are two parts. Under the first part the person deceived must have been fraudulently and

dishonestly induced to deliver any property and second part is in respect of a person who by deceving another intentionally induces the persons deceived to deliver the property. So, in order to constitute cheating there must be fraudlent and dishonest inducement for delivery of property by way of cheating (Shaikh Obaidul Haque Vs. The State (1986) 38 DLR 105.If a person undertakes to supply goods of a specific description on the condition that the goods will be subjected to scrutiny before final acceptance, and will be liable to rejection if they are discovered to be of different quality and quantity, and supplies goods which are not of the specified quality and takes the risk of loss arising from rejection, he does not commit the offence of cheating as defined in section 415 of the Penal Code. He commits no deception unless he so plays with the goods as to conceal its defects, and gives to them the colour to appear as goods of the specified quality. There can be no cheating without deception, and there can be no deception without misrepresentation, takes place only when a person by his conduct changes the face of the article offered for acceptance (M. Sharit Asgar Vs. The State, 11 DLR 90 (WP).

In the instant case an intention to cheat commenced from the inspection of the case. Revision rejected (1985) 2 Crimes 415 (All) = 1985 Cr LJ 1674 (All). The petitioner had cheated on "K" depriving him of Rs. 900/- and "K" corroborated the evidence, Conviction was maintained but sentence modified (1985) 2 Crimes 295) (MP).

The accused projected himself as a scheduled caste candidate while appearing in an I. A. S. Examination. He did so to gain an appointment in its cadre by false representation. Held, conviction was justified (1985) Cr LJ 1984 (WB). Loan taken on representation to pay dishonestly inducing a person to lend the money having no intention to repay will be an offence of cheating. (Shafiuddin Khan. Vs. State 45 DLR 102 = 1993 BLD 362). Money transaction in business can not from the besis of proceding for cheating. (1990 BLD (AD) 168).

It is not correct to say that in a case of cheating there is no necessity to prove initial intention to deceive and that subsequentl conduct of the accused is enough to find him guilty. (Abuld Karim Vs. Shamusl Alam 45 DLR 578). At the inception of a transaction what matters is intention but the same may be change of mind and conduct subsequestly but the same is not relevant to prove an offence of cheating. His Committal act at the inception is sent at the stage when inducements is offered to effect cheating. (1985) 1 Crimes 529 (Del).

Affidavit was alleged to read "permanently" for "three year" for procuring customs clearance in respect of Mercedes Benz Cars. The offence was traced after 20 years. Held, no useful purpose would be served from the prosecution of the accused (1985) 45 (SC) 815).

Four labourers were wrongly marked present for misappropriating their wages by giving them false attendance. On acquittal by the Trial Court, state appeled ; held that attatements of P. W. 6 narrating their checking and finding the aforesaid labourers present nagatives the contention of their absence. Where the statement of the labourers is contradicted by either P. Ws. the allegation becames suspect for which the defence case of their being enimical to him stands established for proving forgery, the attendance should be proved to have been recorded dishonestly that is, the offence was intentionally and deliberately committed with dishonest motive. There is no evidence to show that the labourers could not be present nor is it stated that it could not be so recorded by mistake. There is no case made out for having caused a wrongful loss to Government and to proceure a wrongful gain to self (1984) 1 Crimes 43).

Money realised for works done on contract but done imperfectely and with materials other than those agreed to by presenting a voucher certified by two union Councils members which voucher not signed by the accused but some one else in his (accused) name does not make out, a case of cheating under section 420 (Lutfar Rahman Vs. State (1973) 25 DLR (SC) 101; (1969) 21 DLR 933). In dealing with an offence under section 420, it is necessary for a Court of law to find whether the person making the representation and the knowledge that the statement made by him was false (A.M. Serajul Huq Vs. State (1962) 14 DLR 265).

3. Dishonestly.-The word "dishonetly" implies a deliberate intention to casue wrongful gain, or wrongul loss, and when this is coupled with cheating and delivery of property the offence is punishable under this section (Bashein (1920) 10 LBR 366 : 22 Cri LJ 721).

There are two factes of the definition "dishonestly", namely, the intention of causing wrongful gain to one person or wrongul loss to another, and it is enough to establish the existence of one of them. The law does not require that both should be establised (Tulsi Ram (1963) 1 Cri LJ 623 (SC) = (1963) 1 All 840).

Where there was no question of dishonest intention, conviction under this section cannot be sustained (Laxmi Narain (1955) Cri LJ 948 (SC)).

Where the charge against the accused was that he induced the complainant to part with his goods, on the understanding that the accused would pay for the same on delivery both did not pay, if the accused had at the time he promised to pay cash against delivery an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But, if on the other hand, he had no intention whatsover to pay but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating would be established (Mahadeo Prasad, v. state (1954) Cri LJ 1806 (SC)).

4. Dispute, when can be said to be of a civil nature.-It is only in those cases where the representation on the basis of which the money is obtained by an accused person was correct at the time it was made or was not false to the knowledge of the accused and only subsequently the acused became dishonest or failed to carry out his part of the contract, that the dispute can be said to be a civil nature (A. C. Budwar v. State, 1957 A. W. R. (H. C.) . 293 = 1957 A. L.J. 141).

Where business transactions were going on between the complainant and the accused for a long time relating to supply of fish and the latter made payments in parts. A balance amount claimed by the cmplainant was not agreed on and the accused refused to pay it. This refusal to pay the balance does not constitute any oriminal offence under sections 406/420 Penal Code (Islam Ali Mia Vs. Amal Chandra Mondal (1993) 45 DLR (AD) 27; Syed Ali Mir v. Syed Omor Ali 1990 BCR (AD) 287).The fact of borrowing the debt with a promise to pay back within a certain period coupled with failure to pay it within the stipulated period does not make it a criminal offence under section 406 or section 420, Penal Code, and it is a pure civil liability enforceable through the Civil Court (Somanath Sahu vs. Yudhisthra Sahu (1974) 47 Cut LT 559 (565); see also Shri Manoranjan Halder Vs. Messers Machfab Engineering Industries (1983) 2 GLR 110).

In order to constitute cheating it must be established that one is made to part with the property on the promise of another or to give something in lieu thereof which latter had no intention to give with a view to deceive at the outset. The averments in the complaint petition that the accused turned down the requrest for execution and registration of the sale deed on receipt of balance of the consideration in pursuance of an agreement for sale clearly show that no criminal offence was

made out, at best it may be treated as a breach of civil contract. Distinction between the breach of contract and one of cheating depends upon the intention of the accused at the time of alleged inducement which may be judged by this subsequent acts. Facts show complete absence of dishonest intention on the part of the petitioner at the time when the agreement was executed between the parties (Bhan Jahan Vs. Atiqur Rahman (1987) 39 DLR 164).

Failure to fulfil a contract does not amount to any criminal offence. The contact being genuine and the parties being bound by the terms of the contract, the dispute over alleged breach of contract would be one of civil nature and it can not be said that the petitioners had the intention to decieve or cheat the complainant (Sayed Ahmed Vs. State (1980) 32 DLR 247; (1962) 14 DLR (SC) 76).

Goods were sold by the complainant on credit basis. The credit memos did not require that cash in lieu of supplies would be paid on the same day Dispute was held to be of civil nature. (2985) 1 Crimes 77 (HP). Failure of the promise to pay on a future date gives rise to a civil action only and not to criminal offence of cheating (Thiruguanam v. G. Chan drasekharan (Mad.) 1989 (2) Crimes 692 (Mad).

The complaint did not discolse the charge against the accused. The dispute between the parties was of civil nature which could be gathered from the statement by the complainant relating to the dishonouuring of the cheques on presentation to the bankers of the accused. Liability to pay the proceeds of the cheques was repudiated by alleging that the goods were not of the agreed standard in quality. held, ingredients of offence under Section 420, Penal Code, were not established (1985) 1 Crimes 21 (HP).

Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contact and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed, and where the party said to be aggrieved has an alternative remedy in the Civil Court the mater should not be allowed to be fought in the Criminal Courts (Bangeshwar Misser v. Mist. Khandari Kuer, AIR 1970 Pat. 20 (23) ; Sheosagar Pandey v. Emperor (1936) 37 Cr LJ 38 (Pat) : 1969 Pat. L. J. R. 360= Omor Ali, 1990 BCR (AD) 287. When a person promises to pay price of goods and on his undertaking to pay, the goods were delivered to him. Afterwards he fails to pay price thereof. No case of cheating will lie. The subsequent denial of the transaction amounts to a mistaken attempt to save themselves from criminal prosecution (Md Anwar Ali Vs. State (1978) 30 DLR 327).

In the State of Kerala v. A. Pareed Pillai (AIR 1973 SC 326), it was contended on behalf of the appellant State that the accused respondents cheated the bank inasmuch as they induced the bank authorities to credit the amounts of demand drafts in the account of the firm by representing that the oil tins relating to those demand drafts had been consigned to the railways. The practice followed by the bank in the case of the firm of the accused respondents was to give credit to the firm for the amounts of demand drafts without the production of the railway receipts. There was no cogent evidence to show that at the time when the accused sent the demand drafts they did not have the intention to send subsequently railway receipts in respect of oil tins which were actually delivered to the railaways. Held that it may be that the accused could not keep up the delivery of the oil tins to the railaway and no tins could be despatched in respect of the said thirteen railay receipts but that fact can given rise only to a civil liability of the accused. It is not sufficient to fasten a criminal liability on them. To hold a person guilty of the offence of cheating, it has to

be shown that this intintion was dishonest at the time of making the promise. Sucn a dishonest intnetion cannot be inferred from the mere fact that he could not substequently fulfil the promise (State of Kerala. v. A. Pareem Pillat ai, AIR 1973 SC 326 (329-30).

Ingredients of offences under sections 420, 403 and 406 are to a substantial extent available in most cases of breach of contract. Similarly a default by a borrower in repayment of a debt without admission of liability may also frequently partake of the character of an offence under section 406 of the Penal Code. There are numerous other instances of defaults in transactions purely civil in nature but which often appear to answer fully the ingredients of a criminal offence; and with a little clever glossing over every such case could be converted into an earnest prosecution. It was here that a court was calledd upon to act with circumspection and to exercise utmost care and caution before it was pursuaded to employ its process for compelling attendance. This duty was heavier in private complaints which relate to transactions apparently civil in nature. The tendency to view a criminal action as a handy means to constrain a person's conduct cannot be underscored. We are still left with people in this country who are prepared to pay a price for their fair name and the spects of a criminal prosecution can often compel them easily to relent on a stand which is otherwise well founded in law and in equity. It is this growing abuse of the process of a criminal court that has to be guarded against. The difficulty for the court itself often arises on account of the overlapping nature of civil and criminal causes. But with prudent application of mind it should be posible to draw a distinction between the two. It is perhaps well to remember that the word crime suggests that not only should a man have brought about the forbidden actus but also that the line of conduct which he had voluntarily continued to that conclusion was inspired, or at least accompanied, by mens rea. the accused, in other words, shall have been actuated by a legally reprehensible attitude of mind. (1972 PCrLJ 1130).

Test as to civil or criminal liability : Whethere an act of a person is criminal or civil depends primarily on his intention which is to be gathered from all attending circumstances including the transaction itself (1987 SCMR 1750). The question whether the evidence discloses only a breach of civil liability or a criminal offence under section 420, Penal Code depends upon whether the complainant in parting with his money acted on the representations of the accused and in belief of the truth thereof and whether those representations when made were in fact false to the knowledge of the accused and whether he had a dishonest intention from the outset (PLD 1958 SC (Ind) 115). Where the representation on the basis of which the money is obtained by an accused person was correct at the time when it was made or was not false to the knowledge of the accused and only subsequently the accused became dishonest or failed to carry out his part of the contract, the dispute can be said to be of a civil nature. But where the accused knew from the very beginning that the reprsentation which he was making to the complainant was a false one and it was on the basis of that representation that he obtained a certain sum from the complainant, the accused was guilty under section 420 (1937 All LJ 141). Where payment was made to accused for purchase of a plot, but the complainant did not get the plot as promised. There was delay of more than one and a half years in filing complaint and no report was lodged with police although offence under section 420 of the Penal Code was a cognizable offence. Evidence did not show as to whom money was paid and who took responsibility for getting plot transferred to complainant no case under section 420 of the Penal Code was made out. (PLJ 1988 Cr C 524).

There cannot be any absolute proposition of law that whenever a civil proceeding is pending between parties the cirminal proceedings can never be proceeded with. There are may transactions which result in civil as well as criminal

liabilities. Cheating, misappropriation and theft are undoubtedly the transactions of this type. Therefore, simply because civil proceddings between the parties are pending it canot be said that the criminal proceeding cannot go on before the Magistrate (Gopal chauhan v. Smt. Satya, 1979 Cr.L. J. 446 (450). Merely because civil proceedings were pending between parties it cannot be said that criminal proceedings between them can never proceed (Gopal Chauhan 1979 Cri LJ 446).

The intention of the person who is alleged to have committed the offence af cheating has to be seen at the time when inducement is made and money is paid. Subsequent change of mind on his part is not very relevant to an offence under Section 420, Penal Code. In other words, what may be merely a civil liability to begin with will not be converted into criminal liability by the subsequent change of mind and conduct. In the presnet case, what transpired between the parties orally is anybody's guess but the fact remains that no writing whatsoever has come on record to show that were the terms of the transaction. Strangely enough the petitioner did not ask for any fixed deposit receipt, he did not ask for re-payment of the loan or payment of interest in writing. There is no everment to this effect anywhere. Hence, the learned Magistrate was perfectly justified in holding that a case for fastening criminal liability on the respondent *prima facie* not made out (Jahat Narain v. Stage, (1985) 27 D.L.T. 364 (348) = 1985 (1) Crimes 529 (Delhi).

The question whether the evidence discloses only a breach of civil liaility or a criminal offence order Section 420, Penal Code, depends upon whether the complainant in parting with his money acted on the representations of the accused and in belief of the truth thereof and whether those representations when made in fact were false to the knowledge of the accused and whether he had a dishonest intention from the outset (Shyam Sunder Gupta v. State of Uttar Pradesh, 1985, (2) Crimes 425 (417) (All).

5. Section 420 and other allied offences.- An easy method of differentiating between the offence of theft, cheating with delivery of property, criminal misappropriation and criminal breach of trust is to find out whether the original taking was honest or dishoenst and whether it was with the consent of the owner of without it. In theft the original taking is without honesty and without the consent of the owner, and in criminal breach of trust it is with both. In obtaining property oby cheating, the taking is dishonest but with the consent of the owner and in criminal misappropriation it is honest without the consent of the owner.AIR 1928 Nag 113. thus where originally a property is received bona fide and subsequently after having come to know who the owner of the property was the person who receives the property repudiates the ownership or converts it to his own use, without making efforts to hand it back to the owner, an offence under section 403 is made out but in cases where the person who is alleged to have received the property denies that he ever received possession of the property, he may be convicted of theft or cheating but he cannot be convicted under section 403 (AIR 1955 UNC 1743).

6. Fraud.- To secure by means of a misrepresentation an advantage, the accused's right to which is in dispute at the time, is fraudulent AIR (1921 Cal 119 DB). Where fraud is alleged, it is absolutely essential that there should be clear evidence of intention to defraud or to cheat before the opposite party may be allowed to be harassed with a criminal prosecution (AIR 1931 Cal 452). Thus where a woman is fraudulently induced to believe that she was executing a conveyance deed for Rs. 13,000 when the conveyance is in fact for Rs. 7,500 the signing of the conveyance and handing it over to the purchaser would come within the latter part of sections 415 and 420 (6 Sau LR 466 DB). But where no false or fraudulent representation is made, no offence i said to be committed (AIR 1917 All 108). Thus

the mere faidlure of medical treatment is not by itself a proof of fraud or even of absence of skill or failure to apply reasonable skill and care. Therefore no offence under section 420 can be aid to have been committed by the medical practitioner if his treatment fails to cure the patient PLD 1957 SC 257.

A fraudulent representation within the meaning of section 420 may be made directly or indirectly. A fraudulent representation made through a person acting as an agent for the accused amounts to fraudulent representation by and on behalf of the accused (AIR 1962 All 582).

7. Misrepresentation.- Wilful misrepresentation by a definite fact with intention to defraud would be dcheating (AIR 1954 Manipur 13). Where a person parts with his propoerty as a result of misrepresentation and deceit, there can be no question of entrustment by him of that property to the other Therefore, the accused would be guilty of an offence under section 420 and not one under section 406 of the Penal Code (PLD 1962 Kar 741).

Representation must be false to the knowledge of maker : Where a representation is not proved to be false, the accused could not be held guilty under section 420 (AIR 1924 Rang 31). If the person making the representation honestly believed the representation to be true, there can be no question of cheating. But if he knew that the representation was false and he made it with a view that the other person should act upon it, then that would amount to cheating (AIR 1961 Pat 451). Where the accused had sent fake bills to a bank to get an overdraft of Rs. 2,00,000 he was convicted under this section 1980 PCrLJ 969. Where a headmaster prepared false pay bills of punkhapoullers and misappropriated the salaries so drawn, but no such persons were appointed. The offence stood proved against him. (1976 PCrLJ 137). Where two bills for T.A & D.A. were submitted for the same tour. But the amount of one bill was refunded when the fraud was detected after two years. Conviction of the accused under section 420 was unheld (1973 PCrLJ 19).

In the following case it was held that an offence under section 420 was committed by misrepresentation

(a) Where pronots are pledged but the pledgor retakes them pretending that he required them for collecting money from his debtors to pay off the pledge, and it was proved that he did so dishonestly(AIR 1923 Mad 597).

(b) Where the accused who was wearing khaki dress, and who was not a police officer gave the complainant to understand that he was a police officer and that he had authority, which he really did not have, and on that score he blackmailed him (AIR 1933 Cal 308).

(c) Where a railway servant obtained a free pass for his mother and wife but he gave it to some one else for use (AIR 1925 Oudh 479).

(d) Where M got the property of K mutated to his name on the representation that K was his wife and that she had died But later on it was found that K was neither the wife of M nor was she dead (PLD 1966 Lash 330).

(e) Where a person having created a mortgage over his property by a registered deed in favour of sone, mortgages the ame property to another by holding out to him a written assurance that the property was free from all encumbrances (PLD 1965 Lah 676).

(f) Where the accused, who were two brothers, went toa goldsmith and made a false representation to him that their mother wanted a necklace of a certain description for getting the design copied for the wife of one of the accused. The goldsmith gave the necklace of the required design to the accused who promised to

return it in the evening but subsequently they refused to return it. It was found that the mother of the accused had died long ago and that the accused were not married (AIR 1960 All 387).

(g) Where a contractor engaged by a Union Council to sink, for a sum of Rs. 2,400, tubewell pipes 152 fit. deep with two filters, dishonestly sunk pipes 108 feet deep only and with one filter, and he received payment from the Union Council on making a false representation that the work had been done according to specification he was convicted of an offence under this section (1969 DLC 69).

8. Concealment of facts.- Every concealment of fact is not fraudulent. It becomes fraudulent only when it is dishonest and when it causes damage or loss to the other party. In a particular case the silence of the accused may be rendered into dishonest concealment by circumstances of the case and it may amount to deception within the section (AIR 1925 Cal 14). Thus where the mortgagees who purchased the mortgaged land knew that the trees on the land had been sold by the mortgagor previous to the sale of the land, sold those trees a second time without disclosing the previous sale (AIR 1919 ALll 217), or where an insolvent obtained credit from the complainant by not disclosing the fact of his insolvency to him (AIR 1935 All 439), or where the accused having already sold his house, suppressed the fact of the sale and entered into another contract for sale and induced the vendee to part with earnest money (AIR 1947 Call 32), or where a married girl was married to another man by her mother without disclosing that fact to the bridegroom (AIR 1943 Pat 212 DB), or where an accused gifted his land to his son, and handed over possession to him, and the land was also mutated in his name, but subsequently he again sold it for consideration to the compolainant without disclosing the gift, he was guilty of an offence of cheating under section 420 (AIR 1959 Manipur 26). Where a broker purchased goods for himself in the name of a fictitious buyer and then did not make payment to the principal. He was guilty of dishonest concealment of the name of the real buyer and was convicted under this section (1975 PCrLJ 1184).

9. Valuable security.-An import licence obtained from the office of the Chief Controller of imports is a valuable security because it is evidence of title of the person possessing it to imprt goods into India quite irrespective of whether it is property or not within the meaning of Section 420 Penal Code, (1955) Cr LJ 289 = AIR 1955 Bom. 82 = 56 Bom. LR 188).

Similarly an assessment order is a valuable security under Section 420. If the cheating employed by the accused resulted in inducing the Income Tax Officer to make a wrong assessment order, it would amount to inducing the Income-tax Officer to make a valuable security (1969) 1 SCR 193 = AIR 1969 SC 40 = 1969 or LJ 271 = 1969 SCD 200).

10. Failure to pay price of goods purchased.-Where the accused agreed to purchase certain goods from the complainant and it was agreed that the accused would pay for the goods at his guddi where the goods where to be delivered by the complainant and ultimately the payment was not made though the goods were taken by the accused and the complainant filed a complaint against the accused for cheating him on the ground that the accused induced him to part with the goods on a false promise to pay a cash against delivery, an intention to do so, the fact that he did not pay would not convert the transaction into one of cheating. But if on the other hand he had no intention whatsover to pay but merely said that he would do so in order to induce the complainant to part with the goods, then a case of cheating would be establsihed (Mahadeo Prasad v. State of West Bengal, AIR 1954 SC 754 (725) ; Ram Avtar Gupta v. Gopal Das Taliwal, AIR 1983 SC 1149 = 1983 All. LJ 522).

Where the accused was an utter stranger to the complainant and the latter could not be anxious to sell the goods to the former on credit or even in a falling market except on terms as to cash against delivery, and the accused knew that he had no means to pay the price against delivery, it was held, that it was sufficient to hold that at the time he took delivery he had no intention to pay but only promised to pay cash in order to induce the complainant to part with the goods (Mahadeo Prasad v. State of West Bengal, AIR 1954 SC 725 (726). When a person promises to pay price of goods and on his undertaking to pay, the goods were delivered to him. Afterwards he fails to pay price thereof. No case of cheating will lie. The subsequent denial of the transaction amounts to a mistaken attempt to save themselves from criminal prosecution (Md. Anwar Ali Vs. The State, 30 DLR 327).

Where the false represenation made by an accused in obtaining the railway receipt in the form in which it was issued did not can cast any additional liability on the railway and the issue of the railway reeipt was not likely to cause any damage or harm to the railway, it was held that no question of cheating the railway or the station master could therefore arise (Hari Sao v. State of Bihar, 1970 SCD 233 (244) = AIR 1970 SC 843).

11. Dishonouring of cheques.-Where the accused had paid certain amounts by means of demand draft for the goods supplied by the daler and for the balance amount certain cheques delivered by him to the dealer, where dishonoured on different dates and the bank account showed that at no stage any attempt was made by the accused to pay the sufficient amount for encashment of the cheques, such matter would be sufficient to afford a ground for presuming that the accused had committed an offence under Section 420 (1982 Cr LJ 1482 (Delhi). Messrs Veena Ram. v. Punam Chand Bothra (1984) 2 Cr. L. C. 254 (Pat) = 1984 BLJ 339 (340, 341).

Mere dishonour of a cheque does not *per se* amount of cheating under section 420 of the Penal Code (D. K. Roy v. The State of Bihar and anothers 1989 (1) Crimes 663 (Pat.).

For dishonour of cheque cognizance cannot be taken for offence of cheating. It has to be shown that there was dishonest intention of accused in issuing cheque (T.K. Kanungo & Ors. v. State of Binhar & Ora. 1988 (3) Crimes 419 (Pat.).The post dated cheque for payment of goods already delivered is only a promise to pay on a future date. Breach, there of the dishoneour of the cheque would only entail civil liability and not a criminal offence, especially that there was no necessary averments on the complaint. Subsequent to infer the dishonest intention necessary for making out the offence under Section 420 (1983 Cr LJ 106 (Ker).

Dishonest intention to cheat must exist at the time of promise. Gomplainant against the accused was that the cheque given by him was dishonoured. He had not made a representation that he had sufficient money in the Bank. Held, allegation did not amount to cheating (1985 Cr LJ 1839 (Ori). Where a cheque given by a judgment debtor to a decree holder was dishonoured, it was held that no offence under this section was made out as there was no fraudulent or dishonest intention in issuing the cheque (AIR 1928 Oudh 292=29 CrLJ 657 (DB).

Post-dated cheque against goods.-The issuance of post-dated cheque neans a promise for future payment and if future payment is defaulted on account of susequent dispute that does not consititute any offence of cheating while there is nothing to show that the accused had any intitial intention to cheat or deceive the other party. In order to constiture cheating there must be fraudulent and dishonest inducement for delivery of property. The all important question to be determined is whether the intention not to pay was there when promise was made. Subsequent

failure to keep ther promise to pay does not constitute cheating (Sheika obadul Haque Vs. Reqaur Rahman Khan 1987 BLD 23 = (1986) 38 DLR 105).

A distinction must be drawn between a case where a post dated cheque is given to discharge an existing liability and a case where it is issued against delivery of goods, property or cash with an assurance that it will be met on being presented to the bank on the due date and in due course. In the first case, the failure to provide the balance is merely a breach of promise, whereas in the latter it may have different consequences. Intention of the drawer at the time the cheque is issued is the matterial test and if it appears from the circumstances of the drawer that he did not expect that the cheque would be cashed in normal course, it would be *prima facie* proof of the intention to cheat (Shantilal (1965) Cri LJ 68, Bishwanath Aggarwalla 1976 Cri LJ 1901 (Cal.) ; Ramaprasad Chatterjee v. Md. Jakir Kureshi 1987 Cri LJ 1485 (Cal).

The accused gave post dated cheques for goods delivered to him and the complaint contained no averment that the accused knew that he had no funds in his account or that he never intended to make funds available in his account by the time the cheque was presented. The post-dated cheque for payment of goods already delivered was only a promise to pay on a future date. Breach thereof by dishonour of the cheque would only entail civil liability not a criminal offence (Chary V.V.L.N. v. Martin N. A 1983 Cri LJ 106 (Ker).

Issue of a cheque would not imply any representation that the drawer already had money in the bank to cover the amount shown on the cheque, for he may have either authority to overdraw or have an honest intention of paying in the necessary money before presentation of the cheque for encashment (Mohanty G. K. v. Pratap Kishore Das 1987 Cri LJ 1446 (Ori).

Mere issuing of the cheque which is subsequently dishonoured does not make out an offence of cheating unless there are allegations in the complaint that by taking the cheque the complainant sustained any damage in his mind, body, reputation or property (D. Raj Arora and another v. R. Viswanathan and another 1988 (1) Crimes 812 (A.P.).

Dishonour of cheque does not *per se* constitute the offence of cheating.-Mere dishonour of cheque cannot, in all cases, amount to the commission of the offence of cheating as it does not *per se* constitute such an offence. It is necessary that it is shown that the deception was practised intentionally by the accused. Mere allegation of fraud or cheating in the complaint was held to be not sufficient for taking cognizance of offence (D. K. Roy v. State of Bihar, 1989 (1) Crimes 662 (665) (Pat) = 1989 East. Cr. R. 117).

Dishonour of cheque when constitutes merely civil wrong and when an offence-Intention of the drawer is material.-Exceptions apart, *actus reus* and *mens rea* (guilty intention) both must concur to constitute a crime. *Mens rea* precedes the act. Whether the act is coupled with the pre-existing *mens rea* and there is subsequent inability to perform the promise, only civil liability is incurred. A distinction must be drawn between a case where a post-dated cehque is given to discharge the existing liability and a case where it is issued against delivery of goods, properly or cash with an assurrance implied or otherwise that it will be met on being presented to the bank on the due date and in due course. In the first case the failure to provide the balance is merely a breach of promise where as in the latter it may have different conse-quences. It is the intention of the drawer at the time when the cheque is issued which constitutes the material test and if it appears from the circumstances of the drawer that he did not expect that the cheque would be cashed in normal

course, it would be *prima facie* proof of the intention to cheat as is clear from illustration (f) to Sec. 415, Penal Code. It may be pointed out that direct proof of *mens rea* is seldom available and it has often to be inferred from the surrounding circumstances. If from the facts it is established that failure to meet the cheque was not accidental but a consequence expected by the accused, the presumption would be that the accused intended to cheat. Where prosecution established facts which lead *prima facie* to the conclusion that failure to meet the cheque was not accidental but was consequence expected and, therefore, intended by the accused it will then be for the accused to establishe any fact which may be in his favour which was especially within his knowledge and of which the prosecution could not be expected to have any information (Radhakishan Dalmia and Sons V. Narayan, 1989 Cr. L.. 443 (445) (M. P.).

A perusal of a host of cases decided by different High Courts will clearly lay down the law which may be summed up as follows :

(i) If from the very inception of the contract the intention is of dishonesty and deception and in consequence there of a person in induced to part with any property or to do or omit to do anything that he would not do or omit to do, but for that deception the offence of cheating is *prima facie* made out.

(ii) In case in which as a result of passing of some property or doing of an act or omission to do it, a post dated cheque is issued with the full knowledge of both the parties that for the present the cheque was not encashable, there is no dishonesty or inducement at the very inception of the contract. And if subsequently for some reason or the other, on the due date the cheques are dishonoured, the case of civil liability. The reason being that it was not the intention of the person issuing the cheque to make an immediate payment and the post, dated cheque was only in the nature of a promise to pay which promise, if it is broken, could give gise only to a civil liability (Shyam Sundar v. Lala Bhawan Kishore, 1989 Cr. L.J. 559 (561, 562 (All).

The dishonest intention which constitute the *mens rea* on the basis of which the dishonest or fraudulent inducement was made is a mental element. It may causes, the existence of mental element even at the time of the promise could only be inferred from the facts and circumstances admitted or proved and it may include the subsequent conduct also (A.K. Ali v. C. H. Mammutty, 1989 (2) Crimes 499 (507) (Ker.) = 1989 Cr.L.J. 1820 (1827) (Ker.). Any breach of contract will not create a criminal liability unless something more has been done with a purpose to deceit the complainant (Vinar Ltd. v. Chenab Testile Mills, Kathua, v. state1989 Cr. L. J. 1858 (1861).

12. Partnership firm.-In a complaint of cheating against a partnership firm, a partner of the firm cannot claim exemption on the ground that there is no specific allegation of cheating against him (Ramesh Kumar Jain v. Raghubans Main Prasad 1977 Cri LJ 463 (Pat).

A complaint under Section 420 does not require that names of cheated persons should be mentioned and cognizance of offence cannot be quashed for such non mention (Amarranth Prasad 1976 (Cri) LJ 1778 (Pat.).

13. Breach of contract.- Mere breach of a contract can not give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act. When there is alternative remedy in civil court, the matter should not be fought in criminal Court (Abdul Awal Chowdhury Vs. Md. Waliullah (1960) 12 DLR 520).

Every breach of conttact does not constitue an act of cheating. Dishonest intention cannot be inferred from the mere fact that petitioner did not subsequently fulfil promise where there was no material before the Magistrate on which he could be satisfied that the petitioner had any dishonest intention at the time of the alleged promise or inducement, the dispute was held to be purely of civil nature (AIR 1981 SC 476 = 1980 Cr LJ 1474).

It can never be open to the paurchaser to accept the goods when according to him, the seller has committed a breach of the contract and then ultimately say that the seller should have supplied goods according to the contract and since he has not done as he has practiced fraud whenever ther are circumstances intervening, the seller of goods cannot be said to have induced the purchaser to accept the goods where not superior but as per the contract as alleged by the purchaser (1982 Cr LJ 856).

Refusal to act upon a contract is a civil dispute. It is not a criminal offence under this section (1975 SCMR 165). Cheating amounts to inducing the victim to enter intoa bargain which he would not enter into if he knew the real facts (1957 - 2 Andh W.R. 388). The distinction between a case of mere breach of contract and one of cheating depends upon the intention of ther accused at the time of the alleged inducement which may be judged by his subsquent act but of which the subsequent act is not the sole criterion (37 CrLJ 38). Where in fulfilment of a contract for supply of cotton of a certain quality cottom of a lower quality is deliverately supplied, the offence falls under section 420 (13 CLJ 285 DB). But the mere putting forward of false execuses to defeat the contract would not show guilty intention and hence does not fall under this section (AIR 955 NUC 4041). Similarly where a person takes away ornaments on approval and promises to return them in the evening the same day, his failure to do so is not enough to sustain a charge under section (420 AIR 953 Nag 301).

Where the accused was guilty only of a breach of contract, the dispute is basically of a civil nature and the dmere fact that some fabricated documents are produced does not enter the complaint to take recourse to criminal prosecution under this section (PLJ 179 Cr C 392). Where under a contract the accused was liable to pay toll tax on certain conditions under a contract with the Government. Failure to pay an instalment of the stipulated amount involved a civil liability and criminal case for such default was uncalled for (PLJ 1981 Cr. C 155).

A mere breach of contract cannot give rise to criminal prosecution if it is a mere breach of contract without any dishonesty. If 'A' intends to deceive 'B' in to a belief that 'A' has performed A's part of the contract made with 'B' which he has not a fact performed and thereby induces 'B' to pay him money, A cheats. The question in such case is whether there is any dishonest intention at the time of inducing 'B' to pay to 'A' (1981) 33 DLR 262 DB).

Failure to execute contract as agreed : Failure to execute the work in accordance with the terms of a contract, does not, ipso facto give rise to an inference of mens rea, viz fraudulent or dishonest conduct, which is an essential ingredient of an offence of cheating Where no dishoensty is proved, there can be no conviction under this section (1973) 25 DLR (SC) 101; (1980) 32 DLR 247; (1962) 14 DLR (SC) 76).

14. Preparation and attempt to commit the offence of cheating.-The question whether an act amounts to attempt or merely preparation in some cases, depends upon the surrounding circumstances. In order to constitute attempt, first there must necessarily have been done towards the commission of the offence and third such

act must be proximate to the intended result. The measure of proximity is not inrelation to time and action but in relation to intention. Attempt to commit an offence, therefore, can be said to begin where the presparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. If the accused had made the name board with the questioned degrees, or if the accused got the prescribed slips printed describing himself as holder of such degrees, perhaps, such acts would only have reached the state of preparation. But when he released such prescription slips to others or when he exhibited such name board for others to read, he crosses the state of preparation and transgresses into the realm of attempt (State of Kerala v. C. K. Bharathan, 1989 Cr. L.J. 2025 (2028) (Ker.).

A person commits the offence of attempt to commt a particular offence when (i) he intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence AIR 1961 SC 1698. Therefore an offence under section 420, read with section 511 would be committed by a person who attempts to cheat another person and thereby attempts to induce him to to one or other of the acts mentioned in section 420 (AIR 1955 Bom 82). Thus if the accused dishonestly induces a person to pay him money on the pretence that god had directed the payment but the payment is not made, AIR 1925 Mad 480 or where the accused having set fire to his car which was insured, submitted false information to the insurance compoany in order to obtain the insured amount It was held that the offence fell under section 420/511 (AIR 1934 Pesh 67). Where a person seeks to take payment of a money order addressed to another and signs the receipt, the accused by putting signatures on the money orders in the name of a ficitious personconcluded his act so far as he concerned Whether he got the money or not did not depend upon any future act of his Even if the official of the post office had not paid the money to him, yet the offence of attempt to cheat was completed because all that was necessary for him to do had been done by him. He was therefore, guilty under section 422/511, Penal Code (PLD 1962 Lah 244).

A person commits the offence of "attempt to commit a particular offence" when (1) he intends to commit that particular offence, and (11) he, having made preparations and with the intention to commit the offence, does an act towards its commission. Such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. Where the accused not only forged the endorsements of the persons in charge of passing the bill, but also presented the document before the official of the Accounts Section for taking action to pay the amount. The acts of the accused had clearly reached the state of attempt to commit the offence of cheating (Siwam Sesha Chalapati Rao v. Republic of India, 1989 Cr. L. J. 457 (460) (Orissa).

15. Burden of proof.-It is for the prosecution to show clinchingly that at the time the accused entered into the transation, he had no intention to pay the money and that he was actuated by a dishonest intention to cheat the complainant (K. Veeranna v. NS Mastion Sab. AIR 1960 A. P. 311 (312) = 1960 Cr L.J. 787).

In the undernoted case, the confession made by the apellant was found voluntary and accused did not show that it was made under duress or coercion. It was held that the case against the appellant was proved beyond reasonable doubt (Bhagwan v. State of Maharashtra, 1979 Cr.L.J. 320 (321) (SC).

In brivery cases, Courts have always held that perons who actually pay the bribe or co-operate in its payment or are instrumental in the negotiations are also accomplices of the person who bribes. But so far as the offence of cheating is concerned, by no stretch of imagination, can it be said that they were accomplices to it when they were actually the victims of the offence (In the matter of S. R. Narsimlu, 1973 Cr. L. J. 1481 (1483).

For the purpose of holding a person guilty under Section 420, the evidence adduced must establish, beyond reasonable doubt, *mens rea* on his part (Anil Kumar Bose 1974 Cri LJ 1026).

Where the accused charged for cheating pleads negligence and irregularity, it is for the prosecution to prove that the act was not negligent or irregular but was deliberate and intentional. The prosecution has to prove every ingredient of the offence in question beyond a shadow of reasonable doubt including the burden of proving the mental state of the accused wherever intention or knowledge forms one of the ingredients of the offence and that the act of the accused was intentional (Dadasahed Bapusaheb Naik v. state 1982 Cri LJ 856 Cri LJ 856 (Bom).

The onus of proof of establishing the charge rests on the prosecution. Where a public servant and a contractor were prosecuted for defrauding the Government by submiting false bills of the work done, the State has to bring out beyond all reasonable doubt that the labourers actually employed in carrying out the work were less than that stated in the summaries appended to the bills paid for by the Government. The accused could not be convicted relying on the mere impression of the prosecution witnesses regarding the number of labourers emplyed (Abdullah Mohammed Pagarkar v. state 1980 Cri LJ 220 (SC). Traini Kurmar sen Sachindra Kumar 1980 Cri LJ (NOC) 124 (Gau).

It is the duty of the prosecution to prove that the specimen writings are of the accused and only then the question can arise as to whether the opinion of the handwriting expert who compared the specimen writings with the writing on the questioned documents that they are of the same person, should be relied upon or not. Where the identity of the specimen writings and signatures was not established with the two accused persons, it could not be said that the specimen writings and signatures which were sent to the handwriting and signatures which were sent to the handwriting expert were of the accused persons, and thus, their comparison whith disputed writings would not connect the accused person with the crime (State v. Sharma Dr JP 1983 Cri LJ 585 (Raj).

16. Evidence and proof.-The accused's mere denial of his dealings with the bank is not sufficient to bring the case under Section 415 (1949) JLR 69). By false representation the accused induced the revenue authority to have his name mutated in respect of certain property whereas that property belong to somebody else. The offence being detected the accused was tried for cheating under section 420, Penal Code, and was convicted by the trial Court. On appeal it was contended that the state being the complainant and as the state was not the person who was cheated in this case, the charge under section 420 as against the accused did not lie. Held, the conviction is valid in law. The revenue authority was the agent of the government which granted protection to the right of the subjects (Muhammad Shafi and another vs. The State, 18 DLR 151 (WP).

Before a person could be convicted for cheating of for conspiracy to cheat on the basis of a speculative or improvable schemes issued to the public it must be established that the promoters of the scheme themselves did not believe in the working of the scheme and that they had themselves no faith in it (Zahid Hasan Khan Vs. The State, 16 DLR 23).

Accused assured an emplyment seeker to get a job for him on payment. The amont agreed in between was given to the accused who issued him a receipt. The signatures on the receipt were found doubtful by the handwriting expert. There were also discrepancies in the evidence. Held, evidence raised grave doubt of authenticity (1985 Cr. LJ 1163 (Cal).

Dishonest intention must be proved to exist at the time of cheatin. (1986 Cr. LJ 1271 (Orissa). When the accused, having the dishonest intention deceived the appellant and fraudulently or dishonestly induced him to part with money by inducing a wrong belief in him that his desire of going on employment to the Gulf countries will be fulfilled on making the payment, his conviction under section 420, Benal Code is legally sustainable (A. K. Ali v. C. H. Mammutty & anr. 1989 (2) Crimes 499 (Ker).By false representation the accused induced the revenue authority to have his name mutated in respect of certain property whereas that property belong to somebody else. The offence being detected the accused was tried for cheating under section 420 Penal Code and was rightly convicted by the trial Court (Muhamad Shafi vs. State, (1966) 18 DLR (WP) 151).

Where there was no evidence to show that accused No. 2 induced complainant to part with cloth and the possibility of accused no. 1 not informing accused no 2 of the exact state of affairs was not excluded it was held that conviction was based on surmises and conjectures (1979 UJ (SC) 670). Where the work executed by contractor was in utter disregard of relevant rules but there was no proof of false entires and documents, it was held that suspicion could not make out ingredients of charge (1979) Cr LJ (SC) 683).

Where a client's son filed a complaint of cheating against their Advocate without the father's authority while the sum alleged to have been misappropriated was returned to the father of the client on calculation of the case it was held that the prosecution was not maintainable and that the charge of *mens rea* had to be considered as on the date of fraudulent or dishonest representation (AIR 1977 SC 760 = 1977 Cr LJ 1152 = 1977 Cr LR (SC) 184).

Under this section it is not necessary that a false pretence should be made in express words by the accused. It may be inferred from all the circumstances including the conduct of the accused in obtaining the property (Shivanarayan (1967) Cri LJ 946 = (1967) AIR (SC) 986).

In the absence of allegation in complaint that the accused deceived the complainant or that he fraudulently or dishonetly induced the complainant to part with the money an offence under the section is not made out (Satyabrate Bhattacharya v. Jarnail Singh 1976 (Ori). State v. Bhanwarlal 1973 Cri LJ 1749 (Raj); Lalchand 1984 SCC (Cri) 355). Conviction under sections 468, 411 and 420 cannot be ordered solely on the basis of the evidence of handwriting expert without corroboration (Magan behari Lal v. state 1977 SCC (Cri) 313).

Where an employee of ESI was alleged to have demanded money from complainant with an assurance of procuring a job for him and the handwriting expert was not of the firm opinion that the receipt was signed by the accused was there was also discrepancy in the oral evidence of the complainant, on such discrepant evidence conviction of the accused could not be upheld (Amar Chwdhury 1985 Cri LJ 1163 (Cal). Where money is received to perform a contract void for immorality and if element of cheating is present then prosecution lies notwithstanding the non-maintatnability of suit to recover money paid or for specific performance of contract (Ganesh 1976 Cri LJ 1403 (All).

Where there was no evidence to show that the accused played any fraud on the com;ainant and induced him to part with money and the only evidence was that he

was a partner of the second accused and that they had hired a room for storing cloth, the accused could not be convicted under this section (AIR 1981 SC 476).

B Purchased a binocular for the Forest Department from a particular firm on the advice of the accused and money was paid for it. The accused had represented that he had also purchased a binocular and the price quoted was proper, it was held that conviction under Section 420 and Section 5 of the Prevention of Corruption Act was not sustainable (AIR 1980 SC 366).

In dealing with a cheque under Section 420, 468 and 471 and Sections 5 (1) of the Prevention of Corruption, Act, the burden of proof is only on the prosecution however the suspicious may be (AIR 1980 SC 499= 1980 Cr LJ 220).

One of the partners procured goods by practicing fraud on complainant. There was no evidence that another partner had any knowledge of this state of offence. The goods were stored in room hired by them. It was held that it was not by itself sufficient to convict another partner under Section 420 read with Section 34 (AIR 1983 SC 1149 = 1983 Cr LJ (SC) 219 = 1983 UJ (SC) 413). Where gate passes were issued negligently but not wilfully with a view to commit fraud leading to the acquittal of the accused under Section 477-A it will operate to his benefit for a charge under Section 420. (AIR 1980 SC 310 = 1980 Cr LJ 214).

17. Punishment.-A sentence of imprisonment is obligatory under the law for an offence either under Section 409 or Section 420, Penal Code (27 Cr LJ 562 ; AIR 1926 Lah 350). A substantive sentence is an essential requirement under the Law and in case of failure to pass a substantive sentence under Section 420 Penal Code, it must be held to be a case of failure to exercise an authority vested under the law and even dereliction of duty. When the law provides for sentence of imprisonment and a further liability of fine a Court cannot in its discretion omit to pass the sentence of imprisonment and punish by imposing a sentence of fine only (Md. Yeaku Kazi Vs. Kalooo Khandaker 1987 BLD 150).

Where there is strong indication, on the evidence on record, that there were other perhaps bigger persons involved in the fraud for which the accused was tried and they are not brought to book, the circumstances, though they do not excute or exonerate the accused from his guilt which was been established beyond reasonable doubt, have guilt which has been established beyond reasonable (1953 Cr LJ 1928 = AIR 1953 SC 462 ; 1968 SCD 210; 1968 SCW 19).

Where substantive sentences for two offences under Section 420 on two different counts are awarded they should run concurrently and not consecutively (1981 Cr LJ 1032 = AIR 1981 SC 1384).

It will also not be wrong or illegal if on humanitarian grounds such sentence was limited till the rising of the Court (Shyam Sunder Gupta 1985 Cri LJ 1674 (All).

Where an accused a Reader, holding M. Sc. and Ph. D. degrees, was convicted of attempting to issue counterfeit university degrees, it was held that the award of sentence by the Sessions Court till rising of the court was too lenient and the sentence of 3 years imprisonment awarded by the Court was just and reasonable (Madhav Hayawadanrao Hooskot 1978 Cri LJ 1678 (SC) = AIR 1978 SC 1548 ; Kappaor Chand Maganlal Chanderia. 1985 SCC (Cri) 441).

In Brji Basi Lal, it was said that even if a criminal attempt fails that would not provide a mitigating circumstance with regard to the quantum of sentence as those indulging in criminal activity for grabbing undeserved advantage are not entitled to any conisderation on quantum of sentence of fine (Brji Basi Lal 1981 SCC (Cri) 761).

However, where the accused had deposited the amount in question to the court in pursuance of the court's directions the sntence was reduced to the period already

under gone (Abdul Hamid v. state 1982 SCC (Cri) 470 : State v. Ramados Naidu 1977 Cri LJ 2048 (Mad).

18.Practice and procedure.-Where there is gap of one year between commission of offence and filing of complaint, the complaint is liable to be dismissed (1973 All Cr R. 335). Where the complainant under Section 420 did not disclose commission of any offence under that section quashing of proceedings by High Court under Section 561-A, Cr. P. C. 1898 was held justified (1973 SC Cr R 472 ; 1973 SCc (Cr) 1082 ; 1973 Cr LR 639).

When there is no allegation in the complaint that accused received complainant or that fraudulently or dishonestly induced complainant to part with amount no offence under Section 420 can be held to be made out (1976 Cr LJ 446). Where opportunity to cross-examine material prosecution witness was not given to the accused charged for the offence under Sections 420, 468, 467 and 471 Penal Code, it caused renders prejudice to the accused (1984 Cr LJ 539).

Where the essential ingrdients for conviction under Section 420 were neither contained on F. I. R. nor in a case where the Magistrate did not specify the rule that was violated to warrant his conviction (1986 Cr LJ 574) (HP). For purposes of offence of cheating, what is material is the intention kof the drawer at the time a cheque isissued ; if the intention is *bona fide* at the relevant time then no criminal libaility ataches to the drawer (1984) 2 Crimes 61 (Delhi).

It will be incorrect to say that cognizance of an offence of cheating cannot be taken by a competent Court unless the person cheated himself makes the complaint (Jagadish Chandra Roy Vs. Joy Narayan Biswas, (1962) 14 DLR 198; (1968) 20 DLR (WP) 132). Complaint not by person actually cheated is liale to be dismissed (1954) 6 DLR 177; (1960) 12 DLR 178).

Offence compoundable.-After an inquiry by the police, the accused was charge sheeted. The accused moved a petition under Section 482, Cr. P. C. Since the offence was compoundable a petition for compounding it was also moved but it was dismissed for want of prosecution. On examination of the record it was found the action by the Magistrate was an abuse of the process of law since favourable order could be passed in his absence (1986) 2 Crimes 393 (Ker).

19. Charge.-The charge should run as follows :-

I (name and office of the Magistrate/Jundge,) hereby charge you (name of accused) as follows :-

That you, on or about the ..... day of ..... , at, cheated X by dishonestly inducing him to delivery (specify the property to you and which was the property of the said X (or to make, alter or destory the whole or any part of a valuable security), and that you thereby committed an offence punishable under section 420 of the Penal Code, and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

In a charge under section 420, Penal Code, the manner of deception was not stated. Held, plainly the charges are vague and defective in as much as they failed to set out the modes in which deception was alleged to have been practised upon the alleged victims (MEN Rewail Vs. The State, 10 DLR (SC) 1).

A charge under section 420 read with section 120B, Penal Code would lie where the accused had entered into an engagement or association to do an illegal act but nothing were done in persuance thereof. A conviction under section 420 read with section 34 of the Code is valid in law if the offence had been committed in furtherance of common intention of all even though the original charge laid against them was under section 420 read with 120B of the Code (Md. Yakub Vs. The crown, 7 DLR 75).

Of Fraudulent Deeds and Dispositions of Property

421. Dishonest or fraudulent removal or concealment of property to perevent distribution among creditors.-Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

422. Dishonestly or fraudulently preventing debt being available for creditors.-Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person for being made available according to law from payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

423. Dishonest or fraudulent execution of deed of transfer. containing false statement of consideration.-Whoever dishonestly or fraudulently sings, executes or becomes a party to any deed or instrument which purports to transfer or subject to any deed or interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

424. Dishonest or fraudulent removal or concealment of property.-Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Comments

Where a property has been legally attached by a Court, the possession of the same passes from the owner to the Court its agent. In that situation, the owner of the said property cannot take the law into his own hands., but can file a claim petition to enforce his right. If he resorts to force to get back his property, he acts unlawfully and by taking the property from the legal possession of the Court or its agent, he is causing wrongful loss to the Court. As long as the attachment is subsisting, he is not entitled to the possession of the property, and by taking that property by unlawful means he is causing wrongful gain to himself (Teeka v. state (1961) ALJ 430 (SC)= (1961) 2 All. 13; overrulling Ghasi v. state (1929) 52 All. 214).

Of Mischief

425. Mischief.-Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or

in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Explanation 1.-It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.-Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) A voluntarily burns a valuable secuity belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destorys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(e) A having insured a ship voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has cmomitted mischief.

(f) A, causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.

(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

426. Punishemt for mischief.-Whoever commits mischief shall be punsihed with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Synopsis

1. Ingredients.
2. Wrongful loss or damage.
3. "Mere neglect or carelessness".
4. "Causes the destruction of any property, or any such change in any property."
5. "Destroys or diminishes its value or utility or affects it injuriously."
6. Bonafide claim of right.
7. Master not liable for negligence of servant.
8. Conviction for mischief as well as for theft.
9. Complaint.

1. **Ingredients.**— One of the essential ingredients of the offence of mischief is that the act complained of must be committed by the offender with the intent to cause or knowing that he is likely to cause wrongful loss or to damage to the public or any person. The offence of mischief can be said to have been committed only in those cases where the loss is to be caused by unlawful means and it is to be caused to the property to which the person loosing it is legally entitled (1979) Cr LR (Raj) 684).

To constitute mischief it is necessary not only that wrongful loss or damage to the public or to any person be intended or be likely, but also that any property be destroyed or any such change should occur in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously so as to diminish its value or utility (Ram Roop v. Emperor, AIR 1939 Oudh 38 (39): 40 Cr. L.J. 138 = 178 I.C. 665).

This section necessitates three things : (1) intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person, (2) causing the destruction of some property or any change in it or in situation, and (3) Such change must destroy or diminish its value orutility or affect it injuriously. It will, there fore, be seen that no mischief can be committed where the acts complained of amount to an invasion of civil right. All damages to a property do not amount to mischief within the meaning of the Penal Code. If the owner of a land over which another or a body of others have a right either of passage or other use throws earth upon the land so that the use becomes either disadvantageous or impossible, it does not amount to mischief. This is what was held in some Cases and this also appears upon a plain construction of the section itself (Salien Sanrdar V. State, AIR 1958 Cal, 666(669) = 1958 Cr. L.J. 1396 ; Munir Mohammed V. Md. Abdul Hamid, 1983 (2) Crimes, 148).

Section 425, necessitates three things : (i) an intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person, (ii) causing the destruction of some property or any change in it or in its situation, and (iii) such change must destroy or diminish its value or utility or effect it injuriously. No mischief can, therefore, be committed where the acts complained of amount to an invasion of a civil right (PLD 1987 AJK 146). Mischief comprises of a mental and a physical element. The mental element is the intention express or implied (from the knowledge of likelihood of injury to cause wrongful loss or damage). The physical element is an act of destruction or injurious change in property (AIR 1960 Mad 240).

2. Wrongful loss or damage. - The expression 'wrongful loss or damage' in section 425, Penal Code must mean loss or damage by unlawful means. There is nothing unlawful in the accused installing an oil engine in his own property and working it in any way he chooses, although, if his working causes damage to a neighbour's property, the accused would be liable to a civil suit for damages. The damage cannot be said to be caused by unlawful means, the working of the engine on the accused's own property being a lawful act and the accused is not liable to be convicted for mischief (AIR 1935 Bom 164). For the same reason to remove lateral support and cause damage unless the right to support has been acquired by prescription for 20 years, or seizure of goods pursuant to a proper writ of a Court for attachment does not amount to mischief (12 Cut LT. 56).

Where unlawful loss or damage is caused to another party not with any criminal intent but for personal benefit, the accused cannot escape liability merely on the ground of absence of criminal intention. Thus it is no answer to a charge of mischief to plead that the motive of the accused was to benefit himself and not to injure another if he knew that he could only secure that benefit by causing wrongful loss to another (AIR 1960 Mad 240). Where over the Chabutra of a mosque there was an image of a hindu god, which was surrounded by a wall, the wall being the property of Muslims. The accused who was a hindu, widened the doorway in the south wall of the compound round the image of the idol by demolishing part of the wall on both sides of the doorway. It was held, that by breaking the wall and taking out the bricks, the accused caused wrongful loss to the Muslim public and, therefore, an offence under section 425 was committed (AIR 1926 All 704). Similarly wrongful cutting of trees standing on plaintiff's land by the defendant amounts to mischief (AIR 1942 Cal 544).

3. **"Mere neglect or carelessness" is not mischief.**— Where the accused set fire to heap of rubbish in his field which was close to a protected forest part, which was destroyed by reason or flames carried by the wind. It was held that the accused could not be convicted of the offence of mischief punishable under Section 426 of the Code for the facts did not at the outset show more than mere neglect or carelessness on the part of the accused, to keep the fire form straying into the Government forest (8 Bom LR 851 = 4 Cr LJ 446).

Mens rea is an essential ingredient of the offence of mischief and in absence of it, at best a civil liability may arise and, therefore, a person cannot be liable for prosecution (Impraisung Zeliang & 5 ors. v. State of Nagaland 1989 (2) Crimes 173 (Gau).

4. **"Causes the destruction of any property, or any such change in any in property."**–Where an accused trespasses into an educational institution, turns it records and books, threatens its staff with evil consequences and puts a bomb therein, the object obvioulsy is to create a scare so that neither the teaching staff nor the pupils would dare attend it for prosecution of studies, these acts not only constitute mischief under Section 425 but also constitute mischief which would disturb or is likely to disturb public order (Nagendra Nath Mondal v. state 1972 Cri LJ 482 (SC).

Where A harvests green paddy crops grown by B on his land. A commits the offence of mischief punishable by this Section. It is noteworthy that the offence of mischief is not committed in respect of movable property only as the offence of theft is committed, but it may be committed in respect of immovable property also (Ram Birich v. Bishwanath (1961) 11 Cri LJ 265. See, however, Sippattar Singh v. state (1957) Cri LJ 702).

To constitute mischief within the meaning of section 425 of the Penal Code it is necessary not only that wrongful loss or damage to the public or to any person be intended or be likely but also that any property should either be destroyed or any such change should occur in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously (AIR 1939 Oudh 38). It is not necessary that the damge, contemplated by this section, should be of a destructive character. All that is necessary is, that there should be an invasion of right and diminution of the value of one's property caused by that invasion of right which must have been contemplated by the doer, when he did it(12 Calk 55 DB). It follows that a person can be convicted under section 426 for sending his cattle to graze on the bund of a tank belonging to the complainant (AIR 1942 Mad 724), or for digging earth from joint land of which he is a co-sharer (AIR 1934 All 829). The accused was convicted under section 426, where fearing that the water in his tank would overflow, he caused a breach in the tank of complainant's field so as to let out surplus water on the complainant's land. There were no crops in the field and apart from the damage done to the bank, no other damage was caused to the complainant (AIR 1919 Pat 138). Where in the process of cultivating land, the accused dug up certain graves. It was held, that though primarily the object of the accused was to extend his cultivation yet his act involved such a change in the graves as would injuriously affect them. Graves can be treated as property. The acused, therefore, committed mischief (1 Weir 496 DB).

5. "Destroys or diminishes its value or utility or affects it injurioulsly."-The property regarding which the offence is alleged to have been committed must have been destroyed or its value or utility must have been diminished. In the latter caee it is not said to what extent the value or utility must have been diminished. But there

must be some appreciable diminution, otherwise Section 94 Will apply (1962) 2 Cr LJ 692).

The expression change in the property so as to destroy or diminish its value or utility does not necessarily mean a change in character, composition or form. If something is done to the property contrary to its natural use and serviceableness that dstroys or diminished its value or utility it will amount to mischief. It is not necessary for Section 425 that there must be material change in the property itself nor does the section require that value or utulity of the property means its market value or utility. Thus, where the water suplied to the flat of the complainant was stopped by a positive act in the shape of turning the main pipe through operation of a wrench valve key, it amounted to bringing about some change in the property of the water pipe for the purpose for the pupose for which it was used and such act diminished the value of the property (Bomkesh Bhattacharaya v. Lakshmi Narayan 1978 Cri LJ 484 (Cal). Gopi Nath v. Sommath Sinai Priolkar 1977 Cri LJ 1665 (Goa).

Similarly, the act of the landlord in switching off the electricity supply to the premises in occupation of the tenant constitutes mischief. It is not necessary to prove that in fact the accused had caused any damage to the distribution board or that wires supplying electric current from that board to the tenanted premises had been cut or destroyed (Sundaram P S v. Vershawami 1983 Cri LJd 1119 (Del).

6. Bona fide claim of right.— Where the accused asserts a right in relation to the disputed property it is for the Court to find out whether it was a bonafide assertion on his part, but it is for the Court to find out whether it was a bonafide assertion on his part, but it is not for the Court to decide whether he has a right or not (Manik Chand 1975 Cri LJ 1044 (Bom).

Further, such claim need not be of an actual legal right but may only have the colour of a legal right (Santosh Kumar Biswas 1979 Cri LJ (NOC) 79 (Cal).

What is compendiously referred to as *mens rea* is one of the essential ingredients of the offence of mischief and if the accused honestly believed in good faith that he had the right to do what he did even if he did not in law have that right, he cannot be said to ahve had the necessary intention or knowledge that he was likely to cause wrongful loss or damage. In fact, in the absence of any intention or knowledge of this kind, a conviction for mischief cannot be had (PLD 1964 Dhaka 170). Where a bona fide contest exists as to the title to property, no offence under this section is committed (AIR 1925 All 291) and the jurisdiction of the Magistrate is ousted altogether for trying the offence (23 CrLJ 504). Where a person removes by reasonable means a projection erected by the owner of an adjoining house, honestly believing that the projection is a trespass, the person must be deemed to have acted bonafide in the exercise of what he believed to be his right and he cannot, therefore, be guilty of an offence of mischief (AIR 1939 Mad 400).

Where there is a dispute as to the ownership of a boundary wall between the accused and the complainant and the accused bona fide believed that the wall belongs to him and pulls it down, he cannot be convicted of an offence under this section, unless a finding as to his lack of bona fide is given (PLD 1964 Dhaka 170). Where there was a bona fide claim of right by the accused to the wall in dispute and the accused had entered the complainant's house and pulled down an addition to the wall in his absence, the offence of mischief or house trespass was not made out against the accused (AIR 1924 Bom 486). But where ther was a dispute as to construction of a wall and the accused demolished it 4 months after its construction on the polea that it had been raised on his land. A mere plea of bona fide claim of right cannot exonerate him from responsibility. He cannot take the law in his own

hands. He had no right to abate the wrong and demolish the wall even if it had slightly encroached upon his land. He could very well take resort to sections 133 to 140 of the Cr. P.C. to undo the nuisance (21 DLR 231).

There may be a number of acts which amount to invasion of civil right as well as commission of offence under criminal law of the land. It cannot be said that merely because an act amounts to a tort it cannot be regarded as an offence. Thus where an adjoining higher land owner opened his sluices and allowed the water to flow into the lower land through it may amount to an invasion of a civil right was also held to be a criminal offence as on facts and evidence it was held that the claim of right to open sluices into adjoining land was not bona fide in view of an order of injunction obtained by the adjoining owner restraining the opening of the sluices (Ouseph V. State 1981 Cri LJ 1362 (Ker).

It is no answer to a charge of mischief to plead that the motive of the accused was to benefit himself, and not to injure another, if he knew that he could only secure that benefit by causing wrongful loss to another (Pannadi S (1960) Cri LJ 834

7. Master not liable for negligence of servant.— An owner who lived elsewhere could not, in the absence of express malice, be held criminally liable for the negligence of his contractor in digging the foundations of a house then being built without proper precautions (Srish Chandra Sircar (1918) 19 AIJ 343 : Cri LJ 299= (1919) AIR (A) 385).

In the case of mischief, the master cannot be held vicariously liable for any damage caused by the conduct of his servant (Saday Ram V. Upendra Malakar (1963) 11 Cri LJ `112).

8. Conviction for mischief as well as for theft.— It is not illegal to convict the accused of mischief as well as theft. The essential difference between theft and mischief is that when a person commits mischief he only causes loss to another but does not gain himself while in expense of the victim (Gajadhar 1971 Cri LJ 1361 (All).

9. Complaint.— A complaint may be filed by a co-owner of joint property against another if the accused has caused willful damage, even though the latter be a joint owner and the complainant be not in actual possession of the property in dispute. It is for the opposite party to show that there was no damage and that there was no wrongful intention but that is only at a later stage (AIR 1951 Vindh Pra. 1).

427. Mischief causing damage to the amount of fifty taka.-Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

428. Mischief by killing or maiming animal of the value of ten taka.-Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or animals of the value of ten 1[taka] or upwards, shall be punsihed with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

429. Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty taka.-Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty [1][taka] or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

1. Subs. by VIII of 1973, s. 3 and 2nd Sch., (with effect from 26-3-71, for "rupees".

430. Mischief by injury to works of irrigation or by wrongfully diverting water.-Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

431. Mischief by injury to public road, bridge, river of channel.-Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

432. Mischief by causing inundation obstruction to public drainage attended with damage.-Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

433. Mischief by destroying, moving or rendering less useful a light-house or sea-mark.-Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with mprisonment of either description for a term which may extend to seven years, or with fine, or with both.

434. Mischief by destroying or moving, etc., a land-mark fixed by public authority.-Whoever commits mischief by destoying, or moving any land-mark fixed by the authority of public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (incase of agricultural produce) ten taka.-Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred [1][taka] or upwards [2][or (where the property is agricultural produce) ten [1][taka] or upwards], shall be punsihed with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

436. Mischief by fire or explosive substance with intent to destroy house, etc.-Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, that

1. The word "taka' was substiuted for the word "rupess" by Act VIII of 1973, s. 3 & 2nd Sch., (with effect from 26-3-71).
2. Ins. by the Indian Penal Code Amendment Act, 1882 (Act VIII of 1882), s. 10.

destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the cutsody of property, shall be punished with [3][improsonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope and applicability.
2. Offence of unlawful assembly.
3. Evidence and proof
4. Sentence
5. Charge.

1. **Scope and applicability.**— The section contemplates three classes of buihdings, namely, the building used as a place of worship, the building used as human dwelling and the building, used as a place for the custody of property. The destruction of any one of the three classes mentioned in the section would complete the offence. A hut used for the custody of property shall be a building within the meaning of the section and any body causing destruction of the same by fire shall be liable under Section 436 Penal Code (Muhammad Ali Vs.Md. Fazal khan &ors. 20 DLR 1118).

2. Offence by unlawful assembly.— Where the common object of the assembly was to get the house vacated by forec but on refusal of the occupant to vacate it, the leader of the accused ordered it to be set on fire. It was held that only those members were guilty under Section 436 who set the house one fire (AIR 1942 Oudh 60). Where in consequence of the orders given by the accused, a hut is set on fire by one of the members of an unlawful assembly whose common object was to dismantle the hut and commit an assault on remonstrance, the accused can be convicted under Section 436 read with Section 109 Penal Code (AIR 1958 S.C. 813= 1959 S.C.R. 861=1968 P.Cr L.J. 1352).

Where all three accused persons were simply charged under Section 436 and convicted there under for setting fire to a dwelling house although one of them actually set fire to the house and the other two stood nearby with a view to aid the former. It was held that when it is satisfied that the conviction would not prejudice the appellants the Appellate Court can alter the conviction into one under Sections 436/109 although no such charge was framed (PLR 1959 Dhaka 1177).

Mere presence does not raise any presumption against accused.— However improper and callous the conduct of a person witnessing the serious crime of person being committed, in not interfering or preventing such crime may be said to be, he cannot be held to be a participant in the crime, unless some overt act, conduct or speech is altributed to him in connection with or in relation to the transaction in question (1958 Andh L.T. 856 ; 22 Cr. L. Jour 267 (Pat.)

3. Evidence and Proof.— In prosecution for the offence under Section 436 Penal Code, when twelve persons are allegedly involved in setting the house on fire, conviction of only two persons for the offence is not justified when it is not established as to who set the house on fire (Amulya Sahu and tWo others V. Trinath Nayak and others 1988(3) Crimes 76 (Raj).

There is no evidence that any material alamats of arson was produced before the Magistrate or any enquiring offier except Ext. 1, a muffler and Ext. 11 series, burnt blouses, which can hardly be considered as proper almats of destraction of a hut by fire. In the context of admitted enmity and litigation on the basis of oral evidence alone as the circums tances as noticed above raise reasonable doubt as to

3. Substituted by Ordinance No. XLI of 1985, for "transportation".

the truth of the complainant's case of burning down his dwelling hut. Neither the trial Court nor the High out Division considered those circumstances, particularly the absence of proper alamats of a burnt and complainant's failure (or avoidance) to go to the Police Station, so near to the place of occurrence and such omission, in our opinion, has affected the decision based merely an oral evidence and abused a miscarriage of juste. That there could be implicate the disputants who are no other than brother's sons of the complaints, as has been vigorously argued by the learned Counsel for the appellants, cannot be altogether ignored in view of the aforesaid circumstances. Benefit of doubt, therefore, goes to the appellants (Siraj Mia Vs. The State 1987 BLD (AD) 70 (Para 15)

Conviction under this section be made only on strict proof of the offence and not on mere suspicions. A persons whose property is lost by fire soon after he had affected a fire insurance cannot be suspected of arson (AIR 1941 Rang. 324= 1941 Rang. L.R. 565= 43 Cr. L. Jour 373 (DB). Similarly there can be no conviction under Section 436 on evidence of previous chain of events wherein the accused was not shown to have been convited (AIR 1917 Cal. 807= 17 Cr. L. Jour 421 (DB).

4. Sentence-Where the climate is excessively dry and there s a possibility that in high wind terrible disaster may follow, setting fire to any thatch building ought to be viewed very seriously, and should be severely punished (AIR 1924 All. 481=46 All. 791 (FB). It is right to pass a substantial sentence of imprisonment in such cases (AIR 1931 Oudh 116= 6 Luck 539=32 Cr L.Jour 694 (DB).

5. Charge.— The charge should run as follows:

I(name and office of the Magistrate) hereby charge you (mame of the accused) as follows :

That you, on or about the.....day of ...., at.....committed mischief by fire (or an explosive substamce) namely intending to cases (or knowing it to be likely that you would thereby cause) the destrruction of a building (specify which was ordinarily used as a place of worship (or as a human dwelling house or as a place for custody of property) and that you have thereby committed an offence punishable under section 436 of the Penal Code and within my cognizamce.

And I hereby direct that you be tried by this Court on the said charge.

Charge being one of rioting under Section 147 Penal Code, all who are members of the lawful assembly are guilty of rioting but individuals who did not commit mischief by fire, an offence punishable under Section 546 cannot be held guilty under that section by applying Section 147 (Bangladesh Vs. Abed Ali and others, 36 DLR 235 SC; 4 BCR 186, AD, 4 BLD 324 (AD).

Where the person instigated another to commit offence under this section but offence was committed not by person instigated but by someone else, it was held that the person instigated was guilty of abetment not under section 436 read with section 109 but under section 436 read with section 115 since commission of offence was not consequence of his abetment (AIR 1967 SC 533=1957 CrLJ 541.

Charge being one of rioting us. 147, Penal Code, all who are members of the unlawful assembly are guilty of rioting but individuals who did not commit mischief by fire, and offence punishable under section 436, cannot be held guilty under that Section by applying Section 149 (Bangladesh Vs. Abed Ali 36 DLR (AD) (1984) 235=1984 BLD (AD) 342).

437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden.-Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or

render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

438. Punishment for the mischief described in section 437 committed by fire or explosive substance.-Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with 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.

439. Punishemnt for intentionally running vesel aground or ashore with intent to commit theft, etc.-whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

440. Mischief committed after preparation made for causing death or hurt.-Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

441. Criminal trespass.-Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

Synopsis

1. Scope and aplicability.
2. Intention and knowledge.
3. "With intent to commit an offence or to intimedate, insult or annoy any person in possession of such property."
4. Having lawfully entered into or upon such property, unlawfully remains there."
5. Bona fide claim of right.
6. Possession.
7. Right of private defence against criminal tresspass.
8. Proof of means rea.
9. Civil and Criminal tresspass.
10. Evidence and proof.

1. Scope and applicallity.— Section 441 makes the trespass Criminal, if the entry is with an intent to commit an offence, and for that it is not necessary that the offence must be against the person in possession. The entry is also criminal if the intention is to intimidate, insult or annoy the person in possession. Therefore, if a person sitting in the house of another was beaten or assaulted then the case would fall under the first part, and if not then it would fall under the Second part, as in such a case such an intention must be presumed from the very object with the entry was made (Prafullah Kumar Ghosh V. State, AIR 1959 Tripura, 49 (50) = 1959 Cr. L.J. 1487). Section 441 seems to contemplate entry into property in the possession of another as a means to another act, and to regard the intenton with which it is

made in relation to that act (2 Mad 30 DB). The offence of criminal trespass is confined to cases in which the trespass is committed with a particular intention and the intention specified indicates that the calss of trespass to be brought within the criminal law is the one calculated to cause a breach of the peace (52 CrLJ 172).

It is a condition precedent to constitute the offence of criminal trespass that it should be with intent to commit an offence or to intimidate, insult or to annoy the person in possession of such property. Looking to the wording, mere constructive possession would not be sufficient as a person in absentia cannot be said to be intimidated, insulted or annoyed and such person had to be named by the prosecution in order to sustain the charge of criminal trespass (1983 PCrLJ 42).

Nishikanta Das v. state of Assam, 1977 Assam Law Reporter 47, it was held : "Trespass is a genus. It may be civil trespass or a criminal trespass. Every type of trespass is not criminal trespass. Section 441, Penal Code, does not postulate every unlawful entry to be criminal trespass. The entry must be with the necessary intent envisaged in Section 441, Penal Code, The Section contemplates three necessary or essential ingredients :- (i) there must.be entry into or upon a property in possession of another; (ii) even if such entry is lawful, it may amount to criminal trespass, if the person entering there, unlawfully remains upon such property and ; (iii) such entry as aforesaid or unlawfully remaining as statedd above must be with the intimidate insult or annoy the person in possession of the property:.

It was further held that the claim of the accused person entering upon the land might even be ill-founded but if the claim is well founded, question of approaching a criminal court or bringing a case against them does not arise at all. It was further observed that even if the claim is ill-founded in law but acts upon such in founded right, he cannot be made liable under Section 447 of the Penal Code (Impraising zeliany V. State of Nagaland 1989 (2) Crims 173 Gau).

By the use of the words property in the possession of another in Section 441 what is really meant is that the person concerned should be so situated with respect to it that he has the power to deal with it as owner to the exclusion of all others. These words do not mean that the person in possession of the property must be physically present on the premises at the time of the trespass. As soon as trespass is committed upon property in the possession of another with one of the intents specified in the Section, the offence of Criminal trespass is complete (Ghulam Nabi Vs. The State (1959) 11 DLR 120 (WP).

2. Intention and knowledge.— To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent or at any rate constituted no more than a mere subsidiary intent (55 Cal WN 1= 1951 MWN 437 = 52 Cr LJ 173 (PC) = AIR 1942 Pat 150 = 43 Cr LJ 537).

In order to constitute an offence there should be an criminal mens rea. The words "With the intention of taking unauthorised possession or making unauthorised use of the property". If a person having such an intention does not leave the property on receiving notice of the person who would be deemed to be in possession (i.e. constructive possession) he would be taken to have committed trespass (1981) Cr LJ 1705 (All).

Mere occupation even if illegal cannot amount to criminal trespass. Intention to commit an offence is an essential ingredients (1983 Cr LJ 173 (SC). Criminal trespass depends on the intent of the offneder and not upon the nature of the act and as such conviction for criminal trespass without recording an express finding as

to the real intent of the entry is not maintainable (The State Vs. Habibur Rahman Khan, (1970) 22 DLR 511; 8 DLR 35 Short Notes, 9 DLR 466)

Intent to commit the offence enumerated in the Section is to be inferred from proved facts the rule being that a person intent the natural and inevitable consequences of his own acts. Section 441 of the Penal Code, clearly requires that the act complained of must be done with either one or the other of the intents mentioned therein. It is true that knowledge is not the same thing as intent, Intent is stronger than knowledge. Mere knowledge that annoyance, etc. will be caused not enough for conviction (Jane Alma Vs The State, (1965) 17 DLR 455 (SC).

3. "With intent to comit an offence or to intimidate, insult or annoy any person in possession of such property."-The mere taking of lawful possession of a house will not amount either to criminal trespass or house trespass. An unlawful act is not necessarily an offence. The house in question must be in the actual possession of the complainant. Mere constructive possession is not sufficient (Satish Chandra Modak (1949) 2 Cal. 171 Sant v. state (1962) Cri LJ 31).

Where in a pen-down strike the employees of a bank entered the office and occupied their seats and refused to work during office hours and there strike which was peaceful was wholly confined to regular working hours and the only act alleged against the strkers was that they refused to vacate their seats when they were called upon to do so by the superior officers, it was held by the Supreme Court that the conduct of the strikers did not amount to criminal trespass under this Section. The Supreme Court observed as follows : "The sole intention of the strikers obviously was to put strkers might have known that the strike may annoy or insult the bank's officers it is difficult to hold that such knowledge would necessarily lead to the inference of the requisite intention. In every case where the impugned entry causes annoyance or insult it cannot be said to be actuated by the intention to cause the said result. The distinction between knowledge and intention is quite clear, and that distinction must be borne mind in deciding whether or not in the present case the strikers were actuated by the intention to cause the said result. The distinction between knowledge and intention is quite clear, and that distinction must be borne in mind in deciding whether or not in the present case the strikers were actuated by the requisite intention. The said intention has always to be gathered from the circumstances of the case and it may be that the necessary or inevitable consequence of the impugned act may be one relevant circumstances of the case and it may be that the necessary or invevitable consequence of the impugned act may be one revant circumstance. But it is impossible to accede to the argument that the likely consequence of the act and its possible knowledge must necessarily import a corresponding intention (Punjab National Bank v. AIR NBE Federation AIR 1960 SC 160).

The finding that the accused are guilty under Section 448 Penal Code because they took the law in their own hands with intent to dispossess the complainant from the room is not sufficient for a conviction under section 448, inasmuch as intention to dispossess is not one of the ingrdients covered by Section 441 of the Penal Code, To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or insult, intimidate or annoy the occupant. The findings of a Civil Court would not be relevant in a Criminal Court, when it is called upon to give its own finding on the same facts (Rahmatullah and anothers Vs. The State, (1958) 10 DLR 143).

Every unlawful entry does not amount to criminal trespass. The essence of section 441 Penal Code, which defines criminal trespass is the intent with which the entry is made and in every case the intent must be either to commit an offence or to

intimidate, insult or annoy person's possession. of such property. The section does not penalise unlawful entry with any other intent. Such as mere intent to take possession. The Court must come to a clear finding that the entry was with one or more of the intents mentioned in Section 441 Penal Code (Arjad Ali Vs. The Crown (1953) 5 DLR 13).

In order to constitute criminal trespass under section 441, entry into the property in the possession of another must be with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property (PLD 1962 Kar 330). The difference between a civil and a criminal trespass is that in the latter the criminal intentions mentioned in section 441 should be present (3 DLR 13). Where the accused took possession of a field which was in the possession of the complainant as mortgagee, in his absence, with intent to obtain possession unlawfully and refused to make over possession of the field with a threatening attitude when the compolainant demanded it back. It was held, that this did not necessarily mean that the accused intended to annoy, insult or intimidate the complainant or that in entering upon the field their intent was to commit any offence. In the absence of a clear finding to that effect the accused could not be convicted under section 447 (1951 Raj LW 501).

Primary and secondary intention : It may well be that in doing a particular act a man may have more intentions than one to bring a case within section 441, the intention specified therein must be the dominant intention (1968 PCrLJ 953). If the primary intention is something other than to intimidate, insult or annoy, the section does not apply. Thus where the primary and dominant intention of the accused was to take possession of the property, and in entering into the property, they may have been conscious that annoyance to the complainant might be a natural and inevitable consequence of their action, but that was not the purpose with which they had entered into the house, they could not be convicted under section 441 (3 DLR 13). The other view is that even where dominant intention is other than the one expressed in the section, the section would apply if the ultimate result is intimidation, insult or injury (AIR 1965 Punj 145), is no more good law because the cases mentioned above have been overruled (PLD 1965 SC 640). It follows that where the petitioners were held guilty because they took the law in their own hand with intent to dispossess the complainant from a room, which is not covered by section 441. They could not be convicted under section 441 (PLD 1958 Dhaka 350).

The word 'intimidate' in section 441 must be understood in its ordinary sense to overawe, to put in fear, by a show of force or threats of violence and it may include use of actual force unaccompanied by threats (NLR 1983 AC 513). Thus where a person enters the house of another and throws out his servant by force (AIR 1952 Hyd 38), or where the accused tries to retake possession of a vacant plot from which he was ousted by the rightful owner (AIR 1952 Hyd 50), or of which the rightful owner had taken possession when it was lying vacant, he commits an offence under this section (AIR 1939 Oudh 45).

Trespass is an offence only if it is committed with one of the intents specified in the Section; and proof that a tresass committed with some other object was known to the accused to be likely or certain to cause insult or annoyance is insufficient to sustain a conviction (Mathri (1964) 11 Cr LJ 57 (SC) ! Vullappa. V. Bheema Row (1917) 41 Mad. 156 (FB).

Intention to annoy-When a person enters without any legal justification upon property in the established possession of another, he must be inferred to have had an intention to annoy the person in possession (Jagannath Singh V. Sangeet Kistayya (1952) Hyd 326 : Midha Das (1952) 1 Patiala 302; (1952) Cr LJ 107 ; Ratan Chandra

Baroi v. Muhammed Matakkal 1982 Cri LJ (Noc) 147 (Gau). The mere fact that a person in possession is annoyed is not enough. It must be proved that the intention of the trespasser was to annoy (Upendra Nath Paul v. Bankin Chatterjee (1947) 48 Cr LJ 785).

4. "Having lawfully entered into or upon such property, unlawfully remains there".— Where the accused entered into possession lawfully the complainant later purchased the property and asked the accused to vacate and the accused at first agreeed to do so but later refused it was held that the dispute was of a civil natutre (Mangal Ram Bahagat 1976 Cri LJ 362 (All).

Where the accused took possession of the rooms belonging to the complainant when the latter had left for another place for a short while but refused to vacate them, when on his return the complainant asked him to vacate, it was held that he was guilty of Criminal trespass (Mohanta Lal Das v. Monmohan (1950) 51 Cri LJ 1496 ; 85 Cri LJ 200; (1950) AIR (C) 410).

Section 441 clearly requires that there should not only be a notice in writing at the time when the unauthorised act was being done but such a notice has also to be served upon the trespasser by the date specified in the notice, It is for the prosecution to prove due service and once that evidence is lacking it cannot be urged that the second part of Section 441 would be attracted (Sridhar Gupta v. State 1977 Cri LJ (NOC) 58 (All).

The Section further requires that notice has to be given by the person who has been dispossessed. It cannot be given by a police officer with whom a report may be lodged about the trespass (Ram Bahal Pander.V. Ram Nand Gupta 1976 Cri LJ 290 (All). And where notice under Section 441 did not specify the date by which the accused should vacate the land as the notice was not in conformity with Section 441 accused was held not liable (Man Singh V. State 1979 Cri LJ 1433 (All).

If an owner gives notice under S. 441 to an occupant of his property. whatever his statuse may be, and the occupant does not vacate then the occupant is not liable to be convicted for the offence of criminal trespass. The essence of the offence of criminal trespass under para 2 of section 441 is the specified inteition "of taking unauthorised possession or making unauthorised use of the property." Where the complainant alleged that the complainant and his brother (Who was the accused) were partners in the business carried on at a shop, that the partnership had been business carried on at a shop, though served with a notice to quite, was guilty of criminal trespass, it was held that as the accused was in possession of the shop from the times of his father and as there was no partnership between the parties as alleged by the complainant, the remedy or the complainant to eject the accused was by filing a suit in the competent Civil Court and the accused cannot be punished under Section 447 of the Code (Chidda Lal v. Bal Swarup 1081 Cri LJ 1705 (All).

5. Bonafide claim of right.— A plea of a *bona fide* claim of right to possess property as a defence to a prosecution for criminal trespass could be said to be similar to a plea of an exception from criminal liability. In other words, the burden of proving such a plea would rest upon the accused persons. Nevertheless, it is well settled that the facts proved may shake the prosecution case on the ingredients of a an offence so that the prosecution case fails for want of proof beyound reasonable doubt. Even if the accused do not take up the plea that an entry upon land was made under a bona fide claim of right. yet, if the facts proved, either from the side of prosecution or by the defence, show that such a claim to be in possession had been advanced but the accused failed to set it up to justify re-entry, because interruption of possession itself was denied by them untruthfuly, the prosecution will still have to

discharge its primary and initial burden or proving its case by showing that no such claim of right could reasonably be made to justify re-entry by the accused. If the claim which could have been put forward by the accused is shown to be no better than a mere claim cloak, the prosecution would succeed. But, if that claim could reasonably and bona fide rest upon some right, even if that basis is not legally sound or is temporary only, it could operate as a shield against a criminal prosecution. In such a case the dominant intent may still be to assert a bona fide claim and not one of those intents specified by Section 441 Penal Code (Babu Ram v. State, 1971 A.L.J. 4(11.12).

The plea of bona fide claim only issued in cases where the trespass is not of an aggravated kind and is supported at least by a plausible show of title or by such circumstances as would justify an inference, that the petitioners intention was not to commit an offence or to insult, intimidate or annoy the person in possession, but merely to vindicate what they conceived to be their legal right (Dharamraj v. Thillainathyn, 1977 Cr L.J. 300 (302) (Mad.). When the owner of the property went to the field to take possession in a peaceful manner while acting in entering into the land amounted to criminal trespass (Abdul Gafar Umar V. State of Gujarat 1988(3) Crimes 464 (Guj).

The accused party entered a plot of land under the possession of the complainant. It was held that even if the accused had a bona fide belief that they were entitled to possession of the land such belief could not give them any right to cause damage to the standing crop. Bona fided claim for the crop can be a defence against the offence of theft but no defence in mischief for mischief cannot be caused even to one's own crops. The accused were held liable under the section (Bhadra Kanta Das 1981 Cri LJ (NOC) 91 (Gau).

Law is well, settled that if the claim is a mere pretence the accused is not entitled to claim a bona fide right. Where the petitioners taking advantage of the fact that once upon a time the disputed property was recorded in the name of the father of petitioner No. 1 forcibly took law into their hands and destroyed the paddy seedlings, no case of bonw fide claim of right is made out. The claim is a mere pretence (Gani Mallik V. Nakul Charan Sahu, 1974 Cr. L.J. 216 (216).

Before a conviction under section 447, is maintained it must be held that the accused had not occupied the land under a bona fide claim of rght and that the real and dominant intention of the accusd was to insult or intimidate or annoy the complainant when the accused entered into the property (AIR 1960 Punj 160). It follows that every trespass to do an unlawful act is not necessarily an offence and an intention to commit an unlawful act not being one of the acts mentioned in section 441 mere entry does not render the accompanying trespass a criminal trespass (AIR 1924 Lah 449).

Entry upon land, made under a bonafide claim of right, however ill founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant (PLD 1964 SC 117). Therefore where the accused take up defence of a bonafide claim of right, it is necessary for the complainant to establish by evidence the intention of the petitioners which amounted to intimidation, insult or annoyance to the complainant in consequence of this trespass (PLD 1952 Dhaka 30) Where there is no evidence to prove intention to intimidate, insult or annoy there can be no conviction even where the accused enclosed a portion of the complainant's land in his own in the bonafide exercise of his right (1937 Mad WN 883), or where the zamindars of a villge took possession of the house of their tenant after his death on the ground that they were entitled to it (1 CrLJ 919), or where the accused built a hut on a portion of the land

in dispute between him and the complainant (13 Cal LR 212 DB), or where the accused in exercise of a bonafide claim of right to pasturage entered upon land and remeoved ails erected on it, (AIR 1946 Cal 237), or where the accused who were more than 50 in number went on land with the officers of the court to take delivery of the land under order of the court, (AIR 1960 Tri 43), or where a jagirdar is permitted by the executive authoriies to eject a tenant, and the jagirdar after serving a proper notice to quite upon a tenant goes and cultivats the land (1946 Jai. L.R. 187 DB), or where the accused entered a house to execute a writ of attachment (12 Cut LJ 56), or where a land lord entered the land in possession of his tenant in bonafide exercise of a claim of right invoked the bullocks of his tenant (AIR 1965 J&K 90).

If a person enters on the land in the possession of another in the exercise of a bonafide claim of right, but without any intention to intimidate, insult or annoy the person in possession or to commit, and offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a bona fide claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence (AIR 1950 Pat 564=51 Cr LJ 1565).

Where the accused entered upon a piece of land in the honest belief that he had a right to enter the same for the purpose of cremating the body of a relation and ignored the protest of the person claiming to be in occupation as frivolous, and the accused was strengthened in his belief by a resolution of the panhayat, even though incorrect it could not be held that the accused was guilty of an offence under Section 441 (1966 Mad LJ (Cr) 553= (1966) Mad LJ 99).

There existed a bona fide claim of right, to enter upon a property. Held, in the absence of proof of a criminal intent to commit a trespass the charge would fail (1985) r LJ 1959 (Gau).

The accused entered on complainant's land after being out of possession for long time and sowed paddy inspirte of protest. The complainant claimed to have purchased land from A. The accused alleged absence of partition between "A" his uncle and himself and claimed bona fide right over land. The complainant produced sale deed, mortgagee deed, mortgage deed and documents which proved his prior possession for a very long period. It was held that the plea of bona fide claim of right, by accused was held untenable and accused was guilty of offence under Section 447 Penal Code (1983 Cr LJ NOC 177 (Orissa).

6. Possession.— The word "possession" as used in Section 441, has obviously been used in its most extensive sense and no qualification whatever has been attached to it. It means both "moderate" and "immediate possession." To all intents and purposes a Government office in particular building allotted to him is in actual physical and immediate possession of his office premises qua a member of the public who may have a right of access to it in connection with official business. Therefore, it is possible for the officer in charge of his official premises to make out a case if he asks a person who has entered the office, to quit the same and he refuses to do so and continuously remains therein with the intent prescribed in Section 441 (1963) 1 Cr LJ 223 = AIR 1963 Raj 19 = 1962 Raj LW 636).

Right of possession of trespasser.- Rightful owners of land do not lose their possession, particularly on an open piece of land merely because of a single act of trespass (AIR 1958 Raj 52), or even intermittent acts of trespass (PLD 1965 Kar

637). The treapasser secures possession only when his possession becomes peaceable. As long as there is struggle or effort on the part of the person in possession resisting the requisition of possession by the trespasser, it cannot be said that the trespasser has secured possession of the property (PLD 1959 Kar 345).

Joint possession and ownership.- A co-sharer building upon common waste land despite the refusal of consent by others is not guilty of an offence under section 447. The asking for consent would not opperate as an admission of the ownership of the person whose consent was asked for (AIR 1914 All 490). Where the accused purchased a share in land and structures jointly owned by some co-sharers in execution of a decree against one of them, and he utilized the material of old huts in building new huts on the same land. It was held that the accused was not guilty of an offence under this section (AIR 1936 Cal 261).

A joint owner may in some cases be held guilty of criminal trespass. If a co-owner does something which amounts to ouster of other co-owner in some way, he may be held guilty of criminal trespass (AIR 1955 NUC 3632). Similarly a joint owner, entering on the land intending or knwoing that he is to commit an act wrongful to his fellow owners, is guilty of trespass (12 CrLJ 532).

7. Right of private defence agianst criminal trespass. - Holder of a right to property has a right to defend it. A trespasser can be done any harm short of murder. Such a right would end once the criminal trespass terminates. Any act done beyond it would be penal (1985) 1 Crimes 80 (MP). With regard to property, section 97 of the Penal Code, provides that whenever any of the offences specified in that section is committed or is about to be committed, a person to whom the propoerty belongs has a right to defend it against the commission of such offence or offences. Where the criminal trespass committed by the party of the complainant had not caused any irreparable damage to the land possessed by the accused, but, nonetheless, it amounted to a criminal trespass, the accused had undoubtedly a right of defence against such trespass (PLD 1964 Dhaka 480). He need not, instead of protecting his property run to the police and leave the aggressors to do that which the law entitled him to protect himself by exercising his right of private defence (AIR 1934 All 829). He is entitled to use force to ward off the attack which is delivered on him by the trespasser (AIR 1954 Sau 156). Where new tenants entered into possession of certain plots, in dispute and had sown crops there and when they were engaged in cutting the crop the accused interfered and a fight ensued. It was held that the accused were not entitled to the right of private defence (36 CrLJ 1052).

It is settled view that as soon as apprehension of danger to the body ceases as a consequence of the adversary becoming disable or helpless, the right of private defence comes to an end. In the present case all the accused persons were alredy on the spot duly armed with lathi and ballam. The deceased was assaulted as sooner he entered into the field. The respondents must, therefore, be deemed to have a common intention to assault the deceased by causing such bodily injuries which were likely to suit in death. This common intention apparently developed on the spot, while the assault continued. The accused persons must be convicted under Section 304, Part-1, Penal Code, read with sec. 14, Penal Code (State of Madhya pradesh v. Rawaram. 1985 (1) Crimes 80 (85, 86) (M. P.).

8. Proof of means rea.—Means rea is an essential ingredient of very offence under the Penal Code. A determination of the effence of an act may not be enough. The underlying or real intention in commiting the act may have to be examined to find means rea. In alleged criminal trespass, the dominant intention which is laid down in Sec. 441, Penal Code, gives the required means rea d(Babu Ram v. State, 1971 A. L. J. 4 (11).

In deciding whether the aim of the entry was the causing of such annoyance, intimidation or insult, the Court has to consider all the relevant circumstances including the presence of knowledge that its natural consequences would be such annoyance, intimidation or insult and including also the probability of something also than the causing of such intimidation, insult or annoyance being the dominat intention which prompted the entry (Rash Behari Chatterjee v. Fagu Shaw, (1969) 2 SCJ 864 (865); AIR 1970 SC 20).

9. Civil and criminal trespass.—As such, trespass is a wrong, and it may be a civil wrong a crime. As Strainght, J. Pointed out in one case (Covind Prasad, I. L. R. 2 All 465), out of the four requirements of this section, the last, "to annoy any person," is too vague and must be limited in its construction to that which generally and reasonably affects and ordinary person and not what would specially and exclusively annoy a particular individual (Naurang v. Janta, 1952 Cr. L. J. 542 (542) (H. P.).

This and the following sections are designed to protect possession as distinguished from title in the sense that the question in whom title to the land or property vests is foreign to the offence (Ram Kali v. Gaya prasad, AIR 1950 All 653 (654); 51 Cr LJ 1167; 5 DLR (All) 258; 4 A. I. Cr. D. 505).

If the intention of the accused was only to take possession and not to intimidate, insult or annoy the person in possession, the trespass is only a civil trespas for which damages may be claimed in a civil court and the accused cannot be convicted for criminal trespass (Bishun jDayal. v. Brij Behari, AIR 1933 Oudh 179 (180); 34 Cr L. J. 1014; 10 O. W. N. 266; 145 I. C. 625).

In order to satsify the conditions of sec. 441 it must be established that the apellant entered in possession over the premises with intent to commit an offence. In the instant case a bare perusal of the complaint filed by respondent no. 1 makes it abundantly clear that there is absolutely no allegation about the intention of the appellant to commit any offence or to intimidate, insult or annoy any person in possession. The appellant may be fondly thingking that she had a right to occupy the premises even after the death of her husband's borther. If a suit for eviction is filed in the Civil Court she might be in a position to vindicate her right and justify her possession. This is essentially a civil matter which could be properly adjudicated upon by a commpetent Civil Court. To initiate criminal proceedings in the circumstances appears to be only an abuse of the process of the Court (Kanwal Sood Smt. v. Nawal Kihsore, 1983 Cr L. J. 173 (175).

10. Evidence and proof.—In order to constitute offence of the criminal trespass following three essentials are required to be proved:

(i) entry into or upon property in possession of another;
(ii) if such entry is lawful then unlawfully remaining upon such property;
(iii) such entry or unalwfully remaining must be with intent-
(a) to comit an offence, or
(b) to intimidate, insult or annoy the person in possesson of the property.

Every unauthorised entry is not criminal trespass. A trespass is not criminal unless one or other of the intentions specified in the definition is proved (Mohan Singh v. State, 1989 Cr. L. J. 1199 (1200) (J & K). In a prosecution for criminal trespass it is necessary to determine in whose possession the property was at the date of alleged trespass (AIR 1918 Mad 574 = 18 Cr LJ 761).

Where the accused started building a hut on a piece of land which was not obviously included within railway land, and the accused apparently acted under a bona fide claim of title and there was nothing to establish an intention to intimidate, insult or annoy, but later on it was demonstrated to him that the land was railway

land and he still continued to build in spite of repeated remonstrances and warnings, it was held that he was rightly convicted of the offence of criminal trespass (Baldew (1933) 56 All. 33).

Accused's son, a young boy, having stolen some jewels belonging to his father told him that he had given them to the Head Master of his school, the complainant, who kept them in a box in his house. There upon the accused with his friends, the co-accused, went into the complainant's house and, in spite of the latter's protests, searched the house, but nothing was found. It was held that the accused were not guilty of criminal trespass becuses trepass was an offence only if it was committed with one of the intents specified in the section and proof that a trepass committed with some other object which was known to the accused to be likely or certain to cause insult or annoyance was insufficient to sustain a conviction under s. 448 (Vullappa v. Bheema Row (1917) 41 Mad 156 (FB). See Mathri (1964) 11 Cri LJ 57 (SC).

Accused respondents had also possession in the case land along with the appellant who is not in exlusive possession of the property on which a Partition Suit is pending in the Court between the appllant and his cosharers. Alleged acts done by the accused respondents do not contain ingredients of section 448 ofd the Penal Code, (Belayet Hossain vs. Humayun and others 1982 DCR 465 (AD).

In a case where the accused had gone on the roof of a house at 10 in the night and on being sighted jumped from house to house and was caught in a Khandi, it was held that his presence there was with intent to commit some offence (1970 Cr LJ 1199 (Pat).

It is not sufficient to show merely that the natural consequence of the entry was likely to be annoyance, intimidation or insult and that his likely consequence was known to the person entering. The court has to consider all the relevant circumstances including the presence of knowledge that its natural consequence would be such annoyance, intimidation or insult and including also the probability of something else that the causing of such intimidation etc. being the dominant intention which propted the entry (AIR 1964 SC 986 = (1964) 2 Cr LJ 57 = (1964) 5 SCR 916).

Even if the accused do not take up the plea that an antry upon land was made under a bonafide claim or right, if the facts proved, either from the prosecution or by the defence, show that such a claim to be in possession had been advanced but the accused failed to set it up to justify re-entry, because interruption of possession itself was denied by them untruthfully the prosecution will have to discharge its primary and initial burden of proving its case by showing that no such claim of right could reasonably be made to justify reentry by the accused (1971 All Cr C 47).

442. House-trespass.— Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation.— The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

Synopsis

1. 'Entering into'.
2. Criminal intention.
3. Mens rea.
4. Bonafide claim of right.
5. Building what is.
6. Evidence and proof.

1. 'Enterng into'.— However in Dinesh Thakur it was held that going on the roof of a house is not only crminal trespass but house trespass because, the roof of a house is a part of the building and it cannot be treated as something independent or separate from the building. The words entered into should not be taken too literally and the other ingredents of the offence being satisfied, going on the roof of the house would be an offence under the section (Dinesh Thakur (v. state1970 Cri LJ 1199 (Pat). Satho Tanti v. state 1974 Cri LJ 76 (Pat).

The accused who held a decree against the judgment debtor. Finding the door of the judgment debtor shut they entered into his compound by passing through the complainant's house without the latter's consent and notwithstanding his protest. It was held that the accused's act amounted to criminal trepass, for when they trespassed on the complaonant's house not withstanding his protest they must as reasonable men, have known that they would annoy him (Luxman Raghurnath v. state (1902) 4 BOm LR 280: 26 Bom 533; Lakhmi Das (1919) 4 LLJ 532. See HOwever, Mathri (1964) 11 Cri LJ 57 (SC).

For conviction under section 442 there must be either entry in the building or the accused must have remained in the building (1951 All LJ 461.) Therefore where the accused having broken the lock enters into a kothri which is not in his possession but is in possession of the complainant and does so behind the back of the latter, he is guilty of criminal trespass (AIR 1945 All 26). Sitting on the pial of a house (AIR 1942 Mad 532), or putting his hand accross the top of the railing would amount to house trespass (AIR 1934 All 833). But going under the house (6 CrlJ 134), or getting on the roof of a building (1951 All LJ 461), or the mere putting of hand into a hole in the wall without putting it through the hole is not an entry into the house within the meaning of section 442 (AIR 1934 Lah 509).

As a verandah itself is a part of the house it needs no walling up for the purpose of construing trespass into the verandah of a house as tresapss in the eye of law (AIR 1955 NUC 4320). Even where a mere entry on a verandah may not amount to house trespass, such entry coupled with an attempt to push open the door does amount to an attempt to commit the offence (AIR 1951 Low Bur 102).

2. Criminal intention.— In order to sustain a conviction under this section there must be an express finding that one or other of intents mentioned in section 441 has been found (PLD 1962 Kar 330). Where there is nothing in evidence as to what offence the accused intended to commit nor any finding by courts below that entry into the house was with any of the intents mentioned in section 441, the accused cannot be convicted (1968 PCrLJ 968). Where the petitioners were held guilty because they took the law in their own hand with intent to dispossess the complainant from the room which was not covered by section 441, the conviction was set aside (PLD 1958 Dhaka 350). Mere entry into or upon property in the possession of another does not amount to criminal trespass unless it is with intent to commit an offence or to intimidate insult or annoy any person in possession of such property. The fact that an accused should have known that the entry would cause annoyance to the man in possession, is not enough to hold the act to be criminal trespass (PLD 1962 Lah 91).

3. Mens rea.—Mens rea is intent to commit offence or to intimidate, insult or annoy any person in possession is essential ingredient of the offence (1971) Cr LJ 1483 (Mad).

4. Bona fide claim of right.— Bona fide calim of right which would prevent a trespasser into the house from being a criminal trespass must be a claim with regard to entry into the house (1971 Cr LJ 1401 (Orissa) = (1971) 1 CWR 271).

The accused broke open the lock and gained entry into the house containing the complainant's articles. It was held that though the accused might have believed bona fide that the title of the house vested in him, there being no disput as to who was in actlau possession, accused was well aware that he had no right to enter the house by breaking open the lock, and that his action in so effecting entry could not be held to be in the assertion of a bona fide clam (AIR 1967 Bom 209 = 1967 Cr LJ 856).

Where an entry is made under a bona fide claim of right, mere knowledge of the accused that his action is likely to cause anoyance is not sufficient. It is the duty of the Court to find out the real or dominant intent (1967 Raj LW 149).

Mere entry into or upon property in the possession of another does not amount to criminal trespass unless it is with an intent to commit an offence or to intimidate insult or annoy any person in possession of such property. The fact that an accused should have known that the entry would cause annoyance to the man in possession, is not enough to hold the act to be a criminal trespass (PLD 1962 Lah 91). To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that the claim of right was a mere cloak to cover the real intent or at any rate constituted no more than a subsidiary intent (PLD 1962 Kar 330).

5. Building - what is.— The word "building" has not been defined in the Penal Code, The word "building" as defined in the Chambers' Dictionary means the art of erceting houses, that is, when it is used as verb and mens anything built, a house, when used as a noun. The question as to what is a building must always be a question of degree and circumstances and it is impossible to lay down any general definition of the same (Dinesh Thakur v. State of Bihar, 1070 Cr. L. J. 1199 (1202).

What is a building within the meaning of section 442 must always be a question of degree and circumstances, and it is therefore impossibile to lay down a general definition. The ordinary and usual meaning of building is a block of bricks or stone work covered by a roof. If an open piece of land is surrounded by a wall it would probably be impossible to call it a building. In Bangladeshi houses generally there is a courtyard which is not covered. It may be a matter of some difficulty in such cases to say that when a man commits criminal trespass and enters the courtyard of the house, he is not guilty of house trespass. Moreover, there may be cases where a man may be living in a house, the roof of which has fallen down, but he has put up some sort of a shelter inside within the boundaries. In such cases too it may be difficult to say that the man has not been guilty of house trespass simply because the roof of the house has fallen down. Therefore it would depend on the facts of each case whether trespass has been committed in a building used for human dwelling so as to come within the definition of the word house trespass (AIR 1945 All 81). Whether any particular structure or any part of it was intended as a human dwelling or as a place of worship or for custody of property must ncessarily depend on the facts of each case (AIR 1929 Sind 17). A thatch hut built for residence is a building used as a human dwelling within the meaning of section 442 (AIR 1916 Oudh 109).

Even a courtyard consisting of a walled enclosure with four rooms opening into it and a outer door to get into it will be a building for the purpose of section 442 of the Penal Code. Similarly a walled courtyard has also been held to be building (Umar Ali Vs. The State, 20 DLR 1102).

6. Evidence and proof.— It the existence of mens rea, being the essential ingredient constituting an offence under S. 442, has not been proved by the evidence

on record, the accused is not liable to be convicted under this section (Kamalammal v. Meenakshi Ammal 1971 Cri LJ 483 (Mad).

443. Lurking house-trespass.— Whover commts hous-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

444. Lurking house-trespass by night.— Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night".

445. House-breaking.— A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say :-

First.— If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly.— If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance ; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly.— If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthy.— If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly.— If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Sixthly.— If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation.— Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(a) A commits house-trespass by making a hole throungh the wall of Z' house, and putting his hand through the apperture. This is house-breaking.

(b) A commits house-trespass by creeping into a ship to a port-hole between decks. This is house-breaking.

(c) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house having opened the door with that key. This is house-brcaking.

(g) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(h) Z, the door-keeper of Y, is standing in Y's doorway. A commits hous-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

446. House-breaking by night.— Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night".

447. Punishment for criminal trespass.— Whoever commits criminal trespass shall be punished with imprisoment 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.

Comments

In order to convict an accused under Section 447 of the Penal Code, it is incumbant on the part of the Court to arrive at a finding on consideration of evidence on record that each of the accused had initial intention to commit an offence punishable under Section 447 of the Code. For want of such finding in a dase, no conviction under this Section is warranted (1992 BLD 301).

Co-dsharers are in exclusive possession of specific portion of joint property by amicable arrangement, though no legal partition by metes and bounds did take place. Any taking away of trees from the portion of one co-sharer by enorcachment upon it is punishable as an offence of theft and criminal trespass under section 379 and 447 of the Penal Code (Aftabuddin Vs. The State, 17 DLR 479).

The finding of the Civil Court as to possession passed in a Civil Suit shall prevail over the finding of the Criminal Court as to possession. If the appellant was in possession in 1978 as foundd by the Civil Court, then for the purpose of the Criminal case it was enough to hould that the prosecution evidence as to possession could not be accepted beyond reasonable doubt. The appellant could not be legally convicted for the alleged offence of criminal trespass (Samiruddin Ahmed Vs. The State (1988 BCR 25 (AD).

448. Punishment for house-trespass.— Whoever commits house-trespass shall be punisned with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [1][taka], or with both.

Comments

If the property would have been found in exclusive possession of the appellant, the accused-respondents, even if they had any bonafide claim of right, would not have been justified in taking law into their own hands, to recover possession. The finding of the lower appellate Court being that accused-respondents had also possession in the case land along with the appellant and that a partition Suit is pending between the apellant and his co-sharer, the learned Judge of the Highd

1. Subs, by Act VIII of 1973, s. 3 and 2nd Sch. (with effect from 26-3-71), for "rupees".

Court Division committed no illegality in holding that the alleged act done, by the accused-respondents, does not come within the mischief of section 448 of the Penald Code and that the remedy of the complainant in a competent civil court (Belayet Hossain Vs. Humayun 1989 BLD (AD) 60 (para-15).

Even if the particular plot was ejmali property the accused had no right to take law in their own hands and trespass into the complainants hut and demolish it. Merely because of the plea that a civil suit is pending between the parties it cannot invalidate an order of conviction and sentence under section 448 Penal Code (Afel Khan Vs. The State, 29 DLR 3).

Intention of trespass though not mentioned in the charge. Conviction not bad if inference of criminal intent can be drawn from the facts and circumstances (Ruhul Amin Vs. Nagendra Nath Roy, 22 DLR 66).

An offence under section 448 of the Penal Code is not a minor offence in relation to offence under sections 395 and 412 of the Penal Code (Sultan Ahmed and others Vs. The Stated, 12 DLR 53 (SC).

A forcible entry into a house, during the temporary absence of the owner from the house, would constitute an offence of criminal trespass punishable under section 448 of the Penal Code (Bishu Mukherjee Vs.d Haji Zahur Khan 5 DLR 139).

In charge under section 448 Penal Code for house trespass with intent to cause wrongful loss and to intimidate the inmates, there should be a finding by the court below that the entrance was effected with the intention of causing any wrongful loss. There could be no intimidation when there were no inmates in the room (Madhu Sudan Saha Vs. Jatindra Mohan Coswami, 2 DLR 17). Intention is the most material ingredient, which is to be gathered from the facts and circumstances of a case (Belayet Hossain Vs. Humayun, 2 BCR 465 (SC)

The petitioners have been convicted under section 147 penal Cde. In an offence of rioting, the offence of criminal trespass as disclosed in the facts of the present case is obviosly included. Therefore, although the accused persons could be convicted both under sedtions 147 and 448 Penal Code, there ought to have been only one sentence under any of the sections and even if there were two spearate sentences they ought to have been made concurrent. The consecutive sentences they ought to have been made concurrent. The consecutive sentences cannot, therefore, be upheld (Badu Mia Vs. The State 1985d BLD 65 (para-5).

449. House-trespass in order to commit offence punishable with death.— Whoever commits house-trespass in order to the committing of ary offence punishable with death, shall be punished with [1][imprisonment] for life, or with rigorous imprisonment for a term not exeeding ten years, and shall also be liable to fine.

450. House-trespass in order to commit offence punishable with [1][imprisonment] for life.— Whoever commits house-trespass in order to the committing of any offence punishable with [1][imprisonment] for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

451. House-trespass in order to commit offence punishable with imprisonment.— Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonemnt may be extended to seven years.

1. Substituted by Ordinance No XLI of 1985, for "transportation".

452. House-trespass after preparation for hurt, assault of wrongful restraint.— Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

453. Punishment for lurking house-trespass or house-breaking.— Whoever commits lurking house-trspass or house-breaking, shall be punished with imprisonent of either description for a term which may extend to two years, and shall also be liable to fine.

454. Lurking house-trespass or house breaking in order to commit offence punishable with imprisonent.— Whoever commits lurking house-trspass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

455. Lurking house-trespass or house breaking after preparation for hurt, assault or wrongful restraint.— Whoever commits lurking house-trespss, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonemnt of either description for a term wich may exend to ten years, and shall also be liable to fine.

456. Punishment for lurking house-trespass or house breaking by night.— Whoever commits lurking house-trespass by night, or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years and shall also liable to fine.

457. Lurking house-trespass or house breaking by night in order to commit offence punishable with imprisonment.— Whoever commits lurking house-trespass by night, or house breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either descrition for a term which may extend to five years, and shall also be lible to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

Synopsis

1. Scope and applicability.
2. Lurking house transpers or house breaking.
3. Illicit intimacy.
4. Evidence and proof.

1. Scope and opplicability.— Principal ingredents of the offence under Section 457 may broadly be divided inter alia into wo heads: (1) the accused committed lurking house-trespass by might, and (2) the same was committed with intent to commit theft. The cause "if the offence intended to be committed is theft" in section 457 of the Penal Code, refers to a state of mind of the accused at the time of his entry. When an accused is charged with both offence under sections 457 and 380

Penal Code, one cannot be treated as the part of the other. They are distinct and separate and not independent offences. Failure of one does not necessarily mean the failure of the other. A person may enter innocent somebodys house; as invited guest, but there after may commit theft in the dwelling house of his host. Another significant distinction between the two is regarding time. The offence under section 457 Penal Code is committed only at night but the offence under section 380 Penal Code may be committed at any time, day or night. The distinction betweend the two is one of substance and not of form or detail, and cannot be treated as one offence. It is true there may be cases where facts might be so inextricably linked up that one act might be dependent on the other, but that is a question of fact governed by the peculiar facts and circumstances of its own (Sirajuddin Alias Siraj Vs. State, 28 DLR 162 (SC); AIR 1942 Oudh 214, AIR 1936 AIR 1938 Lah. 251).

2. Lurking house tressposs or house breaking.— The mere fact the a house-trespas was committed by night does not make the offence one of lurking house trepass within the meaning of this section. In order to constitute lurking house-trespass the offender must take some active means to conceal his presence. Where the accused made no attempt to conceal himself this offence was not committed. (Botlal v. state 1986 Cri LJ 650 (MP). Bijoy Kumar Mohapatra 1982 Cri LJ 2162 (Ori).

The accused entered the house at night unnoticed might also give rise to the suspicion that he might have scaled or climbed over the wall. It would not however amount to lurking house trespass or house breaking. He could howver be convicted under S. 451 (Desai Kundu 1979 jCri LJ (NOC) 110 (Pat.)

Where, therefore, an accused entered complainant's house in the night in order to commit rape or at any rate to outrage the modesty of a woman, and there was nothing to show that accusedd took any precaution to conceal his act of house-trespass, it was held that he was not guilty under this section, but only under s. 451 (Jaldeep Singh (1952) 2 Raj 745).

In all "lurking hourse-dtrespass", there must be "house-trespass" and in all "house trespass" there must be "criminal trespass". Unless, therefore, the intent neessary to prove the offence of "criminal terspass" is present, the offence of "lurking house-trespass" or house-trespass cannot be committed (Ildahi Baksh Vs. The State, 11 DLR 131 (WP).

For conviction under this section the accused must have committed lurking house trespass or house breaking by night. To bring a case within the mischief of section 457 of the Penal Code the prosecution must prove positively that the accused entered into a hut or remained there after the hour of sunset and before the hour of sunrise to commit an offence or to intimidate, insult or annoy any person in terms of section 441 of the Penal Code taking precaution to concal such house trespass (21 DLR 312). Thus where the accused entered a house by scaling or climbing over a wall during the night, and through a passage and courtyard entered one of the rooms of the house, and offence under section 457 was committed. (ILR (1951) 1 Raj 526). Where the accused committed house breaking in the house of the complainant and abstracted from it a chambu, and when the complainant attempted to catch him and recover his property, the accused in order to the carrying away of this property caused him hurt; it was held that the accused committed offences under sections 457, 392 and 394 (AIR 1925 Mad 466). But where the trespass was committed in a courtyard and it was not proved that the courtyard was a part of the house the accused could be convicted only under section 457 of the Penal Code and not under section 495. (AIR 1934 Cal 557).

3. Illicit intimacy.— If the accused succeeds in showing that his presence in the house was in consequence of an invitation from or by the connivance of a woman living in the house with whom he was carrying on an intrigue and that he desired that his presence there should not be known to the person in possession, he cannot be convicted of an offence under this section (AIR1925 Lah 23).

Where the accused enters a house to commit adultery, he can be held guilty under this section. But it is the duty of the court when trying an offence under section 457 to satisfy itself that when the accused committed the alleged house trespass with intent to commit adultery, he had not the consent or conivance of the husband (AIR 1925 Cut 160).

4. Theft.— Where an accused is charged with both offences under sections 457 and 380, Penal Code one cannot be treated as a part of the other. They are distinct and separate and not inter dependent offences. Failure of one does not necessarily mean the failure of the other. A person may enter innocently somebody's house; as an invited guest, but thereafter commit theft in the dwelling house of his host. Another significant distinction between the two is regarding time. The offence under section 457 of the Penal Code is committed only at night but the offence under section 380 may be committed at any time, duirng the day or night. Distinction between the two is one of substance and not of form or detail. It is true that there may be cases where facts might be so inextricably linked up that one act might be dependent on the other, but that is a question of fact governed by the peculiar facts and circumstances of its own. Where accused entered at night the house of the informant through a sindh cut by the accused. It was found that articles had been stolen and a broken box was found next day outside in the field. From this evidence it can be inferred that the intention of the appellant at the time of entry was theft. The evidence is ample to draw this conclusion. In the circumstances subsequent fact of actual theft committed by him becomes totally irrelevant (1976 DLR (SC) 162). A person found in possession of stolen property a couple of hours after the commission of a burglary can be rightly convicted of an offence under section 457. (PLD 1979 AJ&K 28). Where the act of the accused charged with offences under sections 457 and 380, Penal Code in leading the police to the spot of concealment not only proved that he knew where the incriminating articles were but also materially supported the story given by the approver that the accused took part in the offence of theft, it cannot be said that the accused could be convicted only under section 411 and not under section 380 or section 457, because the only thing found proved against him was the discovery of stolen articles (AIR 1957 Assam 168). Where two brothers living in the same house on being charged under section 457 of the Penal Code, admit that stolen property was found in their house and do not claim it to be their own, but do not explain how it got there, and the fact that the house in which the property was found was occupied by both of them is established, they can be convicted under section 457 especially when they were seen with another person accused of the same offence on the evening before the commission of the crime (AIR 1936 All 386).

5. Evidence and proof.—To bring a case within the mischef of section 457 Penal Code the prosecution must prove positively that the accused entered into the hut or remained thereafter the hour of sunset and before the hour of sunrise to commit an offence or to intimidate, insult or annoy any person in terms of section 441 Penal Code, taking precaution to conceal such house-trespass. In the absence of any proof of entry inside the building the offence will not be complete (Shakimuddin Vs. The State, 21 DLR 312; AIR 1940 Patna 14).

It is true that there is no direct evidence of his digging the hole. But he chain of circumstantial evidence is so complete that no other conclusion can be reasonably

arrived at. All these tacts conclusively lead to the conclusion that the accused had advanced beyound the stage of preparation and was making an attempt to commitd the offence under section 457 Penal Code. Therefore the conviction under section 457/511 Penal Code has been correctly made (Omar Ali Vs. The State. 20 DLR 1102).

Omission to state particulars in respect of these offences, in the charge, the charge is defective (Safiuddin Vs. The Crown, DLR 519.

Where the accused entered during night the complainant's house in order to have sexual intercourse with a woman who he knew to be the wife the wife of the complainant, it was held that he was guilty under this section and that it was not necessary that the complainant should bring a specific charge of adultery (Kangla (1900) 23 All. 82; Chatterd Singh Damati (1919) 3 UBR 194 = 21 Cri LJ 435) (1920).

Thed mere presence of a person inside the house of another would not establish a case of house breaking (Pempilas Bagh 1984 Cri LJ 828 (Ori). And where there is no clear evidence that the accused was in fact found inside the premises the accused could not be convicted under s. 457 or for any other offence of trespass (Gangadhar Zena 1981d Cri LJ (NOC) 209 (Ori).

Where the accused persons committed house breaking by night for the purpose of committing offence of abducting woman, abduction being an offence punishable with imprisonment, it was held that offence under s. 457 was made out (Nasiruddin 1971 Cri LJ 1073 (SC).

The presumption under s. 114 (a) Evidence Act would apply not only to the offence of theft but also to other offences connected with theft. Where the accused was found in recent unexplained possession of stolen property connected with house breaking by night, the accused was convicted under ss. 380 and 457 (Avodhva Singh 1972 Cri LJ 1696 (SC).

Mere recovery of stolen articles from the possession of accused, though immediately after the incident of theft, would be insufficient to prove the alleged offence u/s. 457 Penal Code (Manik Deorao Shinde & ors. v. State of Maharashtra 1993 (1) Crimes 1087 (Bom).

458. Lurking house-trespass or house breaking by night after preparation for hurt, assault or wrongful restraint.— Whoever commits lurking house-trespass by night or house breaking by night, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

459. Grievous hurt caused whillst committing lurking house-trespass or house breaking._ Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person shall be punished with [1][Imprisonment] for life, or [1][imprisonment] of either description for a term which may extend to ten years, and shall also be liable to fine.

460. All persons jointly concerned in lurking house-trespass or house breaking by night punishable where death or grievous hurt caused by one of them.— If, at the time of the committing of lurking house-trespass by night or house breaking by night, any person guilty of such offence shall voluntarily

cause or attemp to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house breaking by night, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extent to ten years, and shall also be liable to fine.

461. Dishonestly breaking open receptacle containing property.— Whoever dishonestly or with intent to commit mischief breaks open or unfastens any closed receptacle which contains or which he believs to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

462. Punishment for same offence when committed by person entrusted with custody.— Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[2][Of the loss of property of Banking Company

462A. Penalty for negligent conduct of bank officers and employees.— Whoever, being an officer or employee of a banking company, by his negligent conduct in dealing with a banking transaction allows any customer of the company or any other person to cause loss of property to the company shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.— An officer or employee of a banking company shall be guilty of negligent conduct if in discharging his duties he fails, either wilfully or negligently, to follow any direction of law prescribing the mode in which such duties are to be discharged.

462B. Penalty for defrauding banking company.— Whoever fraudulently receives any benefit from a banking company in the course of any banking transaction shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.— In section 462A and in this section "banking company" means-

(a) banking Company as defined in section 5(c) of the Banking Company Ordinance, 1962 (LVII of 1962);

(B) a bank constituted under the Bangladesh Banks (Nationalisation) Order, 1972 (P. O. No. 26 of 1972);

(c) a financial institution as defined in section 50 (c) of the Bangladesh Bank Order, 1972 (P. O. No. 127 of 1972);

(d) Bangladesh Shilpa Rin Sangstha established under the Bangladesh Shilpa Rin Sangstha Order, 1972 (P. O. No. 128 of 1972);

1. Substituted by Ordinance No. XLI of 1985, for "transportation".
2. The heading and sections 462A and 462B were inserted by Act XV of 1991 (w. e. f. 4-3-91).