[1]ACT NO. XLV OF 1860

CHAPTER - I

INTRODUCTION

Preamble

WHEREAS it is expedient to provide a general Penal Code for [2][Bangladesh]; It is enacted as follows :-

1. Title and extent of operation of the Code.- This Act shall be called the [3][Penal Code], and shall take effect [4]* * throughout Bangladesh.

2. Punishment of offences committed within Bangladesh.- Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Bangladesh [5]******.

3. Punishment of offences committed beyond, but which by law may be tried within Bangladesh.- Any person liable, by any [6][Bangladesh law], to be tried for an offence committed beyond Bangladesh shall be dealt with according to the provisions of this Code for any act committed beyond Bangladesh in the same manner as if such act had been committed within Bangladesh.

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

(1) any [8][citizen of Bangladesh] in any place without and beyond [9][Bangladesh];

[10](2) * * * * * * *

[11](3) * * * * * * *

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

1. The Penal Code has been declared in force in the Chittagong Hill tracts by the Chittagong Hill tracts Regulation, 1900 (I of 1900), s. 4 and Sch.
   Offences punishable under sections 121, 121A, 122, 123A, 124A, 125, 131, 164, 192, 194, 195, 196, 197 and 198 of the Code shall be triable exclusively by Special Tribunal constituted under sub-section (2) of section 26 of the Special Powers Act, 1974 (Act No. XIV of 1974) Sch.
2. The word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule.
3. The words within square brackets were substituted for the words "Pakistan Penal Code", ibid.
4. The words and figures "on and from the first day of May, 1861", were repealed by the Amending Act, 1891 (Act XII of 1891).
5. The words and figures "on or after the said first day of May, 1861," were repealed, ibid.
6. The original words "Law passed by the G.G. of India in-C" have successively been amended by A.O, 1937 and A.O, 1949, Sch, and the word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule.
7. Section 4 was substituted for the original section 4 by the Indian Penal Code Amendment Act, 1898 (Act IV of 1898), s. 2.
8. The original words "Native Indian subject of Her Majesty" have successively been amended by A.O. 1949 and A.O. 1961, Art. 2 and Sch. to read as "citizen of Pakistan" and the word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973 to read as above.
9. The word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule.
10. Clauses (2) as amended by A.O. 1949, Sch. has been omitted by A. O., 1961, Art. 2 and sch.
11. Clause (3) was omitted by Act VIII of 1973.
12. Clause (4) was inserted by the Offences on Ships and Aircraft Act, 1940. (Act IV of 1940), s.2.

Explanation-In this section the word "offence" includeds every act committed outside Bangladesh which, if committed in Bangladesh, would be punishable under this Code.

Illustrations

(a) A [1][a Bangladesh subject], commits a murder in Uganda. He can be tried and convicted of murder in any place in Bangladesh in which he may be found.

(b) B, a European British subject, commits a murder in [2][Rangpur]. He can be tried and convicted of murder in any place in Bangladesh in which he may be found.

(c) C, a foreigner who is in the service of the [3][Banglaesh] Goverment, commits a murder in [4][Khulna]. He can be tried and convicted of murder at any place in Bangladesh in which he may be found.

(d) D, a British subject living in Khulna, instigates E to commit a murder in [5][Chittagong]. D is guilty of abetting murder.]

5. Certain laws not to be affected by this Act.- Nothing in this Act is intended to repeal, vary, suspend, or affect [6]********** any of the provisions of any Act for punishing mutiny and desertion of officers [7][soldiers, sailors or airmen] in the service of [8][the [9][Republic]], or of any special or local law.

CHAPTER - II

GENERAL EXPLANATIONS

6. Definitions in the Code to be understood subject to exceptions.- Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or peanl provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision or illustration.

Illustrations

(a) The sections in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

1. The words "a Pakistan subject" were substituted for the words "a coolie who is a Native Indian subject" were substituted by Act XXVI of 1951 and then the word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule.
2. The word "Rangpur" was substituted for the word "Kashmir" by Act VIII of 1973, s. 3 & 2nd sch.
3. The word "Bangladesh" was substituted for the words "West Pakistan", ibid.
4. The word "Khulna" was substituted for the word "Junagadh", ibid.
5. The word "Chittagong" was substituted for the word "Lahore", ibid.
6. The words "any of the provisions of the Statute 3 and 4 William IV, Chapter 85, or of any Act of Parliament of the United Kingdom passed after that Statute in anywise affecting the East Inida Company or Pakistan or the inhabitants thereof; or" were omitted by Act VIII of 1973, 2nd sch.
7. The original words "and soldiers" have successively been amended by the Repealing and Amending Act, 1927 (Act X of 1927), s. 2, and Sch. I, and the Amending Act, 1934 (Act XXXV of 1934), s. 2 and Sch, to read as above.
8. The original words "Her Majesty or of the East India Company" have successively been amended by the Repealing Act, 1870 (Act XIV of 1870) and A.O., 1961, Art. 2 and Sch.
9. The word "Republic" was substituted for the word "State" by Act VIII of 1973, Second Sch.

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

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

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

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

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

11. "persons".-The word "person" incudes any Company or Association or body of persons, whether incorporated or not.

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

13. [Definition of "Queen"]Omitted by A.O. 1961.

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

15. [Definition of "British India"] Rep. by A.O. 1937.

16. [Difinition of "Government of India"] Rep. by A.O. 1937.

17. "Government".-The word "Government" denotes the person or persons authorised by law to administer executive Government in "Bangladesh", or in any part thereof.

18. [Definition of Presidency"] Rep. by A.O. 1937.

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

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

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

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1. The original section 14 has successively been amended by A.O., 1937, A.O., 1949, Sch, and A.O. 1961, Art. 2 and Sch.
2. The word "Bangladesh" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule.
3. The word "Government" was substituted for the words "Central Government or any Provincial Government", ibid.

Illustrations

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

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

[1](c) * * * * * * * * * *

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court, is not a Judge.

20. "Court of Justice".- The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

[2]* * * * * * * * * * *

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

[3]* * * * * * * * * * *

Second.- Every Commissioned Officer in the Military [4][Naval or Air] Forces of [5][Bangladesh];[6]**********

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

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

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

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

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

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

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1. Illustration (c) was repealed by the Federal Laws (Revision and Declaration) Act, 1951 (Act XXVI of 1951), s. 3 and 2nd sch.
2. The original Illustration which was previously substituted, ibid, s. 4 and III sch. has been omitted by A.O., 1961, Art. 2 and sch.
3. Clause First was omitted by Ord. No. X of 1982, s. 2.
4. Subs. by the Repealing and Amending Act, 1927 (Act X of 1927), s. 2 and sch. I, for "or naval".
5. The word "Bangladesh" was substituted for the word Pakistan by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule.
6. The words "while serving under the Government" were omitted by Ord. X of 1982, s. 2.
7. Subs. ibid, for the former clause "Third".

Ninth.- Every officer whose duty it is, as such officer to take, receive, keep or expend any property on behalf of [1][the Government], or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make,authenticate or keep any document relating to the pecuniary interests of [1][the Government], or to prevent the infraction of any law or the protection of the pecuniary interests of "the Government" [2]**********;

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

[3][**Eleventh.**- Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election [4][;]]

Illustration

A Municipal Commissioner is a public servant.

[5][Twelfth.- Every person -

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

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

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

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

[6][**Explanation 3.**- The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under any law prescribed as by election.]

Comments

This section does not define public servant but enumerates and illustrates what categories of servants are meant to be included. A question whether a person is a public servant or not is a mixed question of fact and law. (AIR 1976 SC 2300; 1976 CrLJ 1756; 40 DLR 131. In order to be a public servant, he must be a servant in the first instance whether he receives any emoluments for his work or not and he must

1. The original word "Government" has successively been amended by A.O., 1937, and A.O., 1961, Art. 2.
2. The comma and certain words were omitted by Ord. No. X of 1982.
3. Ins. by the Elections Offences and Inquiries Act, 1920 (XXXIX of 1920), section 2.
4. The semi-colon was subs. for the full stop at the end in clause Eleventh by Ord. No. X of 1982, s. 2.
5. Added, ibid., after clause Eleventh and before Explanation 1.
6. Ins. by the Elections Offences and Inquiries Act, 1920 (XXXIX of 1920), s. 2.

be in charge of a public office and has done the duties of a public servant. A minister of state is a public servant. (AIR 1953 SC 391) A pubnlic servant as defined in this section means a public servant who is holding an office and not one who has ceased to hold office (19 DLR(SC) 33). But a public servant can be prosecuted for the offence under section 5(1) of Act II of 1947 committed during the period while he was in public office (H.M. Ershad Vs. The State 1992 BLD 610; 45 DLR 533;27 DLR (AD) 35 and 17 DLR (SC) 26). No sanction is necessary for prosecution of a public servant who had ceased to be a public servant when the court takes cognizance of the offence allegedly committed by him when he was public servant (Ibid).

The test to determine whether a person is a public servant is whether he is in the service or pay of the government and whether he is entrusted with the performance of a public duty (AIR 1957 SC 13; 1957 CrLJ 1). A branch manager of a national insurance company is a public servant (1980 CrLJ (NOC) 20). Members of a union parishad are public servants within the meaning of section 21 of the Penal Code (41 DLR (AD) 30; 1989 BLD (AD) 25). Receivers are no doubt public servants as they are appointed by the court but a guard appointed by them can not be a public servant (1989 BLD 509). A Mutwalli is not a public servant (30 DLR (SC) 127). Similarly contractor discharging certain functions on the basis of agreement with the government is not a public servant under section 21 of the Penal Code (30 DLR (SC) 58). Nikah Registrar is not a public servant (21 DLR (SC) 330).

A person who was appointed by the Governor to discharge the function ofa Minister and who was paid out of the public exchequer and whc also liable to be dismissed by the Governor comes within the description as indicated in the latter part of section 21 of the Penal Code and as such a minister cannot but be regarded as a public servant (Sk. Mujibur Rahman Vs. The State 15 DLR 549).

Labourers employed by a Government contractor are neither remunerated by the Government nor are they discharging any public duty. They are solely responsible for their duty and remuneration to the contractor. They cannot be said to be auxiliary to any Government servant (30 DLR (SC) 58). The officers of a bank who perform functions in regard to the affairs of the Federal Government are servants of the Federal Government and since they draw their pay and salary also from that Government, they are 'public servants' (1986PCrLJ 1530).

Where a Cotton Inspector was employed by the Director of Agriculture but it was latter on found that he had not been appointed under the statute. it was held that in spite of that irregularity in the appointment as the Inspector was given the duties of a cotton Inspector, he would be covered by the provisions of clause (8) of section 21 (PLD 1954 Lah 37; 6 DLR 143).

An officer of life Insurance and General Insurance Corporation is a public servant (1985 (2) Crimes 869 (670) SC). Employees of a nationalised bank are public servants (1985 CrLJ 1411 (1416) P & H). Receivers are no doubt public servants as they are appointed by the court by a guard appointed by them cannot be a public servant (Syed Md. Jahar Ali Vs. Afrazul Islam Chowdhury 1989 BLD 59). An advocate engaged by the customs authority or for that matter by any government official, does not become a public servant within the meaning of clause 12(a) of section 21 of the Penal Code, just because of his engagement (Adi P. Gandhi Vs. State 1990(2) Crimes 211 (Bom).

The accused was not a public servant as defined in section 21 Penal Code when the alleged offence was committed. He became a public servant within the meaning of section 21 of the Penal Code afterwards as such he cannot be tried as a public servant (29 DLR 218; 26 DLR 17).

22. "Moveable Proparty".-The words "Moveable property" are intended to include corporal property of every description, except land and thing attached to the earth or permanently fastened to anything which is attached to the earth.

Comments

The term property conveys a compound idea composed of that which is its subject, and of the right to be exercised over it. It is everywhere used in this code so as to be applicable exclusively to "that which is its subject". The word 'property' is used in the code in a much wider sense than the expression 'movable property' (11 CrLJ 805).

Teh General Clauses Act of 1897 says that 'movable property' shall mean property of every description, except 'immovable property'. The Registration Act of 1908 says that 'movable property' includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description, except 'immovable property'. The Indian Companies Act, provides that "shares or other interest of any member in a company shall be movable property, transferable in manner provided by the articles of the company."

The definition in the penal code restricts movable property as including corporeal property of every description except land and things attached to the earth. The Code excludes all intangible rights in property and includes things not permanently fixed to the earth. The definition of movable property is narrower than the definition in other enactment. Corporeal property is property which can be perceived by the senses, in contradictiction to incorporeal rights, which are not so perceivable, as obligations of all kinds. Thus, salt produced on a Swump (4 Mad 228), papers forming part of the record of a case and a cheque (52 All 894), are movable property within the meaning of this section.

An order of assessment by an Income Tax officer is movable property (AIR 1969 SC 40; 1969 CrLJ 271). Electricity is not movable property (AIR 1965 SC 666; (1965) 1 CrlJ 605).

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

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

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

Comments

The word 'wrongful' means prejudicially affecting a party in some legal right. The words 'by unlawful means' are intended to refer to an act which would render the doer liable to an action or prosecution (1 CrlJ 730 FB; 23 CrLJ 607; AIR 1921 Mad 322.

The words 'gaining wrongfully' or 'losing wrongfully' need not be confined only to the acquisition or to the actual deprivation of property, and would cover also cases of wrongful retention of property in the one case and wrongfully being kept out of property in the other (1959 CrLJ 1508; 1960 SCR 452).

The gain or loss must relate to property. It must be material. It must be by unlawful means. Thus wrongful gain is wrongful or unlawful acquisition of property which is material. Similarly wrongful loss is wrongful or unlawful deprivation of property which is material. In order to constitute wrongful gain, the property in question should have beeen wrongfully acquired and retained whether such retention results in any profit or not. Similary to constitute wrongful loss, the property in question should have been lost to the owner or the owners should have been kept out of it. Under section 23 the gain or loss contemplated need not be a total acquisition or a total deprivation but it is enough if it is temporary retention of property by the person wrongfully gaining or a temporary keeping out of the property from the persons legally entitled (PLD 1957 Ind 317).

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

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

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

27. Property in possession of wife, clerk or servant.- When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation.- A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this section.

28. "Counterfeit".- A person is said to "counterfeit" who causes one thing to resemble another thing intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

[1][**Explanation 1.**-It is not essential to counterfeiting that the imitation should be exact.

Explanation 2.-When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resembiance to practise deceiption or knew it to be likely that deception would thereby be practised.]

29. "Document".-The word 'document' denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

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

1. subs. by the Metal Tokens Act, 1889 (I of 1889), s. 9, for the original Explanations.

Illustrations

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

A cheque upon a banker is a document.

A Power of Attorney is a document.

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

A writing containing directions or instructions is a document.

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

Illustration

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

30. "Valuable security".- The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration

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

Comments

A document which on evidence given creates or purports to creat a right to movable property and which is recognised or enforceable will be a valunable security (59 Cal 1233). The following documents have been held to be valuable security; (a) A rent note (AIR 1963 Nag 165); (b) A lottery ticket (1970 Ker Lj 193); (c) A pass prt (AIR 1968 Mad 349); (d) Extorted documents executed through fear or threat of injury (35 CrLJ 123); (e) A deed of divorce (11 Suth. WR 15 DB); (f) A document which has been stamped but the signature is not across the stamp can nevertheless be a valuable security (AIR 1916 All 197).

A vokalatnama is a document under which a person empowers his lawyer to do certain things on his behalf. Such a document does not on the face of it purport to create, extend, transfer, restrict or extinguish a right and as such, it can not be deemed to be a valucable security within the meaning of section 30 of the Penal Code (22 DLR 703).

31. "A will".-The words" a will "deriote any testamentary document.

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

Comments

Criminal law fastens liablity on persons who omit to perform the duty required by law such as to provide food, clothing, shelter or medical aid to another, but a refusal to perform acts of mere charity or mercy not coupled with a legal duty, does not entail legal punishment even if death ensues from such refusal or neglect (Om Prakash Tilak Chand Vs. State, AIR 1959 Punj 134(145)=60 PLR 563).

'Omissions' is used in the sense of intentonal non-doing. Thus, according to this section, 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must no doubt be such as to have an active effect conducing to the result, as a link in the chain of facts from which an intenton to birng about the result may be inferred (Thornotti Madathil Poker (1886) 1 Weir 495).

The Code makes punishable omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, a certain evil effect in the same manner as it punishes acts, provided they were illegal. And when the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment (36 CrLJ 308=AIR 1934 Lah 813; Benoy Chandra Dey Vs. State 1984 CrLJ 1038 Cal relying on Hussain SN 1972 CrLJ 496 SC).

As a similar duty is cast upon the Magistrate,a Magistrate who was present while certain police constables were wrongfully confining and causing hurt to a villager with a view to extorting a confession, was similarly convicted of abetment (Krishna Setti; 1 Weir 50; Appannece Hegade, 1 weir 52).

Omission may also render an offender liable for punishment under section 304/34. Although as a general rule participation renders an offender liable for joint action but sometimes omission may also render an offender liable under section 304/34 of the Penal Code if for example a man joins with another to assault a person even though the original intention was merely to inflict relatively harmless injuries but he sees his companion in course of the action give serious beating which is likely to cause his death, but he does not take any step to interfere with that action or to render any assistance to the victim but the victim dies subsequently - such act of omission may render him liable under section 304, Penal Code, for "action" as defined under section 32 of Penal Code includes an omission also (Bhagawat Singh and anothers Vs. Emperor AIR 1929 Pat 65).

In the case of Shaikh Baharul Islam Vs. State, (1991) 43 DLR 336 deceased Arun was mercilessly beaten inside the Ramna Police Stattion and he was seriously injured. The injuries ultimately caused death. Advocate for the complainant argues that accused Baharul Islam, the Officer-in-charge of Ramna P.S. must know who in fact assaulted Arun leading to his death. Being in charge of the Police Station he ought to have prevented the assailants from causing such injuries. Therefore, according to the complainant's advocate, accused Baharul Islam must be held guilty for such act of omission on top of his actively beating the victim. The High Court Division relying on the decision in Bhagewat Singh and another Vs. Emperor, AIR 1929 Pat 65, held that non-interference on the part of Baharul Islam, the Officer in-charge of Ramna Police Station rendered him guilty under section 304/34 of the Penal Code.

33. "Act", "Omission".- The word "act" denotes as well a series of acts as a single act : the word "omission" denotes as well a series of omissions as a single omission.

[1][**34. Acts done by several persons in furtherance of common intention.**- When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Synopsis

1. Principle and applicability.
2. Criminal act done by several persons.
3. "In furtherance of common intention of all".
4. Common intention.
5. Poof of common intention.
6. Presence of accused if necessary at time of commission of offence.
7. Inference of common intention.
8. Mere presence does not raise presumption of complicity.
9. Failure to mention section 34 in the charge - Effect.
10. Where co-accused are acquitted.
11. Distinction between common intention and common object.
12. Section 34 and sections 397, 398.
13. Sentence passed on different accused.
14. Common intention, when not established,- Effect of.

1. **Principle and applicability.**- Section 34 lays down the principle of joint liability for doing a criminal act. The essence of the liability is to be found in the existence of common intention animating the accused persons to the doing of a criminal act in furtherance of the common intention of them all. "Common intention" of several persons is to be inferred from their conduct, manner of doing the act and the attending circumstances. If one has intention to do any act and others share this intention, their intention becomes 'common intention' of them all. And if the act is done in furtherance ofthe common intention, then all who participated in the act are usaully liable for the result of the act. It is true that in this case, as the evidence shows, there was no pre-plan of the accused persons to kill Tara; but their common intention to kill Tara developed on the spot when they all simultaneously fell upon the victim as soon as he appeared on the scene. The learned Sessions Judge is found to have correctly held that in this case as soon as Tara ran towards the accused persons they intended to kill him. The fact that some of them had caused fatal injuries and others caused minor injuries is immaterial if the act was done in furtherance of their common intention. Section 34 is clearly found to be applicable in this case. (State Vs. Montu. 44 DLR (AD) 287; 1992 BLD (AD) 43 (45).

A joint action by a number of eprsons is not necessarily an action performed witha common object, but it may be performed on the spur of the moment as a reaction to some incident and such a case would fall within the ambit of section 34, Penal Code. However, section 34, Penal Code contenplates an act in furtherance of common intention and not the common intention simpliciter and that there is a marked distinction between similar intention and common intention and between knowledge and common intention. Mere presence of an accused at the place of incident with a co-accused who commits offence may not be sufficient to visit the former with the vicarious liability, but there should be some strong circumstnce manifesting a common intention. Generally common intention intr alia precedes by some or all of the following elements namely, common motive, pre-planned preparation and concert pursuant to such plan. However, common intention may undergo change during the commission of offence (Muhammad Akbar Vs. State, PLD 1991 SC 923).

In order to attract section 34 it is not necessary that any overt act must be done by the particular accused. The provision shall be applicable if it is established that the criminal act has been done by any one of the accused persons in furtherance

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

of the intention of all. Mere distance fromthe scence of crime cannot exclude culpability. Criminal sharing, over or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of section 34 (The State Vs. Abdul Khair 44 DLR (1992) 284=1992 BLD 262).

Section 34 does not create a distinct offence; it merely enunciates a principle of joint liability for criminal acts done in furtherance of common intention of the offenders. (AIR 1965 SC 264). It means, that if two, or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. (1977 SCMR 340). Thus where there was previous enmity between the accused and the deceased 'G' once the position is accepted that taking out his knife the accused declared that 'G' would be done to death followed by a concerted attack by all of them, no doubt would be left as to the vicarious liability of others regarding the murderous act of the accused appelant for having dealt a fatal blow to the deceased. (1974 PCrLJ 6 Lah).

For application of section 34 it must be established first that a criminal act has been done by several persons and secondly that all the participants intended that the criminal act should be done and lastly that the criminal act has been done in furtherance of common intention shared by all the offenders. There must be evidence to show that the accused were present at the scene of occurrence and have actually participated and there must be a preconcert or pre-arranged plan. Before finding guilty under section 34 of the Penal Code, it must be borne in mind that this section is not intended to punish the conspirator for the act jointly intended or common intention formed by them but it punishes for the act actually committed. This section has provided punishment for the conspirators where the act shared by several offenders can not be ascertained though the moral culpability is clear and identical. This section may be applied also where it is difficult to distinguish between the act of individual members of a party who acted in furtherance of their common intention but it is difficult to prove exactly what part each of the offenders has played. Once participation with common intention is established section 34 at once is attracted (Sk. Baharul Islam Vs. The State 1991 BLD 158; 43 DLR 336.

The section lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention fo all' nor does it say 'an intention common to all'. Under the section the essence of liability is to be found inthe existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. (PLD 1954 Lah 309). Before section 34 can be applied, it must be shown firstly, that a criminal act was done by several persons, secondly, that all of them intended that the criminal act should be committed, and lastly, that the act was done in furtherance of the common intention shared by all of them. (AIR 1965 SC 257). Thus where three accused demanded back their goods from the deceased but on his refusal made an armed raid on his house and killed and injured two of his party and then went back with the disputed property, it was held that section 34 was applicable and though one of the attackers did not take part in the assult, hewas equally liable with the others for murder. (PLD 1957 SC 207). The question what injuries were inflicted by a particular accused in acase to which section 34 applies, in immaterial; the principle underlying the section being that where two or more persons act with a common intention each is liable for the act done as if it had been done by himself alone. PLD 1954 Lah 309). Thus if three men went to commit assault and some of them beat the victim and others did not hit, all of them would be liable for the assault all the same and each of them would be liable as if he caused the entire injury alone. (AIR 1950 Kutch 2).

For the application of the section it must be shown firstly, that the act was done by several persons, secondly, that all of them intended that the criminal act should be committed and thirdly, that the act was done in furtherance of the common intention shared by all of them. In cases where there is pre-meditation, some kind of pre-concert action, some previous design, and several persons combine and act together they may be deemed to be intending the natural consequence of their combined act; but where the occurrence is sudden, there is commonly a cry for assistance or a call for assault or doing of certain act which is criminal. The person who asked for assistance or who gave certain order cannot be sure of the reaction of others. All those who come, may come with different designs and different intentions. Inference of common intention, therefore, should never be reached unless it is a necessary inference from the circumstances of the case (Kabul Vs. The State 40 DLR 216.

Principle of vicarious liability cannot be invoked in absence of any common object or common intention to kill. (NLR 1986 Cr. 326). Necessary conditions for the applications of section 34 of the Code are common intention to commit an offence and participation by all the accused in doing the act or acts in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the said offence; that is to say, if two or more persons had common intention to commit murder and they had participated in the acts done by them in furtherance of that common intention, all of them would be guilty of murder. PLJ 1980 Cr.C. 458). The common intention within the meaning of the section implies a pre-arranged plan and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. AIR 1945 PC 118). Determination of common intention would be dependent upon inference from motice of accused and his/her act/conduct before or after occurrence. Mere presence on spot during occurrence would not justify accused being imputed with requisite intention under section 34. Where there was no evidence of any pre-consultation between appellant and her two co-appellants, she could not be visited with constructive liability under section 34 (NLR 1988 AC 251).

The crucial test as to the applicability of the principle of vicarious liability under section 34 of the Penal Code is to be found in the phrase. "In furtherance of the common intention of all". The judicial committee of the privy council on the interpretation of the scope and meaning of section 34 of the penal Code held in the case of Mahbub Shah (49 CWEN (PC) 678) that common intention implies a pre-arranged plan and to convict and accused person applying section 34 of the Penal Code it must be proved that a criminal act was done in concert pursuant to the pre-arranged plan and that there should be direct evidence to prove common intention or there must be material to infer from the relevant circumstances that there was such common intention (Kabul Vs. The State. 40 DLR 216).

Common intention is an intention to commit a crime actually committed and every one of the accused should have participated in that intention. A similar intention would not be enough to bring the case within the meaning of the section. Suppose several persons, each acting independently of the others, intend to commit a crime and all of them chose the same moment and commit the crime which each of them intended separately, there would be no common intention in such a case. Each of them would be liable for his act, but not vicariously for the act of another or others. Common intention within the meaning of the section implied a pre-arranged plan, and to convict the accused of an offence, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. The inference of

common intention should never be reached unless it was a difficult if not impossible to procure direct evidence to prove the intention of an individual. (AIR 1963 SC 1413). Where there is no evidence to show that there was a common design, the section would not apply. (10 DLR 459). It follows that where the accused is grapling with the deceased when some other persons came and stabbed him, the section would not apply and they would not all be held guilty of murder. (PLD 1955 Lah 356). Where forcible possession of land was sought to be taken by the accused and the other party resisted the attempt. Suddenly one of the accused took out a knif and killed one of the persons on the spot. It was held that in all probability, h pulled the knife out of his dab on the spur of he moment, and his use of it was thu an individual act, suddenly done which could not be described as the joint act of al other accused persons (16 DLR SC 269).

For the applicability of section 34 it is essential that the act of murder is don by several persons. In other words, all the persons who were sought to be made liable by virtue of section 34 must have done some act and those of the accused who have not taken any part either by word or action in doing the act of murder canno be made liable under that section (Abu Syed Vs. State 38 DLR 17).

In order to convict a person for an offence with the aid of the provisions o section 34 it is not necessary that that person should actually with his own hand commit a criminal act. If several persons have the common intention of doing a particular criminal act and if, in furtherance of that common intention all of them join together and aid or abet each other inthe commission of the act, then though one o these persons may not actually, with his own hand, do the act, yet if he helps by his presence or by other acts in the commission of the act, he would be held to have himself done that act within the meaning of section 34. (PLD 1960 Lah 822).

Requisite ingredient of common intention within the meaning of section 34 of the Penal Code is that each shared the intention of other and that mere proof of each of the participating culprits having same intention to commit certain act is not sufficient to constitute common intention (Kabul Vs. The Stage. 40 DLR 216). Thus section 34 lays down the principle of joint liability in the doing of criminal act; the essence of liability is to be found in the existence of common intention animating the accuseds leading to the doing of a criminal act in furtherance of such intention (Ibid).

2. "Criminal act done by several persons".-For section 34, all accused must participate in the act in some form or other. It is not enough that one conspirator does the act (1956 CrLJ 664= AIR 1956 All 245).

A mere direction from one person to anotehr and the carrying out of that direction by the other may be only instigation of the letter's act and may be a case of a joint act falling under section 34. But where two persons with their followers, all of them armed, move about together for a set purpose and one gives instructions to the other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that the act is not one which was done in the furtherance of the common intention of both (AIR 1956 SC 177).

The section applies only to cases where several persons both intend to do and do an act. It does not apply to cases where several persons intend to do an act and one or more of them does or do an entirely different act in such cases if the number of persons be five or more and the other act was done in prosecution of the common object of all. Section 149, may apply. (AIR 1949 All 211; 1954 CrLJ 752; 1966 CrLJ 727).

When a murderous assault by many hands with many knives has ended fatally, it is legally impossible to dissect the serious one, from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequnece to fix the guilt for murder. Conjoint complicity is the inevitable inference within a group animated by lethal intent accomplish their purpose cumulatively. Section 34 fixing constructive liability conclusively silences such a refined plea or extriction (1977 CrLJ 352; AIR 1975 SC 1084).

No general proportion can be made that common intention implies an intention that developed prior to the commission of the act itself and not some thing that happened subsequent to the act. For there may be circumstances where incident subsequent to the act may also have to be considered in arriving at a conclusion as to whether or not there was a common intention provided the subsequent act is so proximate in point of true that the act and the incident may be correlated. Where there is no evidence of prior enmity between the parties and there was no evidence that either party knew that the other would be there at the place of occurrence, the fact of arrival of the accused together cannot be suggestive of any common intention as between them (1984 CrLJ 201; 1984 CrLJ 221).

In order that section 34 may be applied the common intention of committing a crime must be attributed to more than one individual and if the offence is the result of a joint act of more than one person then only each one of them can be found guilty under section 302 read with section 34 of the Penal Code. (PLD 1957 SC 390). Where the charge is that the accused had committed an offence in furtherance of their common intention but other person named in the charge are acquitted, the conviction of the single accused must also be set aside. (PLD 1957 SC 390). Where the High Court acquitted three of the four accused charged for an offence under section 302 read with section 34 giving them the benefit of the doubt in view of the fact that their identity was not established but convicted the fourth under section 302 read with section 34 on the ground that he had committed the offence along with one or other of the acquitted accused. It was held that the conviction of the fourth accused was clearly wrong. When the accused were acquitted either on the ground that evidence was not acceptable or by giving benefit of the doubt to them the effect in law would be that they did not take part in the offence. Hence the effect of acquittal of the three accused was that they did not conjointly act with the fourth accused in committing the murder. If that was so, the fourth accused could not be convicted under section 302 read with section 34 for having committed the offence jointly with the acquitted persons. (AIR 1963 SC 1413). But where it was clear from the record that more than one person had committed a murder, but two of the accused were given benefit of the doubt and the principal offender was not discovered, the appellate court set aside the conviction of one of the accused under section 302/34, P.C. convicted him under section 302/109 and sentenced him to transportation for life (1970 PCrLJ 415).

3. **"In furtherance of the common intention of all."**- The words 'in furtherance of the common intention of all' have introduced, as an essential part of the section, the element of a common intention prescribing the condition under which each might be criminally liable when there are several actors (52 Cal 197= 27 Bom LR 148). Common intention is an intention to commit the crime actually committed and each accused person can be convicted of that crime, only if he has participated in that common intention(AIR 1975 SC 179= 1975 CrLJ 243).

It is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man is made liable vicariously for the criminal act of another the act must have been done in furtherance of the common intention of all (AIR 1945 PC 118). It is not enough to have the same intention independent of each other common intention may be presumed on the fact of the case. The essence of section 34 is that a person must be physically present at the actual commission of the crime. actual participation may be passive (AIR 1956 MP 262= 1956 CrLJ 1101).

To convict an accused of an offence, applying section 34, it is necessary to establish that the criminal act was done in concert pursuant to a pre-arranged plan. The courts in most cases, have to infer the intention from the act or the conduct of a particular person or from the other relevant circumstances of the case as it is difficult if not impossible, to procure direct evidence to prove the intention of a person, but it is not necessary to attract section 34, that any overt act must be done by the particular accused. The section will be attracted if it is established that the criminal act has been done by any one of the accused persons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on anyone of the persons in the same manner as if the acts were done by him alone (AIR 1973 SC 863(872, 873).

Section 34 lays down the principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say "an intention common to all". Under the section, the esence of liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused in furtherance of the common intention of all; if this is shown, then liability of the crime may be imposed on any one of the persons in the same manner as if that act was done by him alone (1984 PCrLJ 1228). In applying section 34 it is not suficient to show that the accused was present on the scene of occurrence when the offence was committed. It is essential to prove some individual act of the accused person done in furtherance of the common intention (PLD 1972 Lah 19). In order to bring case under section 34, Penal Code it is not necessary that there must be a prior conspiracy or premeditation, the common intention can be formed in the course of occurrence (Hari Om & 2 others Vs. State of UP 1993 (1) Crimes 295(SC).

Where the injuries were caused by the accused, and co-accused though present, neither inflicted any injury nor did any other overt act, he could not be held liable under section 34 (PLD 1961 Kar 684). Where the complainant on being hit by gunshot fell down and although petitioner had ample opportunity to inflict blows on him yet he did not inflict even a single blow. The fact would point against the proposition that petitioners shared common intention with co-accused 11982 PCrLJ 448). Where an accused person went to the place of occurrence empty handed and there was no evidence that he assaulted anybody or that in the circumstances he could have intended to cause grievous hurt to anybody he could not be convicted of an offence under section 326/34, Penal Code (1969 PCr.LJ 1007). Where the only part attributed to accused in dying declaration was that he asked absconding co-accused to beat the deceased. Record did not suggest sharing of common intention of absconding co-accused for giving chhuri blows to the deceased. Common intention was not proved (1984 PCrLJ 990).

The use of the words "in furtherance of" suggests that section 34 is applicable also where the act actually done is not exactly the act jointly intended by the

conspirators to be done, otherwise the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention; if the act charged is extraneous to the common intention or is done in opposition to it, or is not required to be done at all for carrying out the common intention; it cannot be said to be in furtherance of it. Whether an act is in furtherance of the common intention or not, depends upon the common intention and the nature of the act. It is an incident of fact and not of law (AIR 1953 All 668).

A mere direction from one person to another and the carrying out of that direction by the other may be only instigation of the latter's act and may not be a case of a joint act falling under section 34. But where two persons with their followers, all of them armed, move about together for a set purpose and one gives instructions to the other and keeps himself on the spot in readiness to see it carried out and the other carries it out, it is hardly possible to say that the act is not one which was done in furtherance of the common intention of both (AIR 1956 SC 177).

Several persons can simultaneously attack a man and each can have same intention to kill, and each can individually inflict separate fatal blow and yet none would have the common intention as required by section 34 of the Penal Code because there was no prior neeting of minds to form a pre-arranged plan. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of ohter; and if the prosecution cannot prove that his separate blow was fatal one, he cannot be convicted of the murder, however clearly his intention to kill could be proved in this case. Otherwise the unamended section 34 of the Penal Code would have covered such a case without adding the words 'in furtherance of common intention of all acts' to the section in 1870 (Kabul Vs. The State 40 DLR 216).

4. **Common intention**.- Common intention is an intention to commit the crime actually committed and each accused person can be convicted if he shared the common intention. The common intention contemplated by this secction is anterior to the commission of the crime and it does not refer to the time when the offence is actually committed (Nurul Haque Mathbar and others Vs. The State, (1994) 4 14 BLD 178). Common intention implies a pre-arranged plan, that the criminal act was done in concert pursuant to the pre-arranged plan. Care must be taken not to confuse same or similar intention with common intention. A pre-concernt in the sense of distinct previous plan is not necessary to be proved. Common intention to bring about a particular result may well develop on the spot as between a number of persons. It is hardly necessary to emphasise that 'common intention' and similar intention are not conterminous or coextensive in range. Each case is to be considered in its own background (Md. Shand Mia @ Chand Miah Vs. State 1989 BLD (AD) 155; AIR 1945 PC 118; 15 DLR (SC) 65).

The common intention referred to in section 34 presumpposes a prior concert, prearranged plan, i.e. a prior meeting a minds. That did not mean that there must be a long interval of time between the formation of the common intention and the doing of the act. It was not necessary to adduce direct evidence of the common intention. Indeed in many cases, it may be impossible to do so. The common intention may be inferred from the surrounding circumstances and the conduct of the parties (Rishideo Pande Vs. State of Uttar Pradesh AIR 1955 SC 331= 1955 CrLJ 873). A person did not do an act except with a certain intention and the common intention which was requisite for the application of section 34 was the

common intention of perpetrating a particular act. Previous concert which was insisted upon was the meeting of the minds regarding the achievements of a criminal act (Abrahim Sheikh Vs. State of West Bengal AIR 1964 SC 1263; Vijoy Kumar Mohapatra Vs. State 1982 CrLJ 2162 (2175)).

Common intention within the meaning of section 34 of the Penal Code pre-supposes prior concert; it also requires pre-arranged plan and care must be taken not to confuse same or similar intention with common intention, the partition which divides their bounds is often very thin; nevertheles the distinction is real and substantial and if overlooked will result in mis-carriage of justice (Kabul Vs. The Stage. 40 DLR 216).

A common intention presuposes prior concert. There must have been a prior meeting of minds (Ram Tahal Vs. State of U.P. AIR 1972 SC 254). Common intention is sole test of joint responsibility under section 34. It must be proved that there was common intention and that act for whicha ccused are to be made responsible was done in furtherance of common intention (NLR 1986 CrLJ 572). Common intention within the meaning of section 34 implies a prearranged plan. To convict the accused of an offence applying section 34, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan (1988 PCrLJ 645). Where an offence is neither pre-planned nor premediated, this section is not attracted (AIR 1955 SC 216). But it is not necessary that there should be such a previous concert by the offenders a long time before the commission of the offence. They may concert immediately before the commission of the offence. Such a previous concert can be inferred from the circumstances in which the offffence was committed and from the various acts of the accused (PLD 1964 SC 81= 16 DLR (SC) 177). Whether in a given situation all the individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question and that has to be determined on facts AIR 1954 SC 706). The crucial circumstances is that the said plan must precede the act constituting the offence (AIR 1963 SC 1413). Where the accused acting high handedly and armed with lethal weapons attacked the victim and killed him. They were presumed to have knowledge of the consequences of their act and were therefore guilty under section 34 (1979 PCrLJ 80).

Common intention within the meaning of section 34, Penal Code, implies a pre-arranged plan and that the criminal act was done pursuant to the pre--arranged plan. The said plan may also develop on the spot during the course of the commission of the offence (22 DLR (SC) 297). Thus the common intention to bring about a particular result may develop on the spot between more than one person with reference to the facts and circumstances of the situation (PLD 1981 Pesh 23).

Concert and arrangement can, and indeed often must be determined from subsequent conduct. But the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. This is no more than the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of cases. At bottom it is a prior concert, or proof of circumstances which necessarily lead to that inference, or "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis (AIR 1955 SC 216). Thus where the charge is that 11 persons formed an unlawful assembly to assault the complainant party. From evidence it appears that three of the rioters took part in actual assault inflicting three separate injuries on the person of the deceased of which the first two injuries were found to be simple and the third one to be grievous

injury which led to the death of the victim within a few hours of the assault. It was held that there being no evidence that the three assailants had a preconcerted plan to cause the death of the deceased witha common intention, conviction under section 302/34 P.C. cannot be upheld and therefore, in view of the evidence they can be held separately liable for particular offence committed by each of the accused individually (22 DLR 620).

In case of a free fight in which both sides receive injuries, and each side alleges that the other was the aggressor, it is the duty of the court to find out which side acted as the aggressor and if there is definite evidence that one of the sides must have acted as the aggressor and came with a common intention to fight, the question as to which of the accused inflicted injuries on the members of the other side and with what weapons, is not material (AIR 1951 Sau 22). But where there is no evidence as to any of the aprties to the fight having come with the common intention of attacking the other. This section does not apply (1984 PCrLJ 1555).

It is well established that a common intention pre-supposes prior concert and it requires a pre-arrange plan because before a man can be vicariously convicted for the criminal act of another the act must have been done in furtherance of common intention of them all (29 DLR (SC) 246=AIR 1972 SC 254).

Requisite ingredient of common intention within the meaning of section 34 of the Penal Code is that each shared the intention of other and that mere proof of each of the participating culprits having same intention to commit certain act is not sufficient to constitute common intention (AIR 1984 SC 1117). In pandurang Vs. State of Hyderabad (AIR 1955 SC 216), the Indian Supreme Court observed that 'several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no meeting of minds to form a pre-arrange plan. In a case like that, each would be individually liable for whatever enjury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution can not prove that his separate blow was a fatal one he can not be convicted of the murder however clearly intended to kill could be proved in his case.

In the case of Shankarlal Kachrabhai Vs. State of Gujrat (AIR 1965 SC 1260), the Indian Supreme Court said that a mistake by one of the accused as to killing X in place of Y would not displace the common intention if the evidence showed the concerted action in furtherance of pre-arranged plan. The dominant feature of section 34 is the element of participation in actions. This participation need not in all cases be by physical presence. Common intention implies acting in concert. There is a pre-arranged plan which is proved either from conduct or from circumstances or from incriminating facts. The principle of joint liability in the doing of a criminal act is embodied in section 34 of the Penal Code. The existence of common intention is to be the basis of liability. That is why the prior concert and pre-arranged plan is the foundation of common inention to establish liability and guilt (Hethubha Vs. State of Gujrat (1971) 2 SCJ 635; AIR 1970 SC 1266).

5. **Proof of common intention.-** Whether or not a criminal act is done by several persons in furtherance of the common intention of all is a question of fact to be determined on a consideration of the facts in each case and common intention may also be inferred from the circumstances disclosed in the evidence. The simplest method to prove common intention is by direct evidence of that; failing which resort should be had to other circumstances evidencing community of interest. Common intention may be proved by direct evidence such as confessions or an approver's

testimony but in most cases its determination depends upon inference from act done, motive possessed by the persons concerned and also from the nature of injuries inflicted upon the victim (Kabul Vs. The Stage. 40 DLR 216). It is well established that a common intention pre-supposes prior concert and it requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another the act must have been done in furtherance of common intention of them all. But the pre-arranged plan need not preceede the commision of the crime by a great length of time. A pre-concert in the sense of distinguished previous plan is not also necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons. All that is necessary is either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference or incriminating acts must be incompatible with the innocense of the accused and incapable of explanation on any other reasonable hypathesis. Further it is the essence of section 34 that the person must be physically present at the actual commission of the crime (Abdur Rahim Mondal Vs. State. 29 DLR (SC) 246). Where the evidence showed that all the four accused were acting in concert in dragging the deceased inside the Deli. The evidence clearly established that all the four persons were concerned in the act of throwing the victim on the road in front of the Deli after the assault. Of course, no prosecution witness could have witnesse what transpired inside the Deli because the doors of the deli were closed after the deceased was dragged inside. accused were acting in concert and were associated with each other in initially dragging deceased inside the Deli as also in throwing out deeased on the road in front of their Deli after he was assaulted inside the Deli. The circumstances which have been established by satisfactory evidence coupled with the circumstance that as many as 20 injuries of the nature described earlier were inflicted on the deceased, left no room for doubt that all the accused had shared the common intention to cause the death of deceased (Aher Pitha Vajshi Vs. State of Gujrat, AIR 1983 SC 599; (1983) 1 Crimes 1067).

The simplest method to prove common intention is by direct evidence of conspiracy; failing which resort should be had to other circumstances evidencing community of interest. Common intention may be proved by direct evidence such as confessions or an approver's testimony but in most cases its determination depends upon inference from act done, motive possessed by the persons concerned and also from the nature of injuries inflicted upon the victim (Kabul Vs. The Stage. 40 DLR 216).

It is true that in order to convict persons vicariously under section 34 or section 149, Penal Code, it is not necessary to prove that each and every one of them had indulged in overt acts. Even so, there must be materias to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly. In case, such evidence is lacking accused cannot be held liable for the individual act of anyone of them (Rambilas Singh Vs. State of Bihar (1989 CrLJ 1782 (1974) SC = AIR 1989 SC 1593 = 1989 (2) crimes 368).

Common intention under section 34, Penal Code is not by itself an offence, but, it creates a joint and constructive liability for the crime committed in furtherance of such common intention. When these two appellants were very much known to the eye-witnesseses, non-mention of their names in the evidence as to their participation in firing upon the deceased, throws a great doubt. (Hare Krishna Singh Vs. State of Bihar, 1989 LW (Cr) 397 (406) SC).

Existence of common intention has to be determined from such known facts and circumstances which existed before commencement of criminal act as well as

from community of interest shown while committing crime. Common intention can also be assessed from motive, instigation provided during occurrence like exhortation, acts done and part played by accused during commission of crime (NLR 1988 cr. 563).Common intention is sometimes proved by direct evidence, such as confessions or an approver's testimony, but in most cases its determination depends upon inference from acts done and motives possessed, judged in the light of the habits and notions of the class of people concerned. Where for instance 4 armed relatives burst upon a habitation, kill or injure 2 or 3 persons and carry of agirl, the subject of dispute between the two sides, the only reasonable inference is that these acts are unified by a Common intention possessed by each, namely to use force even to the extent of murder in carrying off the girl (PLD 1960 Kar 38; PLD 1962 Dhaka 278; 13 DLR 646 DB).. Similarly where four persons waited by the roadside for their victim to wreak vengeance on him, and when his rickshaw appeared on the road they pounced upon him and killed him as well as another person who came there to rescue him. It was held that the fact that four accused waited on the roadside for the deceased and the manner in which they attacked him was positive proof of the existence of a common intention in the four accused to cause death. Application of section 34, was therefore rightly invoked by the trial court (1968 PCrLJ 235 DB). Similarly section 34 was applied where the evidence clearly showed that all assailants had proceeded to the place of occurrence after making preparations for assault in furtherance of their common object, as otherwise there was no reason at all for them to proceed to the place of incident (NLR 1981 Cr. 241 DB; 1978 PCrLJ 490 (DB).

Prior concert or perarranged plan for proving the Common intention is not necessary to be proved if the manner of assault as proved by the prosecution witnesses necessarily lead to the conclusion that the participating accused persons had developed a Common intention at the time of occurrence (Abdur Rahman Mondal Vs. State, 29 DLR (SC) 246). It is the essence of section 34 that the accused persons must be physically present at the place and at the time of commission of the crime and the incriminating acts and circumstances must necessarily lead to the inference of common intention to commit the crime (Nazimuddin vs. State 36 DLR 22.) The fact of all the accused being armed with deadly weapons and their physical presence in the place of occurrence and inflicting of several injuries on the deceased clearly proved common intention of all the accused (Hazrat Ali Vs. The state 1984 BLD 257).

In case where section 34 Penal Code, is invoked it is incumbent on the prosecution to show, in the first instance, the existence of a common purpose, design or enterprise. If this cannot be done, each of the accused persons is liable only for what he himself actually did (PLD 1959 Dhaka 36 DB). Where the prosecution story does not show that the accused persons were inspired by a Common intention but merely shows that the accused may have been sinspired by a similar intention no constructive liability can be imposed on any one of them on account of section 34 (ILR (1951) 1 Raj 712 (DB). Direct evidence of proving common intention is not easily available. It is however an infernece to be drawn from facts established and surrounded by circumstances (AIR 1955 SC 331). In abdul Jabber Vs. State 16 DLR (SC) 177, accused Mitha actually stabled the deceased fatally. Simultaneously, accused Abdul Jabber held of the other inmates of the house by pointing a pistol at them and sought to suppress their effort to seek asistance from outside. Held, this was a sufficient indication that Abdul Jabber associated himself with the act of murder committed by his co-accused Mitha and it follows that he shared a common intention with him as far as the killing of the deceased was concered. Section 34 was attracted to the case.

Section 34 applies only when the court can, with certainty, hold that the accused had premediated or preconceived a certain result or acted in concert with others, and not where he merely thought that the result was likely to happen (1974 SCMR 251). In other words inference of common intention within the meaning of the section 34 should never be reached unless it is a necessary inference deducible from the circumstancs of the case (1968 PCrLJ 1349; 1968 PCrLJ 1123 DB).

The Common intention denotes action in concert and necessarily postulates a pre-arranged plan or prior meeting of minds and an element of participation in action. As pointed out above, the Common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan e.g. during the progress of an attack on the person who is intended to be beaten but the evidence in that belhaf should be clear and cogent for suspicion, however strong cannot take place of the proof which is essential to bring home the offence to the accused (AIR 1978 SC 1492 (1495); 1978 CrlJ 1938). Common intention may also develop on the spot during the course of the commission of the offence (AIR 1963 SC 1413 = (1963) 2 Cr LJ 351). But there should be cogent meterial on the basis of which the court can arrive at the finding and hold an accused vicariously liable for the act of the other accused by invokin section 34 of the P. Code (AIR 1972 SC 2555 = 1973 cr LJ 26).

When the accused knew well that A-1 and others were armed and that A-1 had caused sword injuries on the vital part of the body of the deceased in the verandah of courtyard and he himself aided accused A-1 by giving blows to the deceased on some vital parts of the body like chest, it was held that he clearly shared a common intention to cause death of the deceased (AIR 1978 SC 1529 (1530).

While the evidence on record clearly established the presence of A-3 along with A-1 and A-2 at the scene of occurrence, the evidence was not adequate to hold that A-3 had shared a common intention with A-1 and A-2 in the commission of offence by them against the other party except that he was on friendly terms with A-1 and A-3 had no scores to settle with the others. A-3 had not assisted A-1 and A-2 in any manner in the attack made by them on that basis. He had not even uttered any words of instigation when the two persons were cut. As regards the subsequent conduct of A-3 in surrendering at the police station it cannot warrant a conclusion that there was a prior meeting of minds between A-3 on the one hand and A-1 and A-2 on the other, and it was on account of a consensus reached between them, the victims had been attacked at the Bazar Road and thereafter all the three of them went together to the police station to surrender themselves. It may well be that A-3 may have thought that if he did not go to the police station when A-1 and A-2 were themselves going, he would be incurring their displeasure and also inviting the suspicion of the police authorities about his complicity in the offences. In such circumstances A-3 cannot be held constructively liable for the acts of A-1 and A-2 (Rangaswami Vs. State of Tamil Nadu, 1989 CrLJ 875 (878) SC = AIR 1989 SC 1137).

When an offence is committed in furtherance of the Common intention of two or more accused, then every one of them is asmuch guilty as the other and it is not necessary that every one of them should have participated in the commission of the offence to the same extent and degree as the other person or persons accused of the offence had acted (State of Punjab Vs. Surjit Singh, 1987 CrLJ 845 (84) SC; AIR 1987 SC 1045).

Before fastending vicarious liability, the criminal court must satisfy itself as to the prior meeting of minds of the prncipal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. Mere accompanying cannot infer common intention. Existence or otherwise

of Common intention depends upon facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the perons accompanying the principal culprit. Otherwise, there must be someother clear and cogent incriminating piece of evidence. When such materials are absent, the copanions cannot be justifiably held guilty of every offence committed by the principal offender. Evidence regarding development of the Common intention to commit an offence graver than the one originally designed, during execution of the original plan, should be clear and cogent (Dhram pal vs. State of Haryana, AIR 1978 SC 1492 = 1989 CrLJ 1538 SC).

It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of then committing the minor offence come to an understandign to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminating evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. there is no law which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the Common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companions cannot justifiably be held guilty for every offence committed by the principal offender (AIR 1978 SC 1492 = 1978 CrLJ 1538).

The fact that the companion of the accused on whose cycle the accused was sitting continued to pedal the cycle after the accused fired a pistol and that he too ran away with the accused would not necessarily go to show that the shot had been fired in furtherance of common intention of the two accused (AIR 1975 SC 12; (1975) 2 SCC 311) =1975 CrLJ 32 = (1975) = SCJ149).

Victim was murdered with gandasa while asleep in his mandi at 10.30 P.M. while co-accused (his brother) stood by with a spear at the time preventing outside interfernece in his murder. Both ran away. It was held that both had Common intention to commit murder (1974 crLJ 1393).

Presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. Every person charged with the aid of section 34 must in some form or the other participate in the offence in order to make him liable thereunder (AIR 1956 All 241; AIR 1953 SC 420; AIR 1956 SC 177). Indulgence in overt act by each and every person is not necessary in conviction of all accused (1982) 2 SCJ 280).

Once it was found that the accused were animated by a Common intention to cause the death, section 34 Penal Code would be attracted particularly when the other three accused also accompanied co-accused at midnight and undoubtedly shared the Common intention to kill the deceased (AIR 1983 SC 838 = 1983 CrLJ 1111). Where two accused attacked the deceased, one with sharp weapon and another with lathi. Held, on facts that there was Common intention to commit murder (AIR 1980 SC 1496). where a common intention of two or more persons to kill the deceased established, the questions as to who gave the fatal blow is wholly irrelevant (AIR 1980 SC 879).

6. Presence of accused if necessary at time of commissionof offence.- The essence of section 34 is that the person must be physically present at the actual commission of the crime. This must be coupled with actual participation. It is essential that the accusded join in the actual doing of the act and not merely in planning its perpetration. Actual participation may be of a passive character such as standing by a door with the intention of assisting in furtherance of the common intention of all the accused and with a readiness to play his part when the time comes for him to act. If the accused was not present, he cannot be convicted with the aid of section 34 (Fazal v. state 1953 RLW 354). Presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act (Srce kanti lal Rammayya Vs State of Bomlsay AIR 1955 SC 287). The actual participation may be of a passive character as where an accused stood near a part to warn his companions about the approach of danger (AIR 1956 MB 262 = ILR 1956 MB 104). In order to justify the application of section 34, Penal Code, an element of participation in action need be proved and and physical presence at the scene of occurrence may sometmes be dispensed with (Nepal Chosh & Anr. v. The State 833 (834).

The essence of liability under section 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the Common intention and presence of the offender sought to be rendered liable under section 34 is not one of the conditions of its applicability. It must of course be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention a meeting of minds----- to commit an offenc and participation in the commission of the offence in furtherance of that Common intention invite the application of section 34. But this participation need not in all cases, be by physical presence. In offences involving physical violence, normally presence at the scene of the offence, of the offenders, sought to be rendered liable on the principle of joint liability and may be necessary, but such is not the case in respect of other offence where the offence consists of divers acts which may be done, at different times and places (AIR 1960 SC 889; AIR 1925 PC 1 relied on).

In the case of an offence involving physical violence, however, it is essential for the application of section 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'crime act'. The essence of section 34 is simultaneous consensus of the minds of person participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. In this case A-2 obviously was acting in concert with A-3 and A-4 in causing the murder of the deceased, when he prevented P.W. 1 from going to the relief of the deceased. Section 34 was, therefore, fully attracted and under the circumstances A-2 was equally responsible for the murder of the deceased (Ramaswami Ayyangar Vs. State of Tamil Nadu. 1976 CrLJ 1563 (1507-68)SC).

Mere distances from the scene of crime cannot exclude culpability under section 34, which lays down the rule of joint responsibility for a criminal act performed by a plurality of perons. In Barendra Kumar Ghosh vs. King Emperor (52 IA 40; AIR 1925 PC I), The judicial committee drew into the criminal act those who only stand and wait. This does not mean that some form of presence, near or remote, is not necessary or that mere prsence, without more, at the spot or crime, spells

culpability. Criminal sharing, overt or covert by active presenc or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of section 34. (Tukaram ganpat Pandere v. State of Maharashtra AIR 1974 SC 514 (516); 1974 crLJ 469 SC).

7. Inference of common intention.- A Common intention or knowledge cannot be proved by direct evidence and has to be inferred from the act, conduct of the accused and attending circumstances of a particular case. No doubt, it pre-supposes pre-arranged plan, but sometime it can be conceived at the spur of the moment (Pritam Singh Vs. state, 1974 Punj LR 77 (82). In the instant case, the charge against all the accused was for committing the murder in prosecution of a common object and thus they were all charged with the aid of section 149 of the Penal code. The Supreme court India held that if the evidence could justify the conviction of the appellant with the aid of section 34, there would have been no difficulty in sustaining his conviction. But the mere fact that the two accused came together armed with rifles is not sufficient to indicate that they had come having shared a common intention to commit the mruder. Only one shot was fired on the head of the deceased by one accused. No shot was fired by the other on him. He had no grudge on him. He did fire a rifle shot on another with the intention to kill him but fortunately he escaped death. admittedly, the deceased was not residing in the haveli, wherein the occurrence took place. It was perchance that he happened to be there. It cannot, therfore, be said by any stretch of imagination that the appellant and his companion had any pre-arranged plan to kill the deceased. On the evidence and the facts found the inference of sharing the Common intention for the murder is not possible to be drawn. It may be that he had such Common intention. But it is difficult to fill the gap between 'may' and 'must' and to say that the other accused must have shared the common intention for causing the death of the deceased (Gajjan sinsh Vs State of Punjab AIR 1976 SC 2069).

Mere proving that criminal act is done will not be sufficient for finding the accused guilty under section 34 of the Penal code, but it must be proved or at least such Common intention could be gathered from the facts and circumstances and evidence on record that the accused - appellants have committed the offence in furtherance of Common intention, otherwise charge under section 34 shall fail. (SK. Baharul Islam Vs. The State. (1991) 11 BLD 15; 43 DLR 336). Inference of Common intention within the meaning of section 34 should not be readily drawn or pushed too for unless the same is deducible from the evidence and circumstances of the case. (SK. Baharul Islam Vs. The State. (1991) 11 BLD 15; 43 DLR 336). There may be a common intention formed on the spur of moment (Askar Ali Vs. State. 11 DLR (SC) 226).

It cannot be said that only because the co-accused was a silent spectator took no part in the assault, he cannot, therefore, be held guilty of having entertained a common intention to commit the murder. On this aspect, the time at which the victim was murdered,the place of mruder, the weapons carried by the appellants, their relationship and finally their concerted conduct in the wake of murder are all relevant. The fact that the appellant did not participate in the assault but he played his part truly by his brother by carrying a spear so as to overcome any outside interference with the attainment of their object and lastly immediately after the victim was murdered the appellants ran away together held to have a sufficient bearing on the existence of common intention in the commission of the murder. (Lalai vs. state of Uttar Pradesh, 1974 crLJ 1391 (SC).

It is now firmly established that a pre-concert in the sense of a distinct previous plan is not necessary to be proved for the application of section 34 of the

Penal code. The common intention to bring about a particular result may well develop on the spot. In the instant case, appellants Nos. 3 and 4 armed with lathis, had come together with appellants Nos. 1 and 2, who were armed with bhalas to the place of occurrence and started hurling lathis on the deceased who warded off the lathis blows. Almost simultaneously appellants Nos. 1 and 2 assaulted the deceased with bhalas, as a result of which he died near the place of occurrence soon after receiving the fatal injury as mentioned above. After the occurrence, appellants Nos. 1 to 4 ran away to their house together. Held that these facts and circumstances go to show that the appellants Nos. 1 to 4 shared common intention in furtherance of which the deceased was killed. therefore, the provision contained in section 34 of the Code is attracted so far as appellants Nos 1 to 4 are concerned. (sita Ram Pandey vs. State of Bihar, 1976 CrlJ 800).

Common intention contemplated in section 34 of the Penal Code, certainly contemplates a pre-plan or pre-meeting of the minds of the reppetrators of the crime. An intention to commit a particular crime, if shared by more persons than one, and if one of such persons commits the intended offence, the others who share the common intention will also be liable for the offence committed. If there is common intention to commit murder although the actual fatal blow is given only by one of confederates, the others who shared that intention would also be liable even though their acts did not result in death. the pre-plan or pre-meeting of the minds before the commission of the offence, need not be preceded by any particular length of time. Common intention can be developed any time even a few minutes before the actual commission of the crime. The existence or otherwise of common intention to commit a particular crime has to be decided on the facts of each case and the commonness or otherwise of the intention has to be inferred not merely by the consequences of the acts but also by a reference to the motive which actuated the offenders, the weapons with which they were armed, the manner of their attack, the individual acts and the attitude of the others with regard to the individual acts. Where the facts spoken to by the witnesses and found to have been proved that the three accused attacked the deceased with deadly weapons having been actuated by a common intention to kill the deceased, the conjoint and concerted attack of the three accused delivberately armed with lethal weapons and the consequences of their attack coupled with their motive, unmistakably indicate that all the three accused were actuated by a common intention to kill the deceased (Public Prosecutor vs. Gene. Venkatesu, (1975) 2 Andh WR 413 (417-18).

It is settled view that in order to attract section 34 it is not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. What is the requisite ingredient of section 34 is that each must share the intention of the other. Where the appellants were in the company of the principal culprit but were shown to be unarmed and they have pelted only stones, it was held that the conviction of the appellants for an offence under section 302 read with section 34 of the Penal code could not be sustained and they could be convicted for an offenc of section 326 read with section 34 of the Penal code. (Delya Moshya Bhil Vs. State of Maharashtra, (1985) 1 Mom. CR 413(SC).

After a quarrel had started over the picking of mangoes in the mango tope, the two appelaints had come from different directions. In the circumstances in which they had been placed and from their acts and conduct prior to at the time of and subsequent to the occurrence, it may not safely be said that both the appellants had been actuated by the common intention to commit the murder of the deceased. But in view of the clear and direct evidence that the appellant had, with the intention of causing the death of the deceased, caused injuries sufficient in the ordinary course of

nature to cause death, by firing from a gun, he can be convicted under section 302 of the code although charged with the other appellant under section 302 read with section 34 of the code, even if the other appellant is acquitted of this charge. The order of conviction passed against the appellant under section 302 read with section 34 of the Penal code, is set aside and in lieu thereof, he is convicted under section 302 of the Penal code and the sentence to under go imprisonment for life passed against him is maintained. (Magata Panda vs. State, (1986) 61 CLT 511 (522-23).

Common intention within the meaning of section 34 of the Penal Code no doubt implies a pre-arranged plan and to convict the accused of an offence applying this section, it should be proved that the criminal act was done in pursuance of a pre-arranged plan. It is difficult, if not impossible, to procure direct evidence to prove the intention of an individual, in most cases it has to be inferred from his act or conduct of other relevant circumstances of the case (Narasinga Nad vs. State 1985 CrLJ 1397 (1400-01).

It is the settled position of law that to invoke section 34, Penal Code, the prosecution must establish common intention and prove that the criminal act was done in concert pursuant to a pre-arranged plan. In inferring common intention from the evidence on record, one must keep in the fore front of his mind the distinction between the common intention and the same or similar intention, though the dividing line between them is often very thin. If this distinction is overlooked, miscarriage of justice is likely to occur. It is equally well settled that inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. the mere fact that suddenly both the accused persons procured their weapons from somewhere would not necessarily lead to an irresistible inference that both the accused persons had entered into a pre-arranged plan to murder the deceased, when their subsequent conduct does not improve the position of the prosecution (State vs. dharanidhar Mohanty, 1975 OJD 558 (571-72).

Inference of common intention of all the accused-appellants cannot be drawn from the different nature of injuries attributed to different accused persons; and the law is that no inference of common intention should be reached unless it is a necessary inference deducible from the evidence or circumstances of the case (Kabul vs. The state, 40 DLR 216).

The distinction between the same or similar intention and the Common intention is real though at times thin and it assumes importance particularly in cases where the occurrence is sudden. common intention should be inferred from the whole conduct of all persons concerned and not only from an individual act actually done. It cannot be said as a matter of law that in all cases,even though the occurrence is sudden any particular act of a member would by itself or exclusively form the basis of the conclusion about the common intention of all (Amar Singh Vs. State, (1967) 69 Punj LR 139). After a person was mercilessly beaten and was thrown in a drain when the same people came back again and seeing the man still with life went on beating him with sticks till he died, there is no difficulty in coming to the conclusion that they had the common intention of killing him. (AIR 1955 SC 331). It is difficult, if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case (Mahbub shah vs. Emperor AIR 1945 PC 118 = 72 IA 148; ILR (1945) 2 Kar PC 210 = 1945 ALJ 344).

Common intention to kill is generally inferred from the manner of attack and the kind of arms used by the accused persons. where one accused had a 12 bore

SBBL gun while the other a 12-bore pistol and the attack was joint and consert, it was held that section 34, Penal code, was correctly employed by the court below in convicting the appellant under section 302, Penal code (Mal Singh vs. State of Rajashtan, (1985) 1 CrDLJ 57 Raj).

The question arises as to whether during the coruse of the incident all the accused shared the common intention of each other to commit the murder of the accused or merely to give him grievous injuries. In this regard, it is noteworthy that the very factum of the accused having come unarmed to the house of the deceased clearly shows that they were intending to lodge protest only, because in case they had intended to kill him, they could have armed themselves with effective weapons like gandasas, kirpan, etc. Which are usually available with the villagers. It appears that during the course of lodging protest some unbecoming words or exchange of hot words took place between the accused and others, which resulted in their entering the courtyard of the house of the deceased and hurling brick bats on them, after picking the same from near the hand pumpl. thus at the most, it can be said that all the accused shared the common intention of each other to cause grievous hurt to the deceased and not to kill him, especially when the possibility of hiting the brick bats at the chest of the victim by his movement cannot be ruled out, even though the accused may not have aimed the same at his chest. It could not be said with certainty that the cardiac arrest of the deceased was the result of brick batting. Under these circumstances, even if it is taken that accused had caused injuries on the chest of the victim, the offence at the most would fall under section 325 P.C. as the accused never intended to cause him the death or had the necessary knowledge that the pelting of brick bats would result in his death. He cannot even be attributed with the remote knowledge that pelting of brick bats would result in cardiac arrest of the victim. Thus he was held guilty for the offence under section 325/34 P.C. and section 448 P.C. and his conviction for the offence under section 449 and 302, P.C. was set aside being not legally sustainable (Balwinder singh vs. State of Punjab 1989 CrLJ 718 (721).

This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one or some of them, the acts done by others to assist those causing the injuries the concerted conduct subsequent to the commission of the offence for instance that all of them had left the scene of the incident together and other acts which all or some may have done as would helf in determining the common intention. In other words, the totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be convicted (Ram Tehal vs. State of U.P. AIR 1972 SC 254 (257).

8. Mere presence does not raise presumption of complictity.- Although a man is present when a felony is committed, if he takes on part in it and does not act in concert with those who commit it, he will not be a principle merely because he did not endeavour to prevent it, or to apprehend the felon. All who are present do not necessarily assist by their presence every act that is done in their presence, nor are they consequently liable to be punished as principals. There must be community of design to make the person present liable (1973 Ker LT 977). The mere circumstance of a person being present on an unlawful occasion does not, therefore, raise a presumption of that persons's complicity in an offence then committed (1979 CrLJ 959).

To hold various accused guilty under section 34, it must be proved that they had a common intention and that they all participated in the criminal act of which

they are charged. Mere presence without proof of any act or omission done to facilitate the offence or at least without proof of the existence of a common intention will not be sufficient under section 34, penal code, to support a conviction. But if common intention is proved, it is no answer to say that the prosecution have not established which of the acts done in the commission of the crime was done by each individual accused (1969 SCMR 454 = 1969 PCrLJ 1007).

It was proved in case that all the three appellants had a motive against the deceased, but there was nothing on record to show that there was a prior concert amongst them to kill the deceased at the alleged time and place and in the manner in which he was done to death. the time of occurrence was such when outsiders could enter the hospital campus to see indoor patients. It would not be surprising if the three appellants also happened to reach there in that connection. and when G saw the deceased, he abruptly took it into his head to whip out a pistol and fire at the deceased. In the absence of any other evidence, direct or circumstantial, to prove the prior concert amongst the three appellants for committing the murder of the deceased, the mere presence of R and K, when G committed the murder, could not make them guilty for the murder with the aid of section 34 (1981 crLJ (NOC) 190 All). The presence of accused at the scene of the offence and their running away after occurrence without further materials or without direct evidence of prior concert cannot be said to be incompatible with innocence of accused (1974 CrLJ 234 Raj).

Presence of the accused on the spot and then running away after the incident without any prior concert will not establish common intention (1982 CrLR (SC) 139). From the mere fact that the person was seen even by the side of the accused at the time when he fired the shot, it is not possible to say that there was a common intention and that was shared by him. Participation in the criminal act is the gist of the offence under section 34 (1973 Ker LT 977).

9. Failure to mention section 34 in the charge - effect.- Failure to mention section 34 in the charge is not a defect for the section does not creat a substantive offence which should be mentioned inthe charge (Shivappa Vs. Hyderabad State, 1955 crLJ 958; ILR (1954) Hyd 147). The common object of the unalwful assembly was merely to administer a chastisement to the deceased and the learned Judges of the High court did not hold that though the common object was to chastise the deceased, the members of the unlawful asembly knew that the deceased was likely to be killed in prosecutionof that common object. The conviction under section 302 read with section 149, Penal code, was not justified in law. When the charge framed against them gave them no notice of any joint liability on the basis of a separate common intention to kill the deceased. On the finding of the High court none of the members of the unalwful assembly had the intention of killing the deceased section 34 cannot be applicable (chikarange gowda vs. State of Mysore, AIR 1956 SC 731).

The appellant was convicted of the offences of murder and robbery by the Sessions Judge by the application of section 34, Penal Code. the charge framed, however, was one of murder and robbery and there was no mention of these offences having been committed where in furtherance of a common intention the High Court found that the appellant along with two others committed these offences and they shared in the goods robbed. The Suprme Court was satisfied that it establishes the offences of mruder and robbery against the appellant and not merely the minor offence of robbery or theft (Wasim Khan Vs. State of U.P. AIR 1956 SC 400).

The charge is a rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made

constructively liable, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside prejudice will have to be made out (AIR 1956 SC 116).

The object of a charge is to warn the accused person of the case he is to answer. It can not be treated as if it was a part of ceremonial. The omission to mention section 34 in the charge can not affect the case unless prejudice is shown to have resulted in consequence thereof. Although there is a difference in common object and common intention, they both deal with combinations of persons who become punishable as sharers in an offence and a charge under section 149 Penal code is no empediment to a conviction by the application of section 34 if the evidence discloses the commission of the offence in furtherance of the common intention of all (AIR 1958 SC 672 (675); 1958 CrLJ 1251).

If the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 cannot result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter (Amar Singh Vs. State of Haryana, AIR 1973 SC 2221 (2224).

Where an accused is charged with others for a substantive offence under section 201 or under section 302 read with section 34 and the others are acquitted the accused can nevertheless be convicted of the substantive offence provided the evidence on record was sufficient to establish the guilt and it is of a consequence that there was not an alternative charge for substantive offence. It is not necessary to frame a charge under section 34 for convicting a person under section 498 read with section 34 provided the facts and circumstances establish common intention (Alamgir vs. State, AIR 1957 Pat 285).

Where six persons were placed on trial under sections 302/149 penal Code and the evidence showed that each of the two accused caused at least one necessarily fatal injury to the deceased. It was held that each of the two accused could rightly be convicted either under section 302 Penal code, individually, or under section 302 read with section 34 Penal Code although they were not charged under section 302 read with section 34 of the Penal Code (9 DLR (SC) 7; PLD 1956 FC 425). When out of the eight persons convicted by the trial court under section 302/149, six were acquitted by the appellate court. The court changed the conviction of the remaining two from one udner section 302/149 to one under section 302/34 as the common intention of those two was proved on the evidence in the case (PLD 1962 Kar 583 DB).

10. Where co-accused are acquitted of. -Where the evidence examined by the appellate Court unmistakenly proves that the appllant was auilty under Section 34 having shared a common intention with the other accused who were acquitted and that the acquittal was bad, there is nothing to prevent the appellate Court from expressing that view and giving the finding and determining the guilt of the appellant before it on the basis of that finding (Brathi v. State of Punjab, AIR 1991 SC 318). An act was alleged to have been committed by a number of specified persons, five or more in number, in furtherance of the common intention of all of them. They were prosecuted for rioting and for the commission of the alleged act in view of the provisions of section 149 of the Code. The court acquitted all except the appelnalt giving them the benefit of doubt. at the same time its definite finding was that the appellant was asosciated with some at least of those acquitted persons in the

commission of the alleged act. It accordingly convicted the appellant of the commission of the alleged act applying the provisions of this section. It was held that such a conviction could be upheld (AIR 1975 SC 2211= 1975 CrLJ 1874). Where an accused is charged with a substantive offence invoking section 34, there is no bar to his conviction for the substantive offence unless prejudice is caused and it is incumbent upon the accused to show that it misled him, causing failure of justice (AIR 1974 SC 778).

Where the accused was charged with co-accused under section 34 and the co-accused was acquitted, it was held that conviction of accused under section 302 simpliciter or section 325 was possible if no prejudice was caused (1968 All LJ 50).

The acquittal of two out of three named accused does not bar the conviction of the third under section 302, read with section 34 if he is shown to have committed the offence with unknown companions (AIR 1974 SC 1557).

The argument that co-aecused having been acquitted and one of the other brother sbeing dead and one having absconded, it can not be said that prosecution has established common intention was not accepted in the instant case and it was held that for the application of section 34 penal Code, there must be evidence involving several accused persons either specifically named or some specifically named and others unnamed in the charge. Where charge specifically mentions named individuals, of whom all are acquitted except one, his liability has to be established individually and not conjointly. where, however, the charge mentions that particular act was committed by some named individuals and all are acquitted except one, but evidence is led as against the named persons as well as the unknown persons, his joint liability with the unknown persons can still be established by invoking section 34. (1976 CrLJ 250 (254, 255) Orissa).

When the two accused A and B were individually charged under sections 302 and 436, Penal Code, they were convicted only under the alternative charges under section 302 read with section 34 and section 436 read with section 34, Penal code, by the Sessions Judge. Consequently, A;s conviction can be sustained only if the High court had sustained the convictions awarded to accused B also. Inasmuch as the High court had given the benefit of doubt of accused B and acquitted it follows that As conviction for the two substantive offences read with section 34, Penal Code, cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted and by reason of it the appellant cannot be held to have acted conjointly with anyone in the commission of the offences. This position of law is well settled (sukhram vs. State of Madhya Pradesh, 1989 CLJ 838 SC).

When accused were acquitted either on the ground that the evidence was not acceptable or by giving benefit of doubt to them, the result in law would be the same; it would mean that they did not take part in the offence. the effect of the acquittal of accused 1, 3 and 4 is that they did not conjointly act with accuseds in committing the murder. If they did not act conjointly with accused 2 could not have acted conjointly with them (AIR 1963 SC 1413 (1417).

Before one of the accused can be convicted of an offence under section 326 read with section 34, it must be established that some other specified person, whose intention the accused shared, committed the act resulting in causing grievous hurt. When the accused alleged to be actual assailtants acquitted, such acquittal means that there is no such person who took part in the assault resulting in causing grievous hurt and hence the conviction for the remaining accused under section 326/34 cannot be upheld (AIR 1958 Bom 469 = 1958 CrLJ 1385).

In order that section 34 may be applied the common intention of committing a crime must be attributed to more than one individual and if the offence is the result of a joint act of more than one person then only each one of them can be found guilty under section 302 read with section 34 of the Penal Code. (PLD 1957 SC 390). Where the charge is that the accused had committed an offence in furtherance of their common intention but other person named in the charge are acquitted, the conviction of the single accused must also be set aside. (PLD 1957 SC 390). Where the High Court acquitted three of the four accused charged for an offence under section 302 read with section 34 giving them the benefit of the doubt in view of the fact that their identity was not established but convicted the fourth under section 302 read with section 34 on the ground that he had committed the offence along with one or other of the acquitted accused. It was held that the conviction of the fourth accused was clearly wrong. When the accused were acquitted either on the ground that evidence was not acceptable or by giving benefit of the doubt to them the effect in law would be that they did not take part in the offence. Hence the effect of acquittal of the three accused was that they did not conjiontly act with the fourth accused in committing the murder. If that was so, the fourth accused could not be convicted under section 302 read with section 34 for having committed the offence jointly with the acquitted persons. (AIR 1963 SC 1413). But where it was clear from the record that more than one person had committed a murder, but two of the accused were given benefit of the doubt and the principal offender was not discovered, the appellate court set aside the conviction of one of the accused under section 302/34, P.C. convicted him under section 302/109 and sentenced him to transportation for life. (1970 PCrLJ 415).

11. **Distinction between common intention and common object**.- Section 34 applies in a case where a criminal act is done by two or more persons in furtherance of the common intention of all while section 149 applies in the case of a member of an unlawful assembly when a criminal act is committed by any member of the unlawful assembly in prosecution of the common object of that assembly (Ataur rahman and others Vs. The State (1994) 14 BLD 391 (392). In the case of section 34 it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan. accordingly, there must have been a prior meeting of minds. Common Intention differs from common object in that the latter does not require prior concert and a common meeting of minds before the attack, and can develop as an unlawful object after the people get there (Public Prosecutor, Andhra Pradesh vs. Bolapali Veeraiah, 1962 MLJ (Cr) 862) Although there is a difference in common object and common intention, they both deal with combination of persons which become punishable as shareers in one offence and the charge under section 149, Penal Code is no impediment to a conviction by the application of section 34, if the evidence discloses the commission of the offence in furtherance of intention of all (Sivapada Senapati Vs. State, AIR 1969 Cal 28; AIR 1956 SC 518).

The essence of the application of section 34 is the physical presence of the person of the actual commission of the crime. If the accused is not present section 34 is not attracted. Actual participation is not necessary. It may be passive. It may be slight (AIR 1925 PC I; AIR 1960 SC 889). Mere presence at the commission of an offence is not sufficient unless community of design is proved against him (1964) 1 CrLJ 375). For application of section 34 some overt act by each of the accused is necessary in the commission of the crime by two or more persons but in the case of appliccation of section 149, if one is found to be a member of the unlawful assembly

for the commission of the crime, whether he takes active part in it or not, he comes within its mischief, and so far as section 109 is concerned, it is simply for abetment of the offence committed (Abul Khayer and others Vs. State (1994) 46 DLR 212; (1994) BLD 391 (392).

Section 34 limits itself to the furtherance of the common intention while section 149 goes further and is more strongly worded than section 34. The words common object and common intention are not synonymous. They involve a substantial difference and if this difference is sought to be eliminated, that would amount to a misdirection tending to misapplication of the law in this regard resulting in a wrong verdict (AIR 1956 SC 731).

In the case of Barendra Kumar Ghosh Vs. Emperor (AIR 1925 PC 1) it was observed that section 149 postutated an assembly of five or more persons having a common object, namely, one of those objects named in section 141, and then the doing of acts by members of the assembly in prosecution of that object or such as the members knew were likely to be committed in prosecution of that object. It was pointed out that there was difference between common object and common intention; though the object might be common, the intention of the several members might differ. The leading feature of section 34 is the element of participation in action, where as membership of the assembly at the time of the committing of the offence is the important element in section 149. The two section have a certain resemblance and may to a certain extent overlap, but it can not be said that both have the same meaning (AIR 1955 SC 274).

Under section 34 when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The words 'in furtherance of the common intention of all' are a most essential part of section 34 of the penal Code. It is common intention to commit the crime actually committed. The common inention is anterior in time to the commission of the crime. Common intention means a pre-arranged plan. On the other hand, section 149 of the Penal Code speaks of an offence being committed by any member of an individual assembly in prosecution of the common object of that assembly. The distinction between 'common intention' under section 34 and 'common object' under section 149 is of vital importance. The aspect of the accused persons being likely to cause death would be relevant under section 149 and not under section 34 of the Penal Code for the obvious reason that under section 34, it has to be established that there was the common intention before the participation by the accused (AIR 1971 SC 1444 (1446, 1447).

If the common object which is the subject matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 may result in prejudice to the accused and should not therefore be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same if the charge were under section 34, then the failure to charge the accused under section 34 can not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter (Amar Singh Vs. State of H.P. AIR 1973 SC 2221). A common object differs from a common intention, in that it does not require prior concert and a common meeting minds before that attack, and an unlawful object can develop after the people get there. The distinction between the common intention required by section 34 of the Penal Code and the common object are set out in section 149 lies just there. In a case under section 149 there need not be a prior meeting of minds. It is enough that each has the same object in view and

that their number is five or more and that they act as an assembly to acheive that object (AIR 1956 SC 513(516, 518, 519). But common intention presuposes prior concert, where must have been a prior meeting of minds. (AIR 1955 SC 216).

See also note 5 of section 149 (post).

12. **Section 34 and sections 397, 398.**- Section 398 is applicable only to actual offender who is armed with a deadly weapon at the time of attempting to commit robbery or dacoity, and section 34 cannot be pressed into service, (PLD 1963 Lah 371) because though it is true that when a man accompanies thieves, one of whom is armed with a revolver, he must know it to be likely that a murder will be committed if the attempt to steal is resisted yet further than that it is not safe to go. Therefore, section 34 would not apply to the case (PLD 1963 Kar 745).

13. **Sentence passed on different accused.**- Constructive liablity under section 34 P.C. relates to cases where several accused persons do similar diverse acts in furtherance of their common intention and liability is shared by each one of theose persons in the same manner as if each one of them alone and unaided had done the whole deed. In such a case each one of them shall be guilty of "the one offence" committed by them all in the final result, regardless of any individual conduct or action, producing a separate offence. In other words, it is not possible in the application of section 34 P.C. to so grade the offence committed, as to form one offence in the case of one accused person and another in the case of another on their separate individual actions, as this would disrupt the unity and commonness of intention which is the main requirement of section 34, P.C. For example, in a case of murderous assault committed in furtherance of common intention by several persons, it is not possible to hold that while committing murder in furtherance of their common intention within the meaning of section 34 P.C. 'A' alone is guilty of murder 'B' of culpable homicide not amounting to murder, and 'C' just of grievous hurt. To split up individual actions for determining separate offences of several persons concerned in a crime is possible only where a case goes out of the ambit of section 34 and conversely where section 34 P.C. is attracted to a case, an attempt to discriminate the role of several accused persons in terms of the act committed by each of them is fruitless (PLD 1959 Lah 950). Thus where both the accused inflicted hatchet injuries on the deceased, both of them had come with the intention to kill the deceased and, therefore, they are jointly liable under section 34 P.C. (1981 PCrLJ 275). But the other view is that if an accused is found to have played only a minor role in the commission of murder, he should not be sentenced to death, imprisonment for life is sufficient sentence for him (1970 PCrLJ 64). Where the appellant is not stated to have caused a fatal blow to the deceased; the right elbow of the deceased. he may be vicariously liable for the murder of the deceased but keeping in view the quantum of actual physical harm he has specifically done to the deceased, he should not be awarded the extreme penalty. It is a case eminently fit for imposition of lesser penalty. Death sentence was altered to imprisonment for life (1981 SCMR 597).

Where the accused are convicted of the same offence they would ordinary receive the same punishment. Thus where the accused are convicted of an offence under section 302/34 no distinction in sentence could be made on the ground that some of them were armed with deadly weapons. If two of them were awarded the lesser punishment of imprisonment for life, there was equally good reason that the others should have been awarded the same penalty (AIR 1963 MP 28). Where however there are special mitigating circumstaances, as where the accused is young and has acted under the influence of an old relation and has not inflicted any blow though he was present when the offence was committed, he may be convicted of the

offence of which the others are convicted but may be given a lighter sentence. When a young man of 17 accompanied his uncle when the later went to commit a murder, but did not inflict any blow on the deceased. He was convicted under section 302/34 but was sentenced to transportation for life though the principal accused was sentenced to death (PLD 1966 Kar 365). Where the accused were real brothers and the younger one gave only one lathi blow to the deceased and caused only simple injuries, the court held that there was a possibility that he might have acted under the influence of his elder brother, the other accused, and altered his death sentence to transportation for life. (1970 SCMR 220). Where the three accused persons were real brothers and the first blow was struck by the elder brother (S). It was held that keeping in view the fact that if the elder brother had not given the first blow, the other two who were under his influence, might not have attacked the deceased at all, the court sentenced (S) to death and the other two to transportation for life.

In the case all the appellants were convicted under section 302 with the aid of section 34 as it was not possible to hold definitely as to which particular accused caused the fatal injuires found on the bodies of the victims. Having regard to all these factors interest of justice would be fully served by substituting the sentence of imprisonment for life for the sentence of death (perveen Kumar Gupla Vs State of U.P. 1974 CrLJ 57 (60). Where the common intention was to cause grievous hurt to the deceased and it was on this footing that one of the accused was convicted of the offence under section 326 read with section 34, the other co-accused also must, on the same basis, be convicted under section 326, read with section 34 instead of section 302, read with section 34 penal code (Ashok Kumar Vs. State of Punjab, 1977 CrLJ 164 (166) SC).

14. **Common intention, when not established - effect of.-** If there is common intention established in the case the prosecution would not required to prove which of the injuries is caused by which assailant. But when common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so when one of the accused has got the benefit of the doubt and has been acquitted (Babulal Vs. State of UP 1968 AWR (HC) 484; AIR 1968 SC 728).

Mere presence at the place of occurrence without active participation or the doing of some positive act, which would indicate the sharing of the common intention, would not make a person liable for the commission of an offence even with the aid of section 34 of the Penal Code (Shew Mangal Singh Vs. State 1981 crLJ 84).

What is necessary for the prosecution to prove in a case is whether the alleged assault resulting in the death of the deceased was in furtherance of the common intention of all the accused and if this is so, then each one of them would be liable for this criminal act in the same manner as if it were done by him alone (Dharma Vs. State 1970 CrLJ 126, 127).

Charge.-

The charge under this section should run thus -

"I..... (name of the Session Judge), hereby charge you (give the names of all the accused persons), as follows :

That on or about..... (date) ..... (time) ..... (place) in furtherance of the common intention of you all, to wit ..... one (or more) of you, namely ..... (give details of the offence committed) and thereby you all committed an offence punishable under section ..... Penal Code read with section 34, Penal Code.

"And I direct that you all be tried by this court on the said charges".

35. When such an act is criminal by reason of its being done with a criminal knowledge or intention.- Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

36. Effect caused partly by act and partly by omission.- Whenever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

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

Illustrations

(a) A and B agree to murder Z by severally and at different times giving him small doses of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effect of several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) A and B are joint jailors, and as such, have the charge of Z, a prisoner, alternately for six hours at a time, A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(c) A, s jailor, has the charge of Z, a prisoner. A intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength. But the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B without collusion or co-operation with A, illegally omits to supply Z with food knowing that he is likely thereby to cause Z's death. Z dies of hunger B is guilty of murder, but, as A did not co-operate with B, A is guilty only of an attempt to commit murder.

38. Persons concerned in criminal act may be guilty of different offences.- Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

39. "Voluntarily."- A person is said to cause an effect "voluntarily" when he causes it by means whereby he inteded to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery and thus causes the death of a person. Here, A may not have inteded to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

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

In Chapter IV, [3][Chapter VA] and in the following sections, namely, sections [4][64], [4][65,] [4][66,] [5][67,] [4][71,] 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389, and 445, the word 'offence' denotes a thing punishable under this code, or under any special or local law as hereinafter defined.

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

Comment

The word 'offence' is to be construed by the general clauses Act which define it as meaning 'any act or omission, made punishable by any law for the time being in force (AIR 1956 Cal 233). The word 'offence' as defined in the code connotes acts and omissions made penal by the Code for which the doer is made punishable under the Code (1976 CrLJ 1403).

Mens rea is an essential ingredient of a criminal offence. The mental element of mens rea required is the intention or knwoledge necessary for the criminal offence (AIR 1970 Ker 98 (102). Mens rea is an integral part of a crime unless it is specifically or by implication excluded. a person is not guilty unless he is proved to have a guilty mind. (AIR 1951 ALL 21).

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

42. "Local law".-A "local law" is a law applicable only to a particular part of [6][the territories comprised in [7][Bngladesh].

43. "Illegal".-The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

1. Subs. by the Indian Penal Code Amenment Act, 1870.
2. Subs. by the Repealing and Amending Act, 1930.
3. Ins. by the Indian Criminal Law Amendment Act, 1913.
4. Ins. by the Indian Penal Code Amendment Act, 1882.
5. Ins. by the Indian Criminal Law Amendment Act, 1886.
6. Subs. by A.O., 1949, Sch., for "British India."
7. The word 'Bangladesh' was substituted for the word 'Pakistan' by Act VIII of 1973, second Sch.

44. "Injury".-The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

45. "Life".- The word "life" denotes the life of a human being, unless the contrary appears from the context.

46. "Death".-The word "death" denotes the death of a human being, unless the contrary appears from the context.

47. "Animal".-The word "animal" denotes any living creature, other than a human being.

48. "Vessel".-The word "vessel" denotes anything made for the conveyance by water or human beings or of property.

49. "Year".-Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calender.

50. "Section".-The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

51. "Oath".-The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

Comment

An 'oath' is a religious asseveration, by which a person renounces the mercy and' imprecates the vengeace of Heaven if he do not speak the truth (Whit'es case (1786) 11 L each 430).

The primary object of the oath is an invocation addressed to God as a witness of truth. All that is required to do is to affirm as follows :

"The evidence that I shall give shall be the truth, the whole truth and nothing but the truth."

52. "Good faith".-Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

Comment

Definition of 'good faith' in section 52 is a negative definition. It indicates that an act is said to be done in good faith when it is done with due care and attention. Indeed, it does not require logically infalibility. The plea of good faith may be negatived on the ground of reeklessness indicative of want of due care and attention if the imputations in question, have been made as categorical statements of facts. (AIR 1970 Guj 171; 1970 crlj 100).

In order to act in good faith, a person must act honestly with fairness and the uprightness (AIR 1969 Bom (27). If an opinion is expressed with due care and attention, honestly, believing it to be true and without malicious motive, it can be said to have been made in good faith (ILR (1957) 2 Cal 181). A person does not act in good faith if he does not proceed with due care and attention (1977 MLJ (Cr) 86). A Magistrate tendering perdon without complying with the priovisions of the Cr. P.C. cannot be said to have acted in good faith (1958 CrLJ 233).

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. Same care and attention

from all persons regardless of the position they occupy cannot be expected (AIR 1960 Cri 161). Good faith is a matter of evidence. It is a question of fact to be decided on the particulars facts and circumstances of each case (1981 SCC (Cri) 698; AIR 1970 SC 1372). The degree of proof that is to be offered by the accused for proving good faith is not the same as is expected of the prosecution which is required to prove its case beyond reasonable doubt, but is a preponderance of probabilities as in civil proceedings (AIR 1970 Guj 171 =1970 crLJ 1100 Guj).

[1][**52A. "Harbour".**-Except in section 157, and in section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension.]

CHAPTER - III
OF PUNISHMENT

53. Punishments.- The punishments to which offenders are liable under the provisions of this Code are,-

First.- Death;

Secondly.- [2][Imprisonment for life];

[3]**********;

Fourthly.- Imprisonment, which is of two descriptions, namely :-

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly.- Forfeiture of property;

Sixthly.- Fine.

[4][**Explanation.-** In the punishment of imprisonment for life, the imprisonment shall be rigorous.]

Synopsis

1. Principle and object of punishment.
2. Deterrent punishment.
3. Fine
4. Imprisonment in default of fine.
5. Imprisonment till rising of the court.
6. Imprisonment to run from date of conviction.
7. Nature of imprisonment to be specified.
8. Discretion of court as to punishment.
9. Measure of punishments.

1. Principle and object of punishment.- Punishment is the mode by which the state enforces its laws for bidding the doing of something or omission to something. Punishment may take different forms. It may be a mere reprimand; it may be a fine; it may be whipping; it may be imprisonment simple or rigorous; it may even extend to death. But whatever the form, punishment is always co-related to a law of the state for bidding the doing or the omission to do something. Unless such a law exists, there is no question of any act or omission being made 'punishable' (AIR 1962 SC 1246 (1248); (1962) 2 CrLJ 303).

1. Ins. by the Indian Penal Code (Amendment) Act, 1942.
2. Subs. by Ord. No. XLI of 1985, for "transportation".
3. Clause Thirdly was omitted by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949.
4. Explanation was added by Ord. No. XLI of 1985.

Punishment should be commensurate with the gravity of the offence (29 DLR (SC) 211) and its general effect on public tranquillity. Object of punishment is to prevent the wrong doer from repeating and to prevent other members from committing similar offences. Punishment is awarded in order to achieve any or as many as possible the following objectives :-

Retribution.- Is the oldest theory of any punishment based on vengeance. Eye for eye, tooth for tooth and blood for blood. The imposition of punishment is not meant to benefit either the individual or the society. Punishment on this basis is also unjustifiable because 'two wrongs do not make a right'.

Deterrent.- The physical exhibition of punishment by performing executions in public had a deterrent influence. The threat of punishment has also such deterring effect on some people. Long terms of punishment and death sentences need not always deter a potential offender. The Supreme Court has observed in suggesting norms for the award of death penalty that 'while deterrence through threat of death may still be a promising as strategy in some fruitful areas of murderous crimes, to expouse a monolithic theory of its deterrent efficay is unscientific'.

Prevention.- Though prevention of crime is a laudable objective, it cannot be achieved by severity of punishment. It is not severity of punishment but certainty of punishment that would prevent the occurrence of crime. Again extremely severe punishments are self- defecating.

Reformation.- The imposition of punishment must serve to reform the offender, or re-educate him. It should serve as a 'curative or a medicinal fundation'. By a system of corrective training, the offender should be re-claimed by the society. Reformation should be the objective for those who commit stray acts of crimes before they become hardened criminals. The endeavour of punishment should be to see that the criminal attains the standar of normal humanity and becomes part of the society. Reformation should be procured through punishment and not procured in association with punishment.

Modern concept of criminology calls for greater attention to the reformation of prisoners (Inacil Manuel Miranda and other etc. Vs. The State 1988 (3) Crimes 777(Bom).

In Dulla Vs. State (AIR 1958 All 198; 1958 CrLJ 316), the principles of punishment have been summarised as follows :-

"1. The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent others from committing similar crimes. The sentence passed on the offender must be the least that will achieve both these objects. In deciding the measure of punishment the court ought to take into account the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender and his age, character and antecedents.

2. The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental, or religious preconceptions should be strictly disregarded. The court must bear in mind the necessity of proportion between an offence and the penalty. The maximum penalty as provided in the code for each offence is meant only for the worst cases.

3. An excessive sentence defeats its own object and tends further to undermine the respect for the law. The jails should be reserved to receive those who perform criminal acts of not merely a technical but of a criminal character. If the law permits a sentence of fine in the alternative there is no need of the sentence of imprisonment unless of course the gravity of the offence or the antecedents of the offend demand it.

4. First offenders or youthful offenders should invariably be treated leniently and in applying the provisions of law, like. The probation of offenders Act, or section 562, Criminal Procedure Code, it would be better to err on the side of liberality; on the other hand a person who has taken to a life of crime or who has refused to take a lesson from his previous conviction should be meted out severe punishment.

5. A deterrent sentence is wholly justifiable when the offence, is the result of deliberation and pre-planning, committed for the sake of personal gain at the expense of the innocent and who is a menace to the safety, health or moral wel-being of the comunity or is difficult to detect or trace. Unlike those acts which are universally acknowledge to be of a criminal nature an act which has only recently been made an offence or which is not unlawful in other parts of the country or states which is not essentially criminal in character deserves leniency except in the case of persistent offender.".

In a criminal cases while imposing sentences, primary endeavour of the Courts must be to that corrective methods in order to enable a convict to reform and rehabilitate himself into the society and avoid imprisonment except in serious cases (Paljhan and others Vs. State of UP 1991 (1) Crimes 850 (All. HC).

2. **Deterrent punishment.**- The following crimes should be punished with a deterrent sentence : (a) Arson (AIR 1924 All 781). (b) Crimes relating to coins (AIR 1927 Lah 226). (c) Burglary (AIR 1932 Lah 258; 33 CrlJ 500 DB). (d) Crimes of violence on women (AIR 1929 LAH 584; 30 CRLj 699). (E) Illegal traffic in drugs or liquor (AIR 1950 Ajmer 17; 51 CrLJ 920). (f) Sodomy (PLD 1959 Lah 677). (g) Theft in railway train (13 CrLJ 531 DB). (h) Cheating by a Railway official (AIR 1950 All 639). (i) A brutal attack by several persons in a fit of susperstition relating to suspected sorecery resulting in the death of the person attacked (AIR 1955 SC 583; 1955 CrLJ 1297). (j) Offence with religious complexion (AIR 1964 MP 182 DB). (k) Repetion of contempt of court' (PLD 1957 BJ 6). (l) Where a gang of desperate men or unlawful assembly threatens to defy the law (12 CrLJ 260 DB Lah; AIR 1937 Sind 239). (m) Corruption cases (PLD 1957 Lah 251).

An accused person is not entitled to get off with a light sentence merely because he is a person of high position or because he belongs to a particular caste or community (PLD 1956 Lah 704), or that he has a certain reputation (AIR 1962 AP 394). The fact that the accused is a legal practitioner is by no means a circumstance which could be accepted in mitigation or extenuation of his sentence (AIR 1962 AP 394).

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. (45 DLR 243 (Para 18); 1993 BLD 297).

3. **Fine.**- In imposing a fine it is necessary to have as much regard to the pecuniary cirucmstances of the accused persons as to the character and magnitude of the offence and where a substantial term of imprisonment is inflicted, an excessive fine should not accompoany it except in exceptional cases (AIR 1952 SC 14; 1952 SCR 172; 1953 CrLJ 542). In cases of offences of an aggravated nature a sentence of imprisonment is more suitable than one of fine (AIR 1924 Lah 81). Therefore imposition of fines should be avoided where a death sentence or any substantial term of imprisonment is given (AIR 1960 ALL 233 DB). It is only in very exceptional cases that it is suitable to inflict a fine as well as a substantive term of imprisonment. These are (i) where the court thinks that justice of the case is met by imposing substantial fine but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson; (ii) Where it is desired to

compensate the complainant; (iii) where the accused had profited financially by his misdeeds (AIR 1957 ALL 764; AIR 1931 Cal 710 DB). Where long terms of imprisonment are given to convicts,it is not desirable that in addition to imprisonment a sentence of fine should be passed upon them for that the sentence of fine will be a burden upon the family of the convicts and not upon the convicts themselves. (1953 CrLJ 1568).

4. Imprisonment in defualt of fine.- Imprisonment in default of payment of fine should be long enough to induce the accused to pay the fine rather than suffer imprisonment (AIR 1950 Kutch 73) But where the fine is so heavy that the accused is unable to pay it, the court should not impose a heavy sentence of imprisonment in default of payment of fine. (AIR 1953 Trav- Co 233; 1953 CrLJ 1265 DB).

Imprisonment in default of payment of fine does not liberate the accused from his liability to pay fine (AIR 1953 Trav - Co 233). A sentence of imprisonment in default of fine cannot be allowed to run concurrently with substantive sentene of imprisonment (Sukumaran Vs. State of Kerala 1993 (2) Crimes 892(Ker).

It is undesirable to impose a fine where the term of imprisonemnt to be undergone in default will bring the aggregate sentence of imprisonment to more than the maximum term of imprisonemnt sanctioned by the particular section (AIR 1941 All 310= ILR 1941 All 608).

Awarding sentence of fine along with sentence of imprisonment for life can not be said to be illegal in view of the provisions of section 409, Penal Code (45 DLR 243 (Para 18); 1993 BLD 297).

A sence of imprisonment can be awarded in default of the payment of fine even though no such imprisonment in default of the payment of fine is provided for by a local or a special statute (Daulat Reghunath Derale Vs. State of Maharashtra 1991 (1) Crimes 856(Bom. HC).

When the offence is punishable with imprisonment as well as fine and where offence is punishable only with fine the imprisonment in default of payment of fine shall be simple and the maximum term is six months. All courts including court of Magistrate has got power to direct recovery of fine, when the offence is punishable only with fine by any of the three methods, such as by issuing distress warrants or by referring the matter to the collector or by committing the offender to the prison (section 33(1), 386(1) Cr.P.C. and section 67, 68 Penal Code) 1985 BLD 1985 (AD) 166).

5. Imprisonment till rising of the court.- A sentence of imprisonment till the rising of the court is a sentence which is in accordance with law. A direction by the court that a person shall be confined in the court premises till the court rises constitutes imprisonment within the meaning of the Penal Code and the criminal Procedure Code. The court has power to pass such a sentence where the facts of a case warrant it, but it should only be imposed in very exceptional cases (Muthu Nadar (1945) Mad 529; Ramalingayya (1943) Mad 230 and Assan Musaliarakath Kunhhi Baba (1928) 56 MLJ 550). overruled. Public prosecutor V. Kanniappan (1955) CrLJ 1080).

The Calcutta High Court has also held that rigorous imprisonment for one day and detention till the rising of the court are not different punishments and accordingly in the case of imprisonment for one day, the day on which the sentence is passed counts for one day and the accused cannot be detained in jail on a warrant issued for such a period (Mullickchand Sheikh (1948) 53 CWN 106).

6. Imprisonment to run from date of conviction.- A sentence of imprisonment must be made to operate from the date of conviction and not from a date prior to the date on which the sentence is passed. Under section 428, Criminal Procedure Code, the period of detention undergone by the accused during investigation, inquiry or trial of his case shall be set off against the term of imprisonment imposed on him on such conviction (1933) AC 699).

7. Nature of imprisonment to be specified.- The nature of imprisonment visited as a penalty should be specified in the judgment itself. It could not be specified for the first time in the warrant. Where the nature of imprisonment was not disclosed in the judgment, it was held that the imprisonment would be simple. (Shivaji Narayan Shinde 1971 Bom LR 215= 1971 Mah LJ 864). Imprisonment for life is always rigorous imprisonment. Therefore there is no need to specify in the order that it will be so (AIR 1964 Ori 149 DB; AIR 1945 PC 64). The sentence of fine where more prisoners than one are punished by fine must define by a specific sum the individual liability of each prisoners.

8. Discretion of Court as to punishment.- When law does ot provide for imposition of minimum sentence of imprisonment discretion is left with the court it is for the Court to decide the quantity of sentecne in consideration of the facts and circumstances and interest of justice (45 DLR 293; 1993 BLD 297). The court in passing a sentence should impose such a punishment as the gravity of the crime warrants and be swayed by considerations whether the sentence would become appealable or not (AIR 1929 Lah; AIR 1952 SC 14). What should be an adequate punishment within the maximum provided for an offence is primarily for the convicting court to decide, but that direction should show that a reasonable proportion has been maintained between the seriousness of the crime and the punishment imposed. No hard and fast rule can be laid down. But courts are expected to observe a desirable proportion between the gravity of the offence and the punishment for it (1958 andh L.T. 856). It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed and committed etc. Undue sympathy to impose inadequate sentence would do more harm to the justice system (Sevaka Perumal etc. Vs. State of Tamil Nadu 1991 (2) Crimes 516(SC).

Apportionment of sentence is left to the discretion of the court. (1961 Ker LJ 122).Sentence is a matter of discretion of the trial judge and normally the High Court will not interfere unless the state chooses to apply for enhancement of sentence (Arathan Sadasivam (1966 CdrLJ 210).

It has been observed in Hindustan Steel Ltd Vs. State of Orissa, AIR 1970 SC 253=(1970) 1 SCR 753 that : "The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in case where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in concious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act int he manner prescribed by the statute (Akbar Badruddin Jiwani Vs. Collector of Customs, Bombay AIR 1990 SC 1579 (1597).

9. Measure of punishment.- In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts. Trial courts in this country already over-burdened with work have hardly any time to set apart for

sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of criminal justice pre-sentence investigation may be of great sociological value. Throughout the world humanitarianism is permeating into a penology and the courts are expected to discharge their appropriate rules (Ramashraya Chakravarti Vs. State of MP. AIR 1976 SC 392(93).

The determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations, but the court has always to bear in mind the necessity of proportion between an offence and the penalty (Adamij Umar Dalal Vs. State of Bomby. AIR 1952 SC 14).

The appropriateness of the nature and measure of sentence in each case depends upon the gravity of offence, the position and status of the offender, the previous character and the existence of aggravating or extenuating circumstances. A day's imprisonment to an honourable man will have far more deterrent effect than a life spent in durance vile by a hardened criminal. The measure of punishment is, therefore, the measure that must be adapted to each case. But there are certain general considerations which may be here set out,for they are the basic principles upon which the enactment has announced the maximum punishments, leaving their adjustment, in each case, to the discretion of the Judge the appropriateness of the sentence, court cannot take into account the subsequent notoriety which the appellant acquired (AIR 1958 ALL 214; 1957 ALJ 857).

In the case of A.M.A. Wazedul Islam Vs.The State (45 DLR 243; 1993 BLD 297) their lordships observed "But we find from evidence that the appellant is an educated young man of a respectable family. He is not a habitual offender. Being misguided out of greed, he committed the offence for the first time, should such a person be allowed to be rotten in jail under a sentence of imprisonment for life?..... 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 sentece 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 imprisonment in consideration of the facts and circumstances of the case and interest of justice. In our view, an educated youngman 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".

Where the court awards the maximum punishment it should give reason therefor (AIR 1926 Lah 239). An exceedingly light sentence may not be illegal but if it is inadequate, the High Court will not hesitate to enhance it, if it be of the view that enhancement is called for (PLD 1956 Lah 704).

The following circumstances have been held to mitigate against harsh punishment : (a) First offence (AIR 1933 All 438). (b) Sudden provocation (PLD 1953 Pesh 33). (c) Exceeding right of private defence (PLD 1959 Lah 987; AIR 1927 All 105). (d) Apology in case of defamation (AIR 1914 Low bur 63). (e) Consent of woman

in sexual offnce (AIR 1927 Lah 91). (f) Intimacy of deceased with the sister (PLD 1959 Kar 1) or the wife of the accused (PLD 1954 NJ 9). (g) When no motive is found for murder (PLD 1959 Kar 460 DB). (h) When a case is kept pending for an unduly long time (PLD 1960 SC 286). (i) An act which has only recently been made an offence or which is not unlawful in other parts of the country or a province or which is not essentially criminal in character (AIR 1958 All 198). (j) Youth of the offender (PLD 1958 Kar 232). and his having acted under influence of another (PLD 1960 Lah 739). (k) Old age (PLD 1961 Dhaka 753).

While imposing a sentence it is the duty of court to see that the sentence is not excessive, but at the same time it should not be so lenient as to compel the injured person to resort to violence, in order to obtain the satisfaction which he expected from the sentence awarded by the court (PLD 1956 Lah 854). The mere fact that the accused is only 20 years old is not sufficient to justify the court in refraining from imposing the maximum penalty prescribed by law, a man of twenty being of sufficient age to be fully able to realize the nature of his acts. (AIR 1935 Cal 526; 36 CrLJ 1220 DB).

[4][53A. **Construction of reference to transportation.**- (1) Subject to the provisions of sub-section (2), any reference to transportation for life in any other law for the time being in force shall be construed as a reference to imprisonment for life.

(2) Any reference to transportation for a term or to transportation for a shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.

(3) Any reference to "transportation" in any other law for the time being in force shall -

(a) if the experession means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter term, be deemed to have been omitted.]

54. **Commutation of sentence of death.**- In every case in which sentence of death shall have been passed, [5][the Government] may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

55. **Commutation of sentence of [1][imprisonment] for life.**- In every case in which sentence of "imprisonment" for life shall have been passed, [6][the Government] may, without the consent of the offender, commute the punishment for imprisonemnt of either description for a term not exceeding [7][twenty] years.

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4. Section 53A was inserted, ibid.
5. The words "the Government" were substituted for the words "the Central Government or the Provincial Government of the Province within which the offender shall have been sentenced" by the Bangladesh Laws (Revision and Declaration) Act, 1973.
6. The words "the Government" were substituted for the words "the Provincial Government of the Province within which the offender shall have been sentenced", ibid.
7. Subs. by Ord. No. XLI of 1985, for "fourteen".

[1][55A. **Saving for [3][President] prerogative.**- Nothing in section fifty-four or section fifty-five shall derogate from the right of [2][the President] to grant pardons, reprieves, respites or remission of punishment.]

56. [Sentence of Europeans and Americans to penal servitude.] Rep. by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949.

57. **Fractions of terms of punishment.**- In calculating fractions of terms of punishment, [4][imprisonment] for life shall be reckoned as equivalent to 5[rigorous imprisonment for thirty years.]

[6][58. and 59]

60. **Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.**- In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

61. Rep. by the Indian Penal Code (Amendment) Act, 1921.

62. Rep. by the Indian Penal Code (Amendment Act, 1921.

63. **Amount of fine.**- Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. **Sentence of imprisonment for non-payment of fine.**- [7][In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable [8][with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,]

It shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

65. **Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.**- The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

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1. Ins. by A.O., 1937 by s. 295 of the G. of India Act, 1935.
2. Subs. by A.O., 1961, Art. 2 and Sch., for "His Majesty, or of the (Governor-General if any) such right is delegated to him by His Majesty".
3. Subs. ibid., for "Royal".
4. Subs. by Ord. No. XLI of 1985, for "transportation".
5. Subs. ibid., for "transportation for twenty years".
6. Sections 58 and 59 were omitted, ibid.
7. Subs. by the Indian Penal Code Amendment Act, 1882, s. 2, for "in every case in which an offender is sentenced to a fine".
8. Ins. by the Indian Criminal Law Amdt. Act, 1886.

66. **Description of imprisonment for non-payment of fine.-**The imprisonemnt which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

67. **Imprisonment for non-payment of fine, when offence punishable with fine only.-** If the offence be punishable with fine only, [1][the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty [2][taka], and for any term not exceeding four months when the amount shall not exceed one hundred "taka", and for any term not exceeding six months in any other case.

Comments

Section 65 relates to a case is which the offence is punishable with imprisnment as well as fine, whereas section 67 attracts a case in which the offence is punishable only with fine. REading all these sections of the Penal Code and the Criminal Procedure Code together, it is clearly found that all cour' sincluding the court of a Magistrate got power to direct recovery of fine, when the offence is punishable only with fine, when the offence is punishable only with fine, by any of the three methods, such as by issuing distress warrant or by referring the matter to the collector of the District or by committing the offender to the prison (State Vs. Abul Kashem 37 DLR (AD (1985) 91(para-7) = 1985 BLD (AD) 166).

An offence punishable with fine only, awarding of imprisonment in default is not illegal (State Vs. Abul Kashem 37 DLR (AD) 1985 91 (para-7) = 1985 BLD (AD) 166).

68. **Imprisonment to terminate on payment of fine.-** The imprisonment which is imposed in default of payment of a fine shall termiante whenever that fine is either paid or levied by process of law.

69. **Termination of imprisonment on payment of proportional part of fine.-** If before the expiration of the term of imprisonment fixed in default of payment, such a proporation of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration

A is sentenced to a fine of one hundred taka and to four month's imprisonment in default of payment. Here, if seventy five taka of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy five taka be paid or levied at the time of the expiration of the first month, or at any latter time while A continues in imprisonment, A will be immediately discharged. If fifty taka of the fine be paid or levied before the expiration of two months of the imprisonments. A will be discharged as soon as the two months are completed. If fifty taka be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

1. Ins. by the Indian Penal Code Amendment Act, 1882.
2. Subs. by Act VIII of 1973, s. 3 and 2nd Sch, for the word "rupees".

70. **Fine leviable within six years, or during imprisonment. Death not to discharge property from liability.**- The fine, or any part thereof which remains unpaid may be levied at any time within six years, after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Comments

Sentence of fine imposed has to be recovered within 6 years u/s. 70 of Penal Code but period of suspension of fine has to be excluded from this period. The limitation is only for commencing the recovery and not to complete it (State of U. P. V. Kamal Kishore and Anr. 1991 (3) Crimes 817 (S. C.).

71. **Limit of punishment of offence made up of several offences.**- Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offence, unless it be so expressly provided.

[1][Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence.

The offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.]

Illustrations

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y, is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily casuing hurt to Z, and to another for the blow given to Y.

72. **Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which.**- In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

73. **Solitary confinement.**- Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of

1. Added by the Indian Penal Code Amendment Act, 1882 (VIII of 1882), s.4.

the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say -

a time not exceeding one month if the term of imprisonment shall not exceed six months :

a time not exceeding two months if the term of imprisonment shall exceed six months and [1][shall not exceed one] year :

a time not exceeding three months if the term of imprisonment shall exceed one year.

74. **Limit of solitary confinement**.- In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

75. **Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction**.- [2][Whoever, having been convicted,-

(a) by a Court in [3][Bangladesh] of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either descripton for a term of three years or upward [4]*

[4]* * * * *

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to [5][imprisonment] for life, or to imprisonment of either description for a term which may extend to ten years.]

CHAPTER IV

GENERAL EXCEPTIONS

76. Act done by a person boud, or by mistake of fact believing himself bound, by law.- Nothig is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations

(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

1. Subs. ibid, s. 5, for "be less than a".
2. Subs. by the Indian Penal Code Amendment Act, 1910 (III of 1910), for the original section.
3. The word 'Bangladesh' was substituted for the word 'Pakistan' by Act VIII of 1973.
4. The word "or" at the end of clause (a) and clause (b) were omitted, ibid.
5. Subs. by Ord. No. XLI of 1985, for "transportation".

77. **Act of Judge when acting judicially.**- Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

78. **Act done pursuant to the judgment or order of Court.**- Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order stet remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

79. **Act done by a person justified, or by misake of fact believing himself justified, by law.**- Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

Illustration

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

80. **Accident in doing a lawful act.**- Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Illustration

A is at work with a hatcher; the head flies off and kills a man who is standing by. Here if there was no want of proper caution on the part of A, his act is excusable and not an offence.

81. **Act likely to cause harm, but done without criminal intent, and to prevent other harm.**- Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation.- It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations

(a) A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vesel, he must inevitably run down a boat B, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two pasengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the

passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him incurring the risk of running down C.

(b) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life, or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

82. **Act of a child under seven years of age.**- Nothing is an offence which is done by a child under seven years of age.

83. **Act of a child above seven and under twelve of immature understanding.**- Nothing is an offence which is done by a child above seven years of age and under tweleve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

84. **Act of a person of unsound mind.**- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Synopsis

1. Scope and applicability.
2. What is insanity.
3. Principles to be considered.
4. Essentials to be proved.
5. Burden of proof.
6. Expert opinion.

1. Scope and applicability.- section 84 deals with deficiency of will due to weak intellect. The concept incorporated in this section is as old as the hills. Jurists have given various reasons for the exemption of unatics or of person of unsound mind from criminal responsibility. It has been said that a mad man is best punished by his own madness - furiosus furote suo puniter. As has been observed by Blackstone "the second case of deficiency in will which executed from the guilt of crimes arises also from a defective or vitiated understanding, namely, in an idiot or a lunatic, for the rule of the law, as to the latter, which may easily be adopted also to the former is that furiosus furore sou puniter". It has further been laid down by the jurists that a mad man has no will - Furiosus mulla voluntus est. He is therefore in all ages an object of commiseration, but as society has to be protected even against the attacks of a maniac, the code of Criminal Procedure provides for his detention to prevent mischief as in sections 328 (Section 464, old) and 339 (Sec. 475 old), Cr. P.C. Such detention, however, is not his sentence (Digendra Vs. State, 74 CWN 231).

Every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing that is, the physical nature and quality as distinguished from the moral or, if he does know the nature and quality of the act he is committing that he does not know that he is doing wrong (State of MP Vs, Shmadullah AIR 1961 SC 998).

Behaviour antecedent, attendant and subseqeunt to the event may be relevant in finding that the mental condition at the time of the event, but not those remote in time (Kanna Kunnummal Ahmed Kova Vs, State of Kerala, AIR 1967 Ker 92 (95).

There is distinction between "medical insanity and legal insanity. According to medical science insanity is another name for mental abnormality due to various causes and existing in various degrees. Even an uncontrollable impulse driving a man to kill or wound comes within its scope. The legal conception of insanity differs considerably from the medical conception. It is not every form of insanity or madness that is recognised by a law as a sufficient excuse. The most elaborate and authoritative exposition of the English Common Law of insanity was embodied in the answers of 15 Judges given in June, 1843, to the questions put to them by the Lords in consequence of the popoular alarm provoked by the acquittal of Daniel Mc Naughten. The learned Judges unanimously laid down that 'to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the accused was labouring under such disease of the mind as not to know the nature and quality of the act he was doing or if he did not know it, that he did not know he was doing what was wrong (Daniel Mc Naughten 's case (1843) 10 Cl. Fin. 200).

Section 84 must be construed strictly (AIR 1948 Nag 20). In the practical application of the principle enunciated in section 84, a more progressive attitude will have to be adopted for determining criminal responsibility of a person suffering from mental disorders in the light of recent advances in the medical science especially in the branches of psychiatry (AIR 1959 Madh Pra. 259). A person is presumed to be responsible for his act and the natural consequences thereof unless he affirmatively proves that he is entitled to exemption from criminal liability. One of the exceptions is provided in section 84 (AIR 1960 MP 102). Therefore it is necessary for the application of section 84 P.C. to show that (a) the accused was insance, (b) that he was insane at the time when he did the act and not merely before or after the act; and (c) that as a result of the unsoundness of mind he was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law. There is no rule that once insane always insane or that now sane, he must have been sane before (AIR 1960 Mad 316).

A claim for relief from criminal liability under section 84 must necessarily be a defence against an admitted or assumed act which, but for the existence of such insanity, would be punishable as an offence. It must always be pleaded by the accused. No accused person can be discharged merely upon the ground that when or if he committed the act he was insane (17 C.P.L.R. 113). On the other hand when a court acquits a person on the ground that he was insane or was incapable of understanding the nature of the act, it should also give a specific finding whether the accused committed the act charged against him (AIR 1961 Cal 436).

According to illustration "A of section 105 of the Evidence Act, the onus of establishing the plea under section 84 rests on the accused. In order that section 84 may come into play it has to be established that an accused is of unsound mind and his cognitive faculties are so impaired that he did not know the nature of the act done by him or that what he is doing is either wrong or contrary to law.

The mere facts (i) that an accused is conceited, odd, irascible and his brain is not quite all right, (ii) that the physical and mental ailments from which he suffered had rendered his intellect wead and had affected his emotions and will, (iii) that he committed certain unusual acts in the past such as snatching away of huqqas from people or hurling brick-bats and giving beating to his uncle, (iv) that he was liable to recurring fits of insanity at short intervals, (v) that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, (vi) that he used to quarrel with his wife on certain occasions and used to lock her up inside the house whenever he

used to go to work, (vii) that his behaviour was queer; have not been held to be sufficient to attract the application of section 84 of the Penal Code.

It would thus appear that every person who is mentally diseased is not ipso facto exempted from criminal responsibility (Govardhan Vs. Union of India (1961) 2 CrlJ 475 (476).

Where there is nothing to show that the cognitive faculties of the accused had been impaired, so that he could not judge the consequences of what he was doing, section 84, Penal Code, does not apply (State Vs. Lal Din, 1973 CrLJ 829).

2. What is insanity.- According to medical jurisprudence insanity is an abnormality due to a variety of cause existing in various degrees. For the prupcse of criminal law unsoundenss of mind which incapacitates the person from knowing the consequences of the nature of the act or the legality of the act alone will be a ground of exemption (1973 CrLJ 1323; 1976 CrLJ 1416).

There are four kinds of persons who do not possesses a sound mind, namely, (i) Idiod, (ii) person becoming unsound through disease of mind, (iii) Lunatics, and (v) Drunkards.

Medical and legal standards of insanity are not identical (30 DLR 275). The court is concerned with legal insanity and not medical insanity (1961) 2 CrLJ 250; 1979 CrLJ 403).

The concept of degree of criminal responsibility of a person whose mind is deranged or diseased or unbalanced has undergone progressive and farreaching changes during the last hundred years or so. Unfortunately the law in this country does not recognise such lesser forms of mental abnormality and, apart from unsoundness of mind which renders a person incapable of knowing either the nature of the act or that what he is doing is wrong or contrary to law, the plea of diminished responsibility is not available as a defence in a crininal prosecution as under the English Law (1975 PCrLJ 910). From the medical point of view, it is probably correct to say that the act of murder by itself denotes an unhealthy and an abnormal state of mind, but from the legal point of view the accused is sane as long as he can understand that his act is contrary to law. If any accused person is aware that the act is one which he ought not to do and the act at the same time is contrary to law, he is punishable. Therefore, to establish successfully a defence on the ground of insanity, it must be proved that the accused person at the time of committing the act was labouring under such a defect of reason, from diseases of the mind, as not to know the nature of his act and that what he was doing was wrong and contrary to law (1978) 30 DLR 27 15). On this legal concept of insanity no amount of queerness in habit, morbidity of temper, peculiarities of character or eccentricities of behaviour, or even aberrations of mind resulting in abnormality will constitute insanity for the purpose of section 84 although they may be relevant factors for determining whether or not the accused was insane (PLD 1974 Pesh 90).

Uncontrollable impulse co-existing with the full possession of the reasoning powers is no defence in law. Existence of delusions which indicate a defect of sanity will not be deemed sufficient to attract section 84. It is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity, it must be shown that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act is question (1971 DLC 771). Being eccentric, slightly weak in head, or subnormal in intellect, does not amount to unsoundness of mind as contemplated by section 84 P.C. which draws a clear distinction between ordinary unsoundness of mind and legal unsoundness of mind. A person may be of unsound mind for the purposes of those interested in diseases of

the human brain, and yet may not be of unsound mind for the purposes of those who have to administer the law, because the unsoundness of the mind which the courts can recognise is that which deprives the perpetrator of a crime of the capacity to understand the nature of his act and of the knowledge that what he was doing was wrong or cntrary to law (PLD 1963 Kar 1034). Thus section 84 does not apply on the mere eccentricity or singularity of manner, (AIR1929 Cal 1), or every kind of frantic humour or something unaccountable in a man's action that points him out to be a mad man (29 CrLJ 827), or merely being subject to uncontrollable impulses or insane delusion or even partial derangement of mind (1976 Law Notes 250). Under the existing law even in a case of impulsive insanity or mania it is necessary to establish that the maniac was incapable of knowing what he was doing at that point of time (1975 PCrLJ 910), or his queer behaviour will not bring a man within this exception (1971 PCrLJ 1285). Even if it be proved that an accused charged with murder was conceited, odd and irascible, and his brain was not quite all right, it cannot be said that he was incapable of knowing that murder was wrong (AIR 1927 Lah 567). Similarly a conflicting statement by a person is not necessarily a sign of insanity (AIR 1941 Mad 326).

3. Principles to be considered.- In dealing with insanity a number of principles in this connection have to be borne in mind. They are -

(a) Every type of insanity recorgnised is no legal insanity unless the cognitive faculty of mind is destroyed as a result of unsoundness to such an extent as to render one incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law;

(b) the court shall presume absence of insanity;

(c) the burden of proof of insanity is on the accused though it is not as heavy as it is on the prosecution to prove an offence;

(d) every minor mental aberration is not insanity, and circumstances indicating a mere possibility of legal insanity cannot, however, be sufficient to discharge the onus resting on the accused;

(e) to attract the immunity provided in section 84 of the Penal Code, the Court has to consider whether the accused suffered from legal insanity at the time when the offence was committed. In reaching this conclusion the circumstances which proceeded, attended, and followed the crime are relevant consideration;and

(f) when a plea of insanity is raised, it is not the duty of the prosecution to establish, affirmatively, that the accused was capable of knowing the nature of the act or of knowing that what he was doing, was either wrong or contrary to law. Every person is presumed to know the law, and the natural consequences of his act. The prosecution in discharging its burden in the face of the plea of insanity has merely to prove the basic fact and rely upon the normal presumptions aforesaid. It is then that the accused is called upon to rebut those presumptions (1971 Cut LT 565).

Any and every type of insanity recognized in medical science is not legal insanity. Every minor mental aberration is not insanity. There can be no legal insanity unless the cognitive faculty of mind is destroyed as a reuslt of unsoundness of mind to such an extent as to redner the accused incapable of knowing the nature of the act or that what he is doing is wrong or contrary to law (Sarka Gundusa Vs. State 35 Cut LT 79 (81) = AIR 1969 Ori 102).

When the accused raises a plea of insanity the court should keep the following principles before it while evaluating it and determining whether benefit of the exception should be given to the accused or not. (i) If the accused raised any special

plea or claims exoneration on the basis of any special or general exception, he must prove his special plea or the existence of counditions entitling him to claim exoneration. (ii) Irrespective of the success or failure of the special plea raised by the defence or its claim to exoneration, the prosecution must prove its case beyond any reasonable doubt. (iii) If after an examination of entire evidence the court is of opinion that there is a reasonable possibility that the defence put forward by the accused may be true or that the evidence casts a doubt on the existence of the requisite intention or mens rea which is a necessary ingredient of a particular offence, this will react on the whole prosecution case entitling the accused to the benefit of doubt. (iv) Legal insanity as contemplated by section 84 Penal code is different from medical insanity. If the cognitive faculty is not impaired and the accused knows that what he is doing is either wrong or contrary to law he is not insane. Merely being subjected to uncontrollable impulses or insane delusions or even partial derangement of mind will not do, nor mere eccentricity or singularity of manner. (v) If there is evidence of premeditation and design or evidence that the accused, after the act in question, tried to resist arrest, the plea of insanity may be negatived. (vi) If the facts are clear so far as the act complained of its concerned, motive is irrelevant (PLD 1962 Dhaka 467 = 13 GLR 289 (DB).

4. Essentials to be proved.- A defence of insanity under this section will succeed if the accused establish that by reason of unsoundness of mind he was incapable of knowing : (i) the nature of the act, or (ii) that he was doing what was morally wrong, or (iii) that he was doing what was contrary to law (Rambharose Vs. State of MP 1974 MPLJ 406).

All the ingredients of section 84 must be fulfilled before the plea of insanity succeeds. The ingredients which must be proved under the section are -

(a) that the accused was insane,

(b) that he was insane at the time when he committed the act and not merely before or after the act, and

(c) that as a result of the unsoundness of mind the accused was incapable of knowing the nature of the act or that he was doing what was really wrong or contrary to law.

There is no rule that once insane always insane or that now sane he must have been sane before (Saka Gundusa Vs. State, 35 Cut LT 79).

The proof of the insanity of the accused at the nick of time is highly improbable. His insanity at the time of occurrence has to be judged from his conduct at the time of occurrence, previous to the occurrence, and after the occurrence along with other attendant circumstances. (Tarseem Singh Vs. State, AIR 1978 J&K 53 (58).

5. Burden of proof.- The onues is on the prosecution to prove the entire case at the trial and the prosecution could not be allowed to fill up the gaps or lacuna left at the trial, at the appellate or revisional stage (State of Rajashan Vs. Daulat Ram, 1980 SC Cr. R. 177).

The doctrine of burden of proof in the context of insanity may be stated as follows :- (i) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rest on the prosecution from the beginning to the end of the trial; (ii) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by section 84 of the Penal Code. The accused may rebut it by placing before the court all the relevant evidence - oral,

documentary or circumstantial but the burden of proof upon him is no higher than that rests upon a party to civil proceedings; (iii) even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the courts as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged (State Vs. Emerciano Lemos, AIR 1970 Goa 1 (6); (1965) 2 SCK 531 = (1964) 7 SCR 1561 (1563, 1568).

It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent, and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide has to prove beyond reasonable doubt that the accused caused the death with the requisite intention described in section 299 of the Penal Code. This general burden never shifts and it always rests on the prosecution. But under section 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the exception lies on the accused, and the court shall presume the absence of such circumstances. (Sakru Sa Vs. State of Orissa (1973) 39 Cut LT 322).

There is a presumption that everyone is of sound mind and responsible for consequences of his acts and as such burden lies on the person pleading insanity to show that not only he was an insane person but at time of alleged offence he was suffering from such disease of mind as not to know the nature of his act (1985 PCrLJ 2302; PLD 1960 Lah 111). Where the plea of insanity is taken on behalf of the accused, the burden of proving such a degree of insanity as exempts him from criminal liability is on the accused (1974 SCMR 214; PLD 1974 Pesh 90; AIR 1961 SC 998). Where the accused in his statement under section 342 Cr. P.C. gave rational answers. Plea of insanity raised by accused was rightly rejected by the trial court (1987 PCrLJ 785; NLR 1987 Cr. 326; PLD 1985 Lah 625).

An accused is not required to discharge the burden of establishing his insanity by evidence more cogent than a plaintiff or a defendant in a civil litigation (AIR 1961 Cal 436; AIR 1936 Nag 187). It is not enough for the defence to rely upon a mere possibility that the accused may have been of unsound mind at the time when he committed an offence; what is requried is that regard being had to the previous history of the accused, his behaviour before or at the time of the commission of the act and his subsequent conduct, coupled with other circumstances, the court should be in a position to hold that there was a reasonable probability that at the time when the offence was committed the accused was suffering from unsoundness of mind of the nature or degree mentioned in section 84 (AIR 1961 Pat 355).

According to section 84, Penal Code, nothing is an offence which has been done by a person who at the time of doing it by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The burden though not as heavy as upon the prosecution in a criminal case, is upon the accused to prove that he was of unsound mind at the time of the commission of the offence and as such, incapable of knowing the nature of his act or that he was doing what was eithr wrong or contrary to law. In the absence of any evidence or material to discharge that burden, there is no escape from the conclusion that the conviction of the accused - appellant is well founded. (AIR 1974 SC 2160.

As it is well established that the law presumes every person os the age of discretion to be sane unless the contrary is proved. It would be dangerous to admit a

defence of insanity upon arguments merely derived from the caracter of the crime. The offenders may sometime show strange and eccentric behaviour before or after the commission of the offence but this does not necessarily take within the exemption contemplated under Section 84; Penal Code and it will not absolve him from the liability. In order to earn immunity from criminal liability the decease, disorder or disturbance of mind must be of such a degree which would obliterate preceptual or volitional apacity. Feeblemindedness, mere frenzy, eomotional imbalance or uncontrollable anger, jealousy, moral depravity, lack of self control, eccentricity and other similar manifestations do not offerrelief from criminal responsibility, dahayabhai v. State of Gujarat (AIR 1964 SC 1563), the legal position with regard to the burden of proof in this context has been stated by the Supeme Court in the following proposition:

(i) The prosecution must prove beyond reasonable doubt that the accused had comitted the offence with the accused had committed the offence with the requisite mens rea and the burden of proving that always rests upon the prosecutionfrom the beginning to the end of the trial.

(ii) There is a rebuttable resumption that the accused was not insane, when he committed the crime, in the sense laid down in section 84; the accused may rebut it by placing before the Court all relevant evidence oral, documentary and circumstantial, but the burden of proof upon him is no higher than that which rests upon a party in civil proceedings.

(iii) Even if the accused is not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the prosecution may raise a reasonable doubt inthe mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case, the Court would be entitled to acquit the accused on the ground that the teneral burden resting on the prosecution has not been discharged."

The sameprinciples have been reiterated by the subsequent dcisions, Bhikari v. State of Uttar Pradesh (AIR SC 1), Ratan Lal v. State of M. B. (AIR 1972 SC 778), S. W. Mohammed v. State of Maharastra (AIR 1972 SC 2443) (Followed in Aravindakshan Pillai v. State of kerala 1989 (2) Crimes 336).

"If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of comission of the offence despite what has been expressly provided for in section 105 of the Evidence Act" (AIR 1966 SC 1 (3) = (1965) 6 SCR 194).

It is for the accused to discharge the burden of proof that he did not know the nature of the criminal acts committed by him (AIR 1970 Goa 1 (4). The position that onus is on the accused to prove that he is insane is not inconsistent with the rules of reasonable doubt which pervades our criminal jurisprudence and according to which a doubt occurring in the matter will react on the prosecution case as a whole resulting in benefit of doubt to the accused (PLD 1960 Lah 111 DB). It follows that benefit of the exception may be given to the accused where evidence regarding insanity is sufficient to cast a doubt on the question whether the act of the accused was done with the intention or knowledge required to constitute the offnece (13 DLR 289 (DB) ; PLD 1962 Dhaka 467). To establish successfully a defence on the ground of insanity, it must be proved that an accused person, at the time of committing the act, was labouring under such a defect of reason, from disease of the

mind, as not to know the nature of his act and that what he was doing was wrong and contrary to law (PLD 1960 Lah 111 DB).Merely from the character of the crime, its suddenness, cruelty, atrocity and apparent absence of motive, it cannot be presumed that the offender must have been insane at the time of its commission. It would be extremely unsafe to admit such plea and it would amount to condoning the crime because of its atrocity (30 DLR 275 (DB).

When evidence on record showing that respondent had remained under treatment for insanity in hospital even before, during days of occurrence and also after occurrence. Relaying on testimony of experts, Appellate Court arrived at the conclusion that there was a preponderance of probabilities that at the time of occurrence the respondent had acted under a fit of unsanity and he was not in full control of his senses (1988 SCMR 85). When the accused sets up section 84 in defence and when most of the prosecution witnesses make a statement favourable to the accused, it si wrong to discard their statement on a mere supposition that they may be helping the accused (AIR 1956 Bhopal 57; 1956 CriLJ 1291).

The crucial point of time at which the unsoundness of mind as defined in this section has to be established is when the act constituting the offence was committed (AIR 1964 SC 1563; AIR 1931 Lah 276; PLD 1982 Kar 360). The mere fact that on one earlier occasion, the appellant had been subject to delusion or had suffered from derangement of the mind would not be sufficient to bring his case within the exception. The court is only concerned with the state of mind of an accused at the time of the act (1987 PCrLJ 785; NLR 1987 Cr. 326). It is not enough for the defence to rely upon a mere possibility that the accused may have been of unsound mind at the time when he committed the offence, what is required is that regard being had to the previous history of the accused, his behaviour before or at the time of the commission of the act and his subsequent conduct, coupled with other circumstances, the court should be in a position to hold that there was a reasonable probability that at the time when the offence was committed the accused was suffeirng from unsoundness of mind of the nature or degree mentioned in section 84 (AIR 1961 Pat 355). Where the accused had failed to prove that he was of unsound mind at the time of committing the crime and incapable of knowing the nature of the act, he was not entitled to the benefit of section 84 (1978) 30 DLR 275; PLD 1962 Dhaka 467; AIR 1964 SC 1563). Accused is not to be called upon to prove the ingredients of section 84 Penal Code beyond reasonable doubt in order to get acquittal, though burden lies on accused to prove his insanity at the time of occurrence and it will be sufficient if the materials on record lead to an inference that requirement of section 84 Penal Code may be reasonably probable (Raghu Pradhan v. State of Orissa 1993 (1) Crimes 430 (Ori.).

It is not necessary that in order to establish a plea of insanity, some scientific evidence must be adduced. It the existence of facts is such as to indicate an unsound state of mind, that is quite sufficient. In such case, the question shall be decided on its own facts, evidence and the surrounding circumstances (1971 DLC 771). In considerating a plea of insanity under section 84, the court has to decide first whether the accused has established that at the time of committing the act he was of unsound mind, and secondly, if he was of unsound mind, whether he had established that the unsoundness was of a degree and nature to satisfy one of the knowledge tests laid down by section 84. If he does not establish the first, his plea must, of course, fail (AIR 1947 Pat 222). It is unsafe for the Magistrate to draw suo motu an inference that the accused was insane at the time of its committal from the character of the crime itself, its suddenness, violence and apparent want of motive (17 CPLR 115). Speaking generally the pattern of the crime, the circumstances

under which it has been committed, the manner and method of its execution the behaviour of the criminal before and after the commission of the crime furnish some of the important clues to ascertain whether by reason of unsoundness of mind the accused was incapable of knowing the nature of the act, or what he was doing was either wrong or contrary to law (AIR 1959 MP 259). For that a court may rely not only the defence evidence but also on what is elicited from the prosecution witnesses as well as on circumstantial evidence consisting of the previous history of the accused and his subsequent conduct and also of course on the surrounding circumstances including an absence of motive. But the court before acquitting the accused has to record a categorical finding that he was incapable of knowing the nature of the act committed or knowing that he was doing what was either wrong or contrary to law (AIR 1932 All 233; AIR 1952 Mad 174). Where all the witnesses belonging to the village have stated that the accused is known as a pagla (lunatic) though actually he may not be so, a conclusion may be drawn that the accused has certainly some derangement in his brain, although not to the extent that he can be called of unsound mind and, therefore, he is deserving of the benefit of section 84 (AIR 1953 Tripura 9).

6. Expart opinion.- To prove that the plea of insanity is well founded, it is not necessary to adduce scientific evidence. If the existence of facts is such as to indicate unsound state of mind, that is quite sufficient (AIR 1929 Cal 1). The question whether in given circumstances a man was sane or insane is for the court of decide. An expert can only furnish a court with data from which insanity can be inferred. It is beside the point whether or not in the opinion of the doctor the man was medically insane (AIR 1949 Nag 66 = II.R 1948 Nag 711). Therefore, if on the basis of the evidence the trial court can come to a finding that the accused was not legally insane at the time of occurrence, there is no legal requirement that the trial court must refer the accused for medical examination and in the absence of medical examination judgment of the trial court would not be maintainable. Accordingly just because the appellant has not been sent to a doctor for medical examination by the trial court, its judgment cannot, only on the ground, be set aside if otherwise the trial court has come to a correct finding on the question of the mental condition of the accused at the time of occurrence (PLD 1982 Kar 360; PLJ 1982 Cr.C. 37).

In every case where a plea of insanity is raised under section 84 P.C. by the accused, the trial court is not under a legal obligation to get the accused medically examined. Of course, if a doubt is created whether an accused was insane in terms of the provisions contained in section 84 P.C. the trial court should invariably refer the accused for medical examination as the report of the Medical Officer would assist the trial court in clearing the doubt (PLD 1982 Kar 360; PLJ 1982 Cr.C. 37). The opinion of an expert is relevant under section 45 Evidence Act, when a question of science is involved in arriving at a finding as to whether an accused in a criminal case was of unsound mind at the time of the commission of the act or was incapable of knowing the nature of the act or that he was doing what was wrong or contrary to law. The opinion of an expert in mental diseases is relevant and such an expert is generally examined as a witness in cases involving a question of insanity (AIR 1946 Nag 321; ILR 1946 Nag. 946). Even though the Court the court is at liberty to raise the issue of insanity itself and investigate it, the order declaring the accused to be of unsound mind and giving him the benefit of general exception embodied u/s. 84 Penal Code is not sustainable when there is no medical evidence indicaing that the accused at the time of the incident was suffering from soem kind of a mental instability or was actually insane (State of Karnataka v. Jatti 1993 (1) Crmes 74 (Kar).

The opinion of a medical witness conversant with the disease of insanity, however eminent he may be, must not be read as conclusive of the fact which the

court has to try. Such opinion may be invited in exceptional circumstances where there is no dispute as to facts or their interpretation but it must be considered by the court as nothing more than relevant. The question whether in given circumstances a man was sane or insane is for the court to decide. An expert can only furnish a court with the data from which insanity can be inferred (AIR 1949 Nag 66). But where such opinion has been taken, it cannot be brushed aside upon the strength of the lay opinion of the trial Judge (AIR 1935 Oudh 143).

85. **Act of a person incapable of judgment by reason of intoxication caused against his will.**- Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law : provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

86. **Offence requiring a particular intent or knowledge committed by one who is intoxicated.**- In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a stage of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

87. **Act not intended and not known to be likely to cause death or grievous hurt, doer by consent.**- Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such fencing, may be caused without foul play; and if A, while playing fiarly, hurts Z, A commits no offence.

88. **Act not intended to cause death done by consent in good faith for person's benefit.**- Nothing, which is not inteded to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer harm, that or to take the risk of that harm.

Illustration

A, a surgeon, knowing that a particular operation is likely to cause the death of Z who suffers under the painful complaint, but not intending to cause Z's death, and intending, in good faith Z's benefit performs that operation on Z, with Z's consent. A has committed no offence.

89. **Act done in good faith for benefit of child or insane person, by or by consent of guardian.**- Nothing which is done in good faith for the benefit of a

person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provided

Provisos. First.- That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly.- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose of other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity;

Thirdly.- That this exception shall not extend to the voluntary causing of grievous hurt, or tc the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly.- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

90. **Consent known to be given under fear or misconception.**- A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reaosn to believe, that the consent was given in consequcnce of such fear or misconception; or

Consent of insane person.- if the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.- unless the contrary appears from the context if the consent is given by a person who is under twelve years of age.

91. **Exclusion of acts which are offences independently of harm caused.**- The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be inteded to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm"; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

92. **Act done in good faith for benefit of a person without consent.-** Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit :

Provided -

Provisos. First.- That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.- That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly.- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations

(a) Z is thrown from his horse, and insensible. A, a surgeon, finds that Z requires to be **trepanned**. A not intending Z's death but in good faith for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending in good faith, the child's benefit. A has committed no offence.

(d) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the housetop, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here even if the child is killed by the fall, A has committed no offence.

Explanation.- Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

93. **Communication made in good faith.-** No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

The mere of fact that a deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself sufficient to justify a prosecution for perjury u/s. 193 Penal Code but it must be established that the deponent has intentionally given a false statement in any stage of the judicially proceeding or fabricated false evidence for the purpose of being used in any stage of thejudicial proceeding (K. T. M. S. Mhod. & Anr. v. Union of India 1992 (2) Crimes 314 (316).

94. **Act to which a person is compelled by threats.**- Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.- A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.- A person seized by a gang of dacoits, and forced by threat of instant death to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

95. **Act causing slight harm.**- Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sence and temper would complain of such harm.

Of the Right of the Private Defence

96. Things done in priviate defence.- Nothing is an offence which is done in the exercise of the right of private defence.

Synopsis

1. Scope and application.
2. Commencement of right.
3. Private defence of property.
4. Defence of possession.
5. Plea of private defence.
6. Plea of self defence and the plea of alibi.
7. Proof of private defence.
8. Quantum of proof.
9. Extent of right of private defence.
10. Free fight.

1. Scope and application.- The right of self preservation is the basic nucleus from which the right of private defence of property and person has been enacted in the penal Code. In the ordinary course of conduct, the accused's uppermost instinct when they are threatened with extinction of their person and property would be to ward off the threat by whatever means they can adopt without permitting an oportunity to the complainant's party to succeed in their objective (1978 WLN 101= 1978 Raj LW 245). The right of private defence is essentially a defensive right circumscribed by the statute, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed off as a pretext for a vindictive, aggressive retributive pupose. This right is available against an offence and, therefore, where an act is done in exercise of the right of private defence such act

can not give rise to any right of private defence in favour of the aggressor in return. This would be so even if the person exercising the right of private defence has the better of his aggressor provided he does not exceed his right because the moment he exceeds it, he commits an offence. If there is no initial right of private defence then there can hardly be any question of exceeding that right (AIR 1971 SC 1492).

Under section 96 of the Penal Code, nothing is an offence which is done in exercise of the right of private defence. A right of self defence has been granted to a citizen to protect himself by effective self resistance against unlawful aggressor and no man is expected to fly away when he is being attacked. He can fight back and when he apprehends that death or grievous hurt would be caused by his adversary, he can retaliate till the adversary is vanquished. But he can exercise such right only if he comes to the conclusion that the danger to his person is real and imminent. If he reaches the conclusion reasonably, then he is entitled to exercise the right so long as the reasonable aprehension has not disappeared. In a given case whether such a right exists or not has to be decided reading the evidence as a whole (1989 CrLJ 1547(1552) Ori; relied on AIR 1975 SC 1478 and AIR 1973 SC 473).

The right of private defence is a right of defence, not of retribution. It is available in face of imminent peril to those who act in good faith and in no case can the right be concluded to a person who stage manages a situation wherein the right can be used as a shield to justify an act of aggression. If a person goes with a gun to kill another, the intended victim is entitled to act in self defence and if so acts there is no right in the former to kill him in order to prevent him from acting in self defence. While providing for the right of private defence, the penal code has surely not devised a mechanism whereby an attack may be proved as a pretence for killing (AIR 1974 SC 1570 (1574).

The deceased and his companions prosecution party going to disputed land to have it tilled. When the son of the accused frustrated their effort, they were annoyed and enraged. They went to the dera of the accused and launched an attack. The accused and his wife fought to repel the attack and in the course of the incident both sides sustained injuries. The accused and his wife were clearly defending themselves and hence they had a right of private defence. Accused could not have weighed in golden scales number of injuries required to disarm assailants. (AIR 1991 SC 1317).

Accused assailing victim on seeing his minor daughter being sexually modested by victim right of private defence applicable. Accused entitled to acquittal (AIR 1992 SC 1683).

The right of self defence as defined by law must be fostered in the citizens of every free country. If a man is attacked he need not run away and he would be perfectly justified in the eye of law if he holds his ground and delivers a counter attack to his assailants provided always that the injury which he inflicts in self defence is not out of proportion to the injury with which he is threatened. (PLD 1980 Pesth 186). He must not use more force than necessary, that is to say, he can use only such force as is necessary to secure his safety or avert the danger (1946 Rang LR 50). Where the accused was hit by the deceased on his head and chest and the accused gave him a single hatchet blow in self defence. It was held that the accused acted in the right of private defence. His conviction and sentence was set aside (1977 PCr. LJ 181).

The right of private defence is always against an act which is an offence (PLD 1949 Lah 421). Therefore dacoits have no right to shoot in self defence private persons who are chasing them in an attempt to arrest them (AIR 1951 All 3). An act

done in exercise of the right of private defence is not an offence and does not therefore, give rise to any right of private defence in return (PLD 1949 Lah 421) There can be no right of self-defence to a trespasser even if the inmates are the first to use force. But the force used should not be more than is sufficient to vacate the trespass (PLD 1979 SC (AJ&K) 56).

An act done in exercise of the right of private defence is not an offence and does not, therefore, give rise to any right of private defence to the aggressor in return (AIR 1974 SC 1550 = 1974 CrLJ 1015). This would be so even if the person exercising the right of private defence has the better of his aggressor provided he does not exceed his right, because the moment he exceeds, he commmits an offence (1976 CrLJ 611 Ori).

2. Commencement of right.- There can be no right of self defence against an anticipated action. It is only a reasonable apprehension of damage or mischief to the property or harm to person that gives rise to the right of self defence, subject always to the limitation contained in section 99 of the Penal Code. And there can be no reasonable apprehension unless an overt act or damage or mischief or harm has not been set in motion, and no occasion arises for any defensive action (PLD 1965 Pesh 82). A person's right to private defence arises when a blow is struck at him (AIR 1954 Assam 56), or from the moment there is an apprehension that grievous hurt or death will be caused by the other party. It is not necessary that a person exercising right of private defence should wait until he himself is attacked. The question in such a case to be determined is not whether there was an actually continuing danger but whether there was reasonable apprehension of danger (NLR 1983 AC 320). But merely because both the parties where brandishing their sticks in the air as if they wanted to strike but no one was being actually hit, there is no justification for the exercise of the right of private defence by any party (AIR 1957 MP 153).

3. Private defence of property.-In the case of right of private defence of property one accused of murder must prove that the property in question was his property. When upon evidence, it is found that the primary object of the accused was to make a forcible attempt to snatch away the paddy of the informant party question of defending such right cannot arise (43 DLR 269). The onus of proving the defence plea of the right of private defence of property and the right of defence of life by the accused of murder is upon him (1989 BLD (AD) 110). But accused need not to prove plea of private defence beyond reasonable doubt (PLD 1981 Kar 1841).

When an attack is made on persons acting in the lawful exercise of their right over property they are entitled to the right of private defence. But where the accused was the aggressor and commenced beating and he was not acting in the lawful exercise of his right over property he is not entitled to claim private defence of person or property (AIR 1934 Oudh 207). Where a party of men are determined to vindicate their right or supposed right by unlawful force and they engage in a fight with anoher aprty of men equally determined to vindicate their right or supposed right by unlawful force, no question of right of private defence of property can arise (AIR 1963 Cal 3).

The owner of property has a right to his property and anything done to protect that property against intruders or persons seeking to take possession of such property would be protected by this section. The accused and his party pursued persons who stole grass from their land and two of them were grievously hurt by the thieves. They gave up pursuit and retreated, whereupon the thieves attacked them. The accused fired on them and killed one of them. It was held that the accused had a right of private defence of property and person. His act came within the exception

in section 96 (AIR 1939 Pat 575). In this connection it may be noted that a person has a right to collect persons in order to protect his crop being taken away by another and if in doing so the first party inflicts injuries on the other party, it could not be held liable unless it is proved that it exceeded its right (AIR 1955 NUC 3285).

4. Defence of possession.- An owner is not bound to submit to an act of trespass (AIR 1953 All 89). A trespasser can be ejected with reasonable violence and force. The right of private defence extends, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrongdoer any harm other than death provided such right is exercised at the earliest possible opportunity (AIR 1914 Cal 623). Therefore where a trespasser enters upon the land of another, the person in whom the right of possession is vested, may turn the trespasser out of the land by force while the trespasser is in the process of acquiring possession, and if in doing so, he inflicts such injuries on the trespasser as are warranted by the situation, he commits no offence (AIR 1949 All 564). Similarly where a landlord enters the premises occupied by his tenant to throw out his effects without taking recourse to law for his eviction, the tenant has a right to defend his possession by use of force (1980 PCr.LJ 59). The person in rightful possession is not debarred from raising a plea of right of private defence merely because apprehending an attack upon the property, he collects his strength and when the anticipated attack does come, defends his own, though it may result in a free fight (PLD 1969 Dhaka 991).

The fact that a person has title to a plot of land does not give him the right to forcibly eject a trespasser in peaceful possession of the same. His remedy is to eject him by civil process. The right of private defence of property does not cover a case of taking or retaking possession by means of criminal force or show of criminal force (AIR 1924 Pat 143). A trespasser, who is in settled possession of land, is entitled to defend by force his possession even against the rightful owner, unless he is evicted in due course of law (PLD 1965 Kar 637). Where land was allotted to complainant party during consolidation proceedings, but the allotment was set aside in appeal. Land in dispute was in physical possession of accused and their family members. Complainant party came there for taking possession of land. Complainant party neither resided there nor cultivated disputed land or any land nearby. Right of defence of property and self defence was held to have been made out (1987 PCrLJ 1518). Where the trespasser had been in possession for two months when he was uprooted by the owner, it was held that the trespasser had the right of self defence against the owner (AIR 1959 Punj 570).

5. Plea of private defence.-The right of self defence need not be specifically pleaded by the accused. A person taking the plea of private defence is also not required to call evidence on his side, but he can establish that plea by reference to circumstances transpiring from the prosecution evidence itslef. The questions in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden (Allappa Ningappa Mugalkhod Vs. State of Mysore (1972) 1 Mays LJ 406).

In a case where the accused persons themselves do not specifically plead self defence, the plea can only be allowed on the basis of very clear evidence on the record, which would go at least the extent of showing that it was reasonable possible the accused persons have acted in sefl defence (Ali Zaman Vs. The State 15 DLR (SC) 107 = PLD 1963 SC 152).

Despite the fact that no evidence had been led by the accused to prove a plea of self defence yet if the plea received support to the extend of being reasonable

possible from the circumstances proved by the prosecution evidence, the accused was entitled to acquittal (PLD 1964 Pesh 143 (DB). But the accused must at least make a case out of which a plea of the right of private defence might arise. The question in such a case would be a questionof assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden (AIR 1952 Cal 621).

In a case where the accused persons themselves do not specifically plead self defence and no evidence is led in defence, the court can not consider the possible effect of a plea of self defence on the prosecution case (PLD 1973 SC 418). In such a case the plea can only be allowed on the basis of very clear evidence available on the record, which would go at least to the extent of showing that it was reasonably possible that the accused persons had acted in self defence (PLD 1963 SC 152).

It is well settled that if an accused does not plead self defence it is open to the court to consider such a plea, if the same arises from the meterial on record (1982 CrLJ 138). The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record .(AIR 1968 SC 702). Where the plea of the accused that the injuries found on his head were caused by a blow with the lathi given by the deceased appears to have some ring of truth in it. This circumstances by itself is not sufficient to establish plea of private defence so as to exonerate the accused completely, in the absence of circumstances to indicate that he had not dealt the blows on the deceased, the latter either would have caused his death or would have inflicted grievous injuries on his person (State of Orissa Vs. Gollari Damo (1972) 38 Cut LT 397).

Once it is established that an accused killed another person the onus is on him to prove that the killing was justified or execusable. It is open to an accused person at any stage to point out to the court to examine the evidence and ascertain for itself whether it is consistent with a plea of self defence AIR 1961 All 38).A plea of the right of private defence is open to an accused even though he repudiated his complicity in the crime provided such a plea could properly be raised upon the evidence and surrounding circumstance of the case (AIR 1962 Cal 85) 65 CWN 808).

A plea of self defence is not to be discarded on the ground that it is not proved or it is false or belated. The truth or falsity of the statement of the appellant is not a correct criterion for coming to a right conclusion in a case. If the plea of self defence gets reasonable support from the prosecution evidence, it shall not be refused to the appellant (23 DLR Pesh 7), merely because the statement given by him is not in total consonance with the probabilities of the case (1980 LN 535; PLDF 1962 Kar 495).

While considering whether the right of private defence is available to an accused; it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused;the entire incident must be examined with care and viewed in its proper setting. The injuries received, the imminence of threat to his safety, the injuries caused by the accused and the circumstance whether the accused had time to have recourse to public authorities are all relevant factor to be considered on a plea of privat defence. Sword attack on the deceased cannot be excused by saying that the severity of the injuries is often a matter of chance. Runing to the house, fetching a sword and assaulting the deceased on his head with that sword are by no means a matter of chance. These acts bear the stamp of design (Biran singh vs state of Bihar AIR 1975 SC 87).

6. Plea of self defence and the plea of alibi.-The defence may take whatever pleas he likes, including inconsistent pleas, such as an accused, when charged with an offence, may take the plea of alibi that at the time of commission of the offence he was not present in the locality and at the same time he may take the plea of private defence either of life or of propoerty. the simple reason for allowing such contrary pleas is that the accused is not required by law to prove his innocence, but it is entirely for the prosecution to prove his guilt, failing which the accused shall be acquitted (1986 BLD (AD) 1(3). Where accused raised an express plea of alibi a plea of self defence on their behalf is inconsistent with the express plea raised by them. However, if on the material placed on record the plea of private defence could be made out consistent with the provision of section 105 of the Evidence Act, there will be no justification to deny the benefit of it to the accused (AIR 1961 Mys 74 (80) = (1901) 1 CrLJ 403).

It is open for the accused to plead that he was present else where at the time of occurrence and did not commit the act alleged against him but that if it is taken to be proved that he committed the offence, he acted in his right of private defence of property. If there is sufficient material on the record in a case to show that the accused acted in his right of private defence of property, he cannot be deprived of the benefit of the plea of self defence even though he tried to set up the plea of absence in vain and pleaded the right of private defence of the propoerty in the alterative (Karnail sing state of Raysthan1977 CrLJ 1729 (1733).

The fact that the plea of self defence was not raised by accused and that he had on the contrary pleaded alibi does not preclude the court from giving to him the benefit of the right of private defence, if, on proper appraisal of the evidence and other relevant material on the record, the court concludes that the circumstances in which he found himself at the relevant time gave him the. right to use his gun in exercise of this right (AIR 1970 SC 1079(1088) = 1970 crLJ 1004(SC); 1978 CrLJ 262 (Ori).

7. Proof of private defence.-The onus of proving the defence plea of the right of private defence of property and the right of defence of life by the accused is upon them (1989 BLD (AD) 110). The law governing the plea of the right of private defence is laid down in section 105 of the Evidence Act, which throws the burden of proving the existence of circumstances bringing the case within any of the general exceptions of which the plea of private defence is one, on the accused. Of course, for this purpose an accused can rely on evidence directly adduced by him or on facts and circumstances arising from the prosecution evidence or materials brought out in cross examination of the prosecution witness by him (1969 SCMR 802; 1969 PCrLJ 1548). The court will also give benefit of this right to an accused person if there are circumstances on the record from which exercise of such a right can be inferred (PLD 1979 Lah 621 (DB).

It is true that the burden on an accused person to establish the plea of self defence is not as onerous as the one which lies on the prosecution and that the prosecution is required to prove its case beyond reasonable doubt, the accused not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross examination of prosecution witnesses or by adducing defence evidence (Salim Zia vs State of u.p. AIR 1979 SC 391, Munshi Ram vs Delhi Administratian AIR 1968 SC 702).

An accused person who puts forward the plea of private defence will seek to prove it from the material on record, consisting of defence evidence, oral or

documentary, and admissions elicited from the prosecution; and he can drive advantage from such meterial in two ways. In the first place; if this material is sufficient to show that the plea of private defence is more probable than the prosecution case, the plea will be taken as proved and the accused will be entitled to acquittal on ground that he has discharged the onus laid on him by section 105 of the Evidence Act. Alternatively, if this material (read in conjunction with the other evidence on record) is found to create a reasonable doubt in the mind of the court regarding something that is required to be proved by the prosecution in order to establish the accused's guilt, the accused will be entitled to acquittal on the ground that prosecution has failed to discharge the primary burden that lies on it in all criminal cases. In the vast majority of offence *mens rea* is one of the essentials that the prosecution has to establish before the crime can be said to be proved; and a reasonable doubt as to whether *mens rea* is present or not must inevitable lead to acquittal. A person who inflicts harm in a lawful manner in order to protect his person or property is clearly devoid of *mens rea* and if the material relied upon by the accused creates a doubt as to whether he acted in exercise of the right of private defence, a doubt will simultaneously arise as to whether he had the *mens rea* that must be proved in order to make his act a punishable offence. In such circumstances he will have to be given the benefit of the doubt regarding this essential pre-requisite of the prosecution case and will be entitled to acquittal (Rishi kesh sing vs state AIR 1970 All 51 (62).

It is well settled that even if an accused does not pelad self defence it is open to the court to consider such a plea if the same arises from the material on record (state of Uttar Pradesh Vs. Mohammad Musheer Khan AIR 1977 SC 2226(2228).

8. Quantum of proof.- Whether an a ccused person, taking a plea of the right of private defence is to prove in the same manner as the prosecution is required to prove its case or whether a lower standard proof would suffice, the accused must at least make a case out of which a plea of the right of private defence might arise. It is true that an accused person taking the plea of the right of private defence is not required to call evidence but can establish that plea by reference to circumstances transpiring from the prosecution evidence itself. But the questions in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden. (Dhirendra Nath vs state AIR 1952 Cal 621). No doubt where the accused sets up a plea of private defence and the court is in doubt whether or not the accused has been able to substantiate completely to its satisfaction the plea set up by him the accused is entitled to the benefit of doubt (Parbhoo vs Ernperor AIR 1941 All 402). That principle has absolutely no appliciation to a case where an accused person set up a plea of self defence but completely fails to establish it or fails to adduce any evidence in support of it (AIR 1948 All 223 (225) = 49 CrLJ 436).

It is not necessary for the accused to lead evidence to prove their defence because such proof can be offered by relying on the evidence led by the prosecution, the material elicited by cross examining the prosecution witnesses and the totality of facts and circumstances emerging out of the evidence in the case (AIR 1974 SC 1570 (1572).

It is true that the burden on an accused person to establish the plea of self defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross

examination of prosecution witnesses or by adducing defence evidence (AIR 1976 SC 966; AIR 1968 SC 702; (1979 CrLJ 323 (328) (SC).

In a criminal case the accuseds are not required to set up their case in writing, such as a written statement of the defendant of a civil suit, nor are they required to give evidence to prove their innocence or even to establish their pleas, except a special plea within the meaning of section 105 of the Evidence Act and it is entirely for the prosecution to establish the guilt of the accused. The cardinal principle of criminal justice that the accused shall be presumed to be innocent until his guilt is proved shall be followed at all stages of the trial (42 DLR (AD) 31).

The question of quantum of proof required to prove self defence fell for consideration. It is clearly laid down that the standard of proof required on the part of the accused is not as high as that required on behalf of prosecution (AIR 1976 SC 966). The accused will be deemed to have discharged the burden if he satisfies the standard of a prudent man (AIR 1964 SC 1563).

Accused is not required to prove his case to hilt but only to show from material on record, including prosecution evidence, a reasonable possibility of defence version being correct. accused may take any plea (grave and sudden provocation, self defence etc.) if spelt out from material available on records even at a later stage, if not taken earlier. No adverse presumption can be raised against accused, if no evidence produced in support of his plea (1973 PCrLJ 379; PLD 1953 FC 93).

9. Extent of right of private defence.- The right of private defence arises only in cases where there is an apprehension of hurt or grievous hurt, but the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence, (PLD 1964 Lah 677). One can use only such force as is necessary to secure his safety or avert the danger, (PLJ 1980 Cr.C. 411; PLD 1980 Pesh 186). But when exercising the right of private defence it is difficult to expect the accused to weigh in golden scales what maximum amount of force is necessary to keep within the right, (PLD 1980 Pesh 186; PLJ 1980 Cr.C. 411) particularly so when he is exercising the right in a state of panic (PLD 1988 SC 25). It follows that a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger and if in a conflict between them, he happens to kill, such killing is justifiable (AIR 1964 Ker 222; 10 CrLJ 391) because a man placed in imminent danger of losing either his life or limb is dominated solely by his desire to secure his safety and if in pursuance of that desire he uses more force than a cool bystander would, he should not be held to have exceeded the right of private defence. Every allowance should be made for the stress, danger and excitement under which he labours, (1946 Rang L.R. 50) and in such circumstances even if there be some excuse, it is to be condoned because of the difficulty in assessing the extent of the excess committed (PLJ 1980 Cr.C. 411; PLD 1980 Pesh 186). Faced with a dangerous adversary, no man can possibly act with a detached reflection and under such circumstances if he travels a little beyond the limit, the law protects him and hence courts should not place more restrictions on him than the law demands (AIR 1964 Ker 222).

The right of private defence was not exceeded in the following cases : (a) Where the accused not only apprehended that grievous hurt would otherwise be the consequence of such an assault but actually grievous injury was inflicted as fracture of the shaft ulna bone of one of them was caused (PLD 1964 Lah 177; PLR 1964 (2) W.P. 982). (b) Where the accused was caught as a suspected thief and was heavily

beaten whereupon he used a firearm and killed one of the attackers (PLD 1966 SC 432; 13 DLR (SC) 299). (c) Where the deceased appeared to have attacked the accused with long knives whereupon the accused fired and killed two of the attackers (PLD 1964 Pesh 143). (d) Where the accused was attacked with hatchets and in self defence he used a chhuri and caused an injury to the victim on his thigh, which is not a vital part of the body but the injury proved fatal (PLD 1965 Pesh 11) (e) Where the deceased attacked with a lathi and the accused gave a fatal blow to him in defence (PLD 1961 Kar 374). (f) Where the accused fired two shots on the deceased although one shot was sufficient for his defence (PLD 1964 Pesh 143). (g) Where murder was committed while resisting sodomy (PLD 1965 Lah 553).

In the following cases the accused was held to have exceeded the right of self-defence : (a) Where the deceased provoked the quarrel but the accused continued to beat him even after he had fallen on the ground. (b) Where the accused had more supporters than the deceased and he hit the deceased from behind (AIR 1947 Par 172). (c) Where the accused stabbed an unarmed adversary in a minor scuffle (AIR 1952 Mys. 10).

Where the accused had not recieved any injuries an the injuries recieved by some of defence witnesses were simple, the accused must be said to have exceeded his right of private defence when he had fired six shots indiscriminately, killing one and injuring six others (AIR 1991 SC 769).

10. Free fight.- It is well settled that in a free fight, no right of private defence is available to either party and each individual is responsible for his own acts (1986 CrLJ 1145 (1148) Ori). The right of private defence cannot be successfully invoked by men voluntarily and deliverately engaged in fighting with their enemies for the sake of fighting as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them (AIR 1915 Bom 213). A free fight takes place "when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends on the tactics adopted by the rival commanders (AIR 1954 SC 695). Thus if two enemies, each shown to be determined to injure the other, meet suddently and go to fight, it will be hardly proper to dispute the existence of a free fight and to assume right of private defence for both the parties (AIR 1965 Raj 74). Evidence and circumstances where estbalish the fact that each party came armed to fight with other, no question of right of private defence arises (14 DLR (SC) 316).

There can be no question of a free fight when there is a clear finding that one of the parties is the aggressor (AIR 1954 SC 695). The crucial and the decisive, or at any rate, a more appropriate test to determine whether a fight is a free one or not, is that both the parties should voluntarily enter into a fight and there should be mutual intent to harm each other. A desire to fight and a mutual intent to harm each other can easily be entertained at the spur of the moment and the resulting fight will certainly be a free fight. Cases may arise where in the case of a sudden fight between two persons one of them may decline to fight further and retreat as far as he can with safety and then faced with a dangerous situation causing reasonable apprehension of death or grievous hurt take recourse to violence. He can certainly claim the right of private defence (AIR 1965 Raj 74). In cases of free fight the parties do not generally come out with the true story, it is a normal incident of an "advisary proceeding" to minimise one's own part in the incident. In such a case the court must not be deterred by the incompleteness of the tale from drawing inferences that properly flow from the evidence and circumstances (PLD 1962 SC 502; 14 DLR SC 264).

Wherer a mutual conflict develops and there is no dreliable and acceptable evidence as to how it started and as to who was the aggressor, law does not permit the plea of private defence to be taken on either side (AIR 1957 SC 469). When a free fight took place on the question of possession and from the state of relations between the parties, it was clear that both the parties were prepared to fight and that a very trival incident was sufficient to bring them into conflict. It was reasonable to infer that in entering upon the conflict each party knowingly and deliberately took upon itself the risk of an encounter. In the circumstances such as those no question of right of private defence would arise (14 DLR 264; PLD 1962 SC 502). Where in the case of a sudden fight between two persons one of them may decline from a further fight and retreat as far as he can with safety and then faced with a dangerous situation causing reasonable apprehension of death or grievous hurt; recourse to violence, he can certainly claim the right of private defence (AIR 1965 Raj 74 (76,77).

Where both sides take up arms and go into the open to indulge in a fight, no question of the exercise of the right of self-defence arises and it is immaterial whether the fight is begun by one side or the other (48 CrLJ 367). If two persons or two factions voluntarily and with determined intention come out to fight and in fact fight and it is not possible to ascertain with reasonable certainty as to who was the aggressor or how the fight got started, then the rule of law as laid down in various decisions is that neither side is entitled to claim any benefit arising out of the general exceptions contemplated under section 96 read with section 100 (1970 CrLJ 97 Guj: 1982 CrLJ 1167 Ori). When there is a free fight, that means, when both the parties come determined to fight without there being any corresponding rights of private defence, no party is entitled to the protection of law. Each party and the members thereof will be responsible for the illegal acts done by them (1970 CrLJ 114 Ori). Where a free fight takes place and both parties enter into and engage in a fight of their own free violation, none of them can plead self defence (PLD 1962 (SC) 502 = 14 DLR (SC) 316). In a free fight neither side has a right of private defence (Munnir Ahmed Vs. State of Rajsthan, AIR 1989 SC 705).

97. **Right of private defence of the body and of property.**- Every person has a right, subject to the restrictions contained in section 99, to defend-

First.- His own body, and the body of any other person, against any offence affecting the human body;

Secondly.- The property, whether moveable or immoveable, of himself or of any other person against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

Synopsis

1. Scope and application.
2. General principles governing exercise of right of private defence of body.
3. Public servant acting in official capacity.
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5. General principles governing the exercise of right of private defence.
6. Right of private defence against trespasser.
7. Limitation on exercise of right of private defence.
8. When right of private defence of property is not available.
9. Right of defence where exceeded.
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1. Scope and application.- A right of private defence given by the penal Code is essentially one of defence or self protection and not a right of reprisal or

punishment. It is subject to the restrictions indicated in section 99, which are as important as the right itself. One of them is that the harm inflicted in self defence must be no more than is legitimately necessary for the purpose of defence. Further, the right is conterminous with the commencement and existence of a rasonable apprehension of danger to body from an attempt or a threat to commit the offence. It avails only against a danger, real, present and imminent (Onkar Singh Vs. State of U.P. AIR 1974 SC 1550 (1559-60).

Section 96 of the Penal Code lays down that nothing is an offence which is done in the exercise of the right of private defence, and section 97 proceeds to divide the right of private defence into two parts: the first part dealing with the right of private defence of person, and the second part dealing with the right of private defence of property (AIR 1969 Bom 20 (22-23).

Every person has a right to defend himself, his property movable or immovable against any act which is an offence falling under the definition of theft, robbery, mischief or criminal tresspass (1965 (2) CrLJ 582; AIR 1979 SC 577 = 1979 crLJ; 584). An act done in the exercise of this right is not an offence and does not give rise to any right of private defence in return (Narayan Assan Vs State 1956 CrLJ 276).

This right commences when he has a reasonable apprehension of danger to his life or property and continues so long as the offender continues in his commission of the offence and even there is a risk of harm to innocent person (AIR 1970 SC 1079). It is not necessary that he should wait until he is assaulted (AIR 1961 Guj 87 = (1961) 2 CrLJ 54).

In order that an act may be pleaded as justified by the right of private defence there must be an offence committed or attempted to be committed. The question of the accrual of the right of private defence to a person does not depend upon an injury being caused to him. If the facts and circumstances of a particular case indicate that, placed as the accused was, he could have had a reasonable apprehension in his mind of a grievious injury being caused to him, then the right of self defence was available to him (AIR 1966 All 244 (247).

It is not necessary that there should be an actual commission of the offence in roder to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of privat defence is not exercised (AIR 1957 Ori 130 (150). The right of private defence would become negatory if it were to be exercised after the commissicn of an offence. No right of private defence can arise merely because an unlawful or wrongful act has been done. It arises only when that unlawful or wrongful act is an offence (ILR 16 Cal 206 (218).

Broadly stated, the right of private defence rests on three ideas: first, that there must be no more harm inflicted than is necessary for the purpose of defence; secondly, that there must be reasonable apprehension of danger to the body from the attempt or the at to commit some offence and, thirdly, the right does not commence until there is a reasonable apprehension (Dominic Varkey Vs. State of Kerala AIR 1971 SC 1208 (1210). the right of private defence only arises against acts which constitutes an offence except in certain specified circumstances. The right of private of person extends to acts which amounts to an offence affecting the body of the person exercising the right or the body of any other person. The right of private defence of property covers cases of acts which are offences falling under the definition of 'theft' 'robbery', 'mischief' or 'criminal tresspass' or an attempt to commit anv of these (AIR 1954 All 39 (41).

Under section 97 the right of private defence extends not only to the defence of one's own body against any offence affecting the human body but also to defending the body of any other person. The right also embraces the protection of property, whether one's own or another person's against specified offences, namely, theft, robbery, mischief and criminal tresspass (AIR 1952 SC 165 = 1952 CrLJ 848).

2. General principles governing exercise of right of private defence of body.- While considering whether the right of private defence is available to an accused, it is not relevant whether "he may have a chance to inflict severe and mortal injury on the aggressor". In order to find whether the right of private defence is available to an accused the entire incident must be examined with care and viewed in its proper setting. The injuries received by the accused, the immense of threat to his safety, the injuries caused, by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered on a plea of private defence (1975) SCC (Ct) 454 = AIR 1975 SC 87).

The Supreme Court of Inida set out the extent and the limitation on the exercise of right of private defence of body. It observed :

(a) there is no right of private defence aginst an attack which is not in it self an offence under the code;

(b) the right commences as soon as - and not before - a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is coterminous with the duration of such apprehension. accordingly the right avails only against a danger imminent present and real;

(c) It is a defensive and not a punitive or retributive right. Consequently in no case, the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence. At the same time; it is difficult to expect from a person exercising this right in good faith to weigh golden scales what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bonafide defender, if he with the instinct of self preservation strong upon him, pursues his defence with a little further than may be strictly necessary in the circumstances, to avert that attack. It would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to the attack;

(d) The right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crime enumerated in the six clauses of section 100. The combined effect of the first two clauses is that taking the life of an assailant would be justified on the plea of private defence, if the assault causes reasonable apprehension of death or grievous hurt to the person exercising right;

(e) There must be no safe or reasonable mode of escape by retreat, for the person confronted with an impending peril to life or of grave bodily harm except by inflicting death on the assailant; and

(f) the right being in essence, a defensive right does not accrue and avail where there is time to have recourse to the protection of the public authorities. (AIR 1980 SC 680; 1980 CrLJ 459(SC; Patil Hari Meghji 1983 CrLJ 82 (SC).

No right of private defence can exist against an unarmed and unoffending individual who was buying to get up and was standing at the time when the fatal injury was inflicted upon him by the accused (AIR 1974 SC 496 = 1974 CrLJ 463). Where there is free fight, when both sides indulge in a pitched battle, as it were, the

question who is the aggressor and who is the agressee is immaterial as no right of private defence accrues to any party (AIR 1938 Lah 332; AIR 971 SC 1491).

If both parties go armed to have a trial of strength, neither party can put forward the plea of private defence (AIR 1946 Pat 251). In considering whether the accused is entitled to exercise the right of private defence, all circumstances should be weighed but the scales canot be golden scales (AIR 1952 SC 665 = 1952 CrLJ 878).

Right of private defence can not be based on speculation (1968 Cut LT 1107). Where the accused pleaded alibi, the right of private defence will not be available to him (AIR 1954 Cal 258; 55 CrLJ 774).

In order to avail of the exception of self defence, it is essential to show; (i) that the occurrence was not due to the fault or act of accused; (ii) that there was an immediate danger to life, in honest belief of accused, (iii) that no reasonable course was available to accused to escape or avoid the necessity; and (iv) that there was no intention to cause more harm than necessary for the purpose (PLD 1988 SC 134 = PLJ 1988 SC 66). Thus the accused have a right of private defence where they were attacked by the complainants and suffered grievous hurt at their hands (1969 PCrLJ 1355; PLD 1964 Lah 177) or where the accused was caught as a suspected thief and was heavily beaten whereupon he used a firearm and killed one of the attackers, (PLD 1966 SC 432; 18 DLR SC 299) or where the deceased had attacked the accused with long knives whereupon the accused fired and killed two of the attackers, (PLD 1964 Pesh 143) or where a lathi blow was given to the accused, (PLD 1961 Kar 374) or his companion (36 Punj L.R. 300).

Where a private citizen tries to apprehend the accused on a suspicion of theft; the accused may evade arrest and to do so may exercise the right of private defence by inflicting injuries on the person attempting to arrest him (PCrLJ 1354). Where a police constable going to the railway station promises to take precautions against commission of crimes prevalent in the locality found some beggars sleeping on the ground. He woke them up without use of force and found himself engaged in an argument with one of the beggars during the course of which he was suddenly struck by the beggar on his forehead with a heavy implement. While reeling under the effect of the blow the constable struck his assailant on the head with a hatchet. It was held that a good case for exercise of right of private defence was made out in favour of the constable (AIR 1942 Lah 33).

When a person is apprehending grave danger to himself and his instinct of self defence is aroused, he cannot have the mental balance of measuring the degree of assault which he would deal to his opponent (Dassarth sendha v. state of orissa; 1990 (1) crimes 660 =1989 (31) OJD 592 (597 (Cr).

Where there is a fight between the parties, the court must determine which party was the aggressor. Once it is clearly established that one of the parties opened the attack, the other would have a right of private defence. Where the accused had a head injury which was caused to him by means of a blow with a hatcher, which the deceased carried at the time of occurrence. The possibility of the deceased having opened the attack on the appellant cannot be excluded to a moral certainty and in case of doubt as to who attacked first, the benefit of doubt is to go to the accused (PLD 1965 (WP) Pesh.11). Where a fight took place in the common pasture of the village on a dispute over the grazing of cattle and both the accused and the deceased suffered injuries with sharp-edged weapons. The prosecution evidence was found to be unreliable. Therefore the court could not give a definite finding as to who was the aggressor. It was held that the plea of self defence raised by the accused must be

accepted (PLD 1969 Pesh 195). where the deceased went to the accused with a spade in his hand with the intention of picking up a quarrel; it was held that the deceased was the aggressor and the accused had justifiable reason to apprehend that the deceased would cause grievous hurt to him and he was within his rights to hit the deceased in self defence (AIR 1954 Sau 34).

The right of private defence of body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence though the offence may not have been committed (PLD 1970 Lah 857). If the accused apprehending immediate danger to his life thinks that it is only if he made a counter attack that he could save his life, and makes the attack, he is entitled to do so, because it is not necessary nor does the law require that the accused should wait for the purpose of exercising his right of private defence till he receives a grievous injury. In considering whether the accused is entitled to exercise the right of private defence, one has to place oneself in the position of the accused in the midst of circumsances in which the accused stood and then form an opinion whether under the peculiar circumstances the accused had not the apprehension of such injuries to his body as would entitle him to exercise his right (AIR 1960 Ker 258). However, it is not every idle threat that would entitle a man to use arms against others. Before using this valuable right of self defence he has to consider and reflect whether the threat is intended to be put into execution or not (PLD 1970 Lah 857). Where the complainant party fired a shot at the accused party, the accused though not hit have a right of private defence and if they retaliated and beat the complainants they were covered by this exception (1978 PCrLJ 515).

Where the police started the assault and were the aggressors and the accused used force to repel the attack the action of the accused could be taken to be protected (AIR 1957 Ori 130). The person exercising the right of private defence is entitled to overcome the threat (AIR 1971 SC 1208). The right of private defence does not extend to chasing and killing a person who is running away from scene. (AIR 1963 SC 612 = (1963) 1 CeLJ 493).

3. Public servant acting in official capacity.- Where a police officer bonafide believing a certain person to be a proclaimed offender, in his endeavour to arrest him, was attacked by that person with a hatcher and in defending himself the officer fired a shot which proved fatal to his assailant. It was held that the police officer was protected by the right of private defence which extneded even to the causing of death of the assailant and that the police officer should not be held criminally liable for the unfortunate outcome of what he did (AIR 1933 Sind 193). Similary where an excise officer by force took away the account books of the accused believing in good faith that he had the authority to do so, and the accused recovered the books from him by force, it was held that the general right of private defence given under section 97 Penal Code is subject to the restrictions contained in section 99 P.C. It is clearly provided in section 99 P.C. that there is no right of private defence in a case in which there is time to have recourse to the protection of the public authorities. In the instant case, the applicant could have approached the superiors of the officer for the return of the registers and if there was no officer superior to him posted at the station, the applicant could have approached senior officers of other departments and, in any case, could move the police for redress; therefore he had no right of private defence (AIR 1965 All 534).

Where a public servant acts illegally in the purported exercise of his powers, the person against whom he acts has a right of private defence against the police officer. Where the search, in carrying out which the accused was alleged to have obstructed the public servant, was itself illegal, the accused has got a right of private

defence of his person and if while doing so he caused simple hurt to the public servant with his teeth or nail or stone chips in order to extricate himself from the clutches of the public servant holding him, it cannot be said that the accused exceeded his right of private defence (AIR 1964 Pat 493). Similarly where the aggressors were a police party and the accused who were 9 in number began the attack in desperation, finding 51 persons of the police party advancing against them with loaded rifles, revolvers and lathis, or where a police officer took the accused to a dispensary in order to be medically examined to ascertain whether he was under the influence of drink, or where a constable wrongfully confineds a person, such person has a right of private defence against him (AIR 1957 Ori. 130; AIR 1959 Bom 284; AIR 1923 All 34).

4. When right of private defence of body is not available.- The right of private defence is available only to one who is suddenly confronted with immediate necessity of overting an impending danger not of his creation. The necessity must be present, real or apparent (AIR 1988 SC 83 = 1988 CrLJ). The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence (AIR 1974 SC 1570 (1575). Where the deceased was way laid and attacked by accused with dangerous weapon, it was held that the question of private defence did not arise (AIR 1979 SC 1230).

Where it appeared from the evidence that even after the deceased had fallen down, the accused continued to injure him in a vidictive and revengeful spirit, the right of private defence was held not available (AIR 1971 SC 1891).

A person who tresspasses on deceased's premises can not claim the right of self defence even if the fight was started or the first blow was inflicted by the deceased, or inmates of his house were the first to use force. Force used however, should not be more than what is sufficient for vacation of the trespass (NLR 1981 SCJ 210). The aggrssors can not claim the right of private defence(AIR 1979 SC 1230 = 1979 CrLJ 1023).

When in a sudden fight the accused takes an unfair advantage, he can not plead the right of private defence (PLD 1966 SC 664). Where both sides take up arms and goout into the open to indulge in a fight, no question of self defence can arise, and it is immaterial which side begins the fight first (PLD 1962 SC 502 = 14 DLR SC 264). A person cannot set up a right of private defence if he voluntarily engages himself in a fight with a desire to fight instead of being forced to fight to save himself of threatened violence (AIR 1915 Bom 213). Therefore where two parties were spoiling for a fight and every person began to pick up stones and throw them at the other party, then the accused's party cannot plead that because the other party was also intent on beating them, every blow they gave was given in self defence (AIR 1934 Mad 492). If two enemies, each shown to be determined to injure the other, meet suddently and go to fight, it will be hardly proper to dispute the existence of a free fight and to assume a right of private defence for both the parties (AIR 1965 Raj 74).

The right of private defence of person is not available to a person who is committing an offence when he is attacked either to stop him or to apprehend him. Where the accused enters the house of a woman to commit a cognizable offence, any person can arrest the accused and cause death, if necessary, and the accused has no right of private defence (AIR 1937 Pesh 92). Where the accused armed with a gandasa makes a violent attack on another who is unarmed, the fact that certain persons came to the rescue of the victim would not give the accused any right of private defence against the rescuers (AIR 1943 Lah 164). One M went to the house

of the deceased to commit an offence; he knew that the men of the family of the deceased might discover him and M went prepared for this eventuality. He was armed and had every intention of using his dagger, if discovered. He was discovered and when pursued by the deceased he killed him with the dagger. It was held that M could not be said to have a right of private defence (AIR 1941 Lah 81). Where the owner of the house tried to arrest a thief who had entered his house and on the thief retreating, called upon his neighbours to arrest him; it was held that the arrest by the neighbours was legal and the thieves had no a right of private defence (AIR 1948 All 103).

Where the deceased is made helpless by being disarmed by the accused the accused had no right of private defence by causing injuries to the deceased for an assault made previous to the disarming (PLD 1966 SC 664). Where the accused had overpowered the deceased, thrown him on the ground and disarmed him of the knife with which the accused then caused fatal injuries to the deceased,it was held that right of private defence could not be pleaded in defence (PLD 1966 SC 664).

The law of private defence does not reqire that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force. This necessarily postulates that as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there, if the danger or the apprehension about it has ceased to exist there is no longer the right of private defence (1989 (31) OJD 605 (608) Cr; 1989 ACrR 749 (753, 754).

5. General principles governing the exercise of right of private defence.- A full Bench of the Orissa High Court observed with respect to defence of property :

"The law on the point can be summarised thus :

(1) In a civilised society the defence of person and property of every member thereof is the responsibility of the state. Consequently there is a duty cast on every person faced with apprehension of imminent danger of his person of property to seek the aid of the machinery provided by the state but if immediately such aid is not available, he has the right of private defence.

(2) Whether or not a case is one in which recourse should be had to the public authorities depends upon the nature of information regarding the threat of imminent danger. The right of private defence of property commences and the duty to apply for protection to public authorities when some information of definite kind as to the time and place of danger is actually received. Thus, in most of the cases the time lag between receipt of definite information and the commencement of apprehension of actual danger would be one of the determinative features.

(3) After the actual danger has commenced there is ordinarily no question of applying for protection of the public authorities.

(4) The law does not require a person in possession of the propoerty to run away or retire in the face of attack on it, to ask for protection of public authorities. If a reasonable apprension of immminent danger to the property has commenced the exercise of right of private defence is available. At such point of time no duty is cast on the accused to run for protection of public authorities.

(5) A person in possession when attacked by trespasser is entitled to maintain his possession and drive away the aggressors by use of force without applying for protection of public authorities. Where the person in physical possession has been

dispossessed by the trespasser, he is even entitled in exercise of the right of private defence to drive away the intruder, provided there has been no acquiescence to such dispossession and the trespasser has not obtained settled possession over the property. Here also there is no duty to run for protection and thereby allow the trespasser to have settled possession over the property.

(6) Where the accused is in physical possession of the property but at the moment of attack he is not present at the spot, then on coming to know that the trespasser is getting in to possession of the same or attempting to do so, he is entitled to come to the spot with necessary force to repel the entry and turn away the aggressor.

(7) Where there is imminent danger to the property and the person in possession apprehends substantial injury thereto, he is entitled to raise his own arms in defence and retaliate to keep away the attack without applying for state aid.

(8)When no serious loss to the property is threatened and there is no urgency for driving away the trespasser, recourse to state aid must be taken even if the trespasser has just entered the land. This should be the rule where at the time of trespass, the person in settled possession is not upon the field. Where such person is present on the property at the time tresspass is attempted he would ordinarily have the right of private defence as soon as his possession over the property is actually threatened, no matter whether there is standing crop on the land or substantial injury is apprehended or not. An exception to the requirement of seeking state aid may also be made in a case where taking advantage of the temporary absence from the field of the person in settled possession, the trespasser to get into possession.

Where A is in settled possession and B trespasses and from the property trespassed, A can re-enter the property and maintain his possession by use of force if B attempts to get into the property again.

(9) The bare fact that a police station is not far off from the scene of occurrence is not by itself sufficient to deprive a person of his right of private defence. The questions in all cases is whether if the police intervention could have been timely and effective. The effectiveness of the police help depends not only on the nearness of the police station but also on the possibility giving timely information to the police and obtaining timely assistance from police.

(10) In dealing with cases of this type a distinction must always be borne in mind between enforcing a right and maintaining the right. Where the owner, not in possession tries to enter upon the property by show of force, the person in possession, though not the owner is entitled to resist and also claim right of private defence of property.

(11) Mere preparation to meet an apprehended attack does not militate against the right of private defence if there is no time to have recourse to public authorities (State Vs. Rabindranath Dalai 1978 CrLJ 1686 Ori (FB); followed in State Vs. Bhagabat Mohanta 1978 CrLJ 1566 Ori).

After considering several authorities the Allahabad High Court laid down, the following propositions relating to defence of propoerty :

(1) There can be no danger to property if the accused is not in possession. If he has merely a bare title to the property, his remedy is to seek possession from a court of law and not to enforce it by force himself.

(2) If the accused was previously in peaceful possession but the other side has dispossessed him and the accused has acquiesced in the dispossession for

sometime, then again he must have recourse to law and not enforce his right to take back poossssion by his own force.

(3) The accused may have lost possession but if immediately on coming to know of the other side having on his land or taken possession of his propoerty he rushes to oust the trespasser, he is entitled to oust him by force. He is not bound to have recourse to a lengthy process of a trial in a civil court. But this rule cannot be applied to a case in which the trespasser has already peacefully established himself in the enjoyment of the property for some time.

(4) If, however, there is no question of permanent deprivation of one's possession over propoerty and the question is of infringment of enjoyment of a mere right over property, then in that case unless the injury to be caused by the obstruction of the enjoyment to one's right is expected to be enhanced if recourse is had to public authorities for protection, one is bound to take such recourse.

(5) In every case, however, if one is already in possession of one's property or in enjoyment of a right, one is entitled to reach the spot earlier then other party with arms and reinforcements and to wait in readiness to defend to such property or right from the expected aggression from the other side.

(6) If the information of the expected aggression is of a definite kind it would be proper for the party in possession to inform the public authorities and seek their help but one is not bound to seek such help unless an apprehension of danger to such property has actually commenced.

(7) If the apprehension of danger has actually commenced and if one can have recourse to the public authorities before an actual injury is caused to the property or right he must do so, or else he will lose his right of private defence. This contingency usually arises when one has got definite information about the other side proceeding towards the land in dispute, and the poublic authorities are within such a reach that one could inform them before the actual damage to the property is done, e.g. when the police station falls on the way to the land in dispute and the accused can inform the police while proceeding towards it for its protection.

(8) When a fight takes place not because property or person has to be proceed but because parties want to measure their strength and protection of property is merely a pertext, no question of self defence arises, bu this finding can be arrived at only when the possibility of either party fighting for the protection of his property has been excluded.

(9) When the determination to fight is bonafide in the desire to protect one's property, that would not be a case in which it can be said that the right of self defence is excluded. In this connection it would be important to note whether one is fighting for maintaining one's possession or maintaining one's enjoyment of a right which has been enjoyed for some time previously; or one tries to obtain possession of a propoerty which he thinks belongs to him, or to inforce a right which may be his but which he had never enjoyed before. In the latter class of cases there is no right of self defence. In the former class of cases there is.

(10) Again, where a fight takes place in an open field, not on or near the property to be protected but far away from it, this fight cannot be said to be one for the protection of that property and there will be no right of self defence in such cases.

(11) Again, where one party challenges the other party for a fight then also the right of private defence is excluded even thogh the fight be near or on the property. One is however, entitled to say to the aggressor, if you attack you will be met by

force, but it would be challenging another to fight if one were to abuse him and say come on try strength if you like.

(12) Where there is a dispute over ownership or possession of property and parties quarrel, and there is an exchange of abuses, but the party out of possession has neither attempted nor threatened to take possession immediately, nor attempted nor threatened to cause injury to the party in possession, the party in possession has no right to strike first, and if he does so, he gives the other party the right to strike back in self defence (Paras Ram Vs. Rex 1949 All 274 (284) = 50 CrLJ 445).

In another case the Division Bench of the Allahabad High court has laid that where during the course of an attack by party one member of such party falls down on the ground due to defensive action of the members of the complainants party it cannot give rise to any right of private defence to any member of the party committing aggression (Shailesh Kumar Vs. State 1968 CrLJ 110 (ALL). There is nothing in sections 96 to 106 of the Penal Code which can lend support to the view that a person entitled to exercise his right can not exercise it until he has failed after taking other reasonable steps to avoid causing harm to his assailant (Mozan Ansari vs. State 1961 BLJR 824).

In order to justify use of force in self defence there must be invasion of propoerty either actual or threatened. A mere protest from a distance does not amount to such an invasion (Sidhu gope Vs. Emperor AIR 1946 Pat 84) (89). When the apprehension of causing mischief to property ceases to exist or the mischief is already done the right of private defence ceases to exist or the mischief is already done the right of private defence to proerty is not available (1989 CrLJ 1980 (1982) P&H).

The right of private defence of property comes into operation only when certain specified offences against property are committed or are attempted to be committed (AIR 1934 Cal 610). The right arises not only when the offences enumerated in the section are committed but also when an attempt to commit or a threat to commit any such offence is made (PLD 1960 (WP) Lah 62). Where a civil court of competent jurisdiction had ordered maintenance of status quo regarding possession of the disputed land between the parties and in consequence thereof accused were in possession. In spite of it the complainants went all the way from their village to land in dispute to restrain the appellants from ploughing the field in dispute without due course of law. The three appellants, had full right to protect their person and property, when they were attacked and received grievus injuries (KLR 1987 Cr. C. 100). The right of private defence of property can only exist, in favour on the person who possesses a clear title to that property (AIR 1916 Oudh 345). It is preposterous to claim for a judgment debtor, whose property has been sold in execution of a decree, a right to assault the auction purchaser who had been put in possession of the property by the civil court and was protected by the criminal court in keeping that possession when he goes to the land armed with the delivery of possession and supported by the orders of the criminal court (AIR 1934 Pat 565).

Under Muslim Law a will in favour of an heir is invalid unless it is consented to by the other heirs. Therefore, if a transferee of certain lands of the legatee under such a will digs part of the land, which on evidence is found to be in constructive possession of other heirs, with a view to appropriate it for his exclusive use, his action amounts to criminal trespass and the heirs have, under section 97, a right of private defence to beat and eject the transferee (AIR 1934 All 829). But this does not mean that mere title is sufficient for having a right of private defence of property. The party acting in private defence must also be in actual possession of

property. The mere right to have possession restored by a civil court does not justify an individual in taking the law into his own hands (AIR 1927 Sind 92). Thus landlord cannot take the law in his own hands, and pre-emptorily throw away the household effects of a defaulting tenant. Faced with this predicament, the tenant and his family had every right to defend their possession by use of reasonable force against the defendant (1980 PCrLJ 59).

Private defence of property will not be available to a person who is neither the owner nor a person in possession (1975 CrLJ 968). The right of private defence extends to protection of his propoerty whether one's own or that of another and this normally arises in case of mischief, theft, robbery and tresspass (AIR 1952 SC 1651). The question of possession of the disputed property at the time of occurrence is material in finding out whether a party has a right of private defence of property (AIR 1957 Ori 117).

6. Right of private defence against tresspasser.- A rightful owner is entitled to turn out physically a trespasser or one trying to infringe upon his rights. A person exercising this right should, however, not use more force than is reasonable to defend his possession from a trespass (44 CrLJ 172). It is well settled that a true owner has every right to dispossess or throw out a trespasser, while the tresspasser is in the act or process of trespassing and has not accomplished his possession, but this right is not available to the true owner if the trespasser has been successful in accompolishing the possession to the knowledge of the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law (Ram Ratan Vs. State of U.P. (1977) 1 SCC 188).

Where a tresspasser enters upon the land of another, the person in whom the right of possession is vested, while the tresspasser is in the process of acquiring possession, may turn the tresspasser out of the land by force and if in doing so he inflicts such injuries on the tresspasser as are warranted by the situation he commits no offence (1972 MLJ (Cr) 292). If, on the otherhand, the tresspasser had already accomplished or completed his possession and the person with the right of possession has acquiesced in this accomplishment, it is not open to the latter to avail hmself of the doctrine of self defence and by inflicting injuries on the tresspasser to re-acquire possession of his land (50 CrLJ 868). However no one including the true owner has a right to disposses the trespasser by force if the tresspasser is in settled possession of the land and in such a case, unless he is evicted in due course of law, he is entitled to defend his possession even against the rightful owner. The possession which a tresspasser is entitled to defend against the rightful owner must be settled possession extending over a sufficiently long period and acquisced in by the true owner (1977 CrLJ (Raj) 200).

Even if a person is a trespasser and has wrongfully cultivated a certain portion of a field of which he was bound in law to deliver possession to another person, the latter person has no right to take law into his own hands and beat the former in order to dispossess him from the field. If the latter person is an aggressor, there is no doubt that the former person, though a tresspasser, has a right of self defence of person (1954 CrLJ 54; 1971 SCC (Cri) 87).

In Ambika Singh Vs. State, AIR 1961 All 38, it was held that it may therefore be considered setteld law that a trespasser acquires the right to defend his possession against physical attack only if he has come to it by the acquiescence express or implied of the rightful owner and his possession has become peaceful and settled. If the rightful owner somehow acts into possession of his land he comits no crime, the trespasser cannot defend his wrongful possession which is gone.

Possession which a trespasser is entitled to defend against the true owner must be possession for a sufficiently long period (1969 CrLJ 1260). Where a trespasser wrongfully cultivates a piece of land, to the knowledge of the true owner, the true owner can not take the law into his hands but should take the remedies open to him to get back possession (AIR 1975 SC 1674 = 1975 CrLJ 1479). A trespasser can claim right of private defence of his person only when he has brought to an end his act of tresspass (PLD 1983 SC 135).

The nature of possession which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes :

(i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment and which contains an element of *animus possidente*. The nature of possession of the trespasser would, however, be a matter to be decided on facts and circumstacnes of each case.

(iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced in by the true owner; and

(iv) that one of the usual tests to determine the quality of settled possession in the case of cultural land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence and the true owner will have no right of private defence (Puran Singh Vs. State of Punjab, AIR 1975 SC 1674 =1975 CrLJ 1997 AIR 1977 SC 619; 1985 CrLJ 1384 (1386).

A co-sharer may be guilty of criminal tresspass giving his co-sharer a right of private defence of property. Thus it has been held that one of the co-sharers in constructive possession of joint land has no right to dig part of it with a view to appropriating it for his exclusive use. If he does in the teeth of opposition by another who is also in constructive possession the act amounts to criminal trespass and his co-sharers have every right to prevent him from doing so (AIR 1934 All 829 (831).

Where an attack is made on a person acting in the lawful execise of their right over property, they are entitled to the right of private defence (AIR 1927 Lah 740). Where the complainants deliberately prevent the lawful ploughing of a field by the accused, the latter has a right of private defence against them and can oust them from his land (55 Runj L.R. 343). Where the complainant party interfered in the lawful right of the accused to take water from a channel, the accused was held to have a right of private defence against such interference (AIR 1955 Al 90).

Where the complainant party had no right to cut fuel from a certain jungle but the other party had such right and therefore the latter resisted the attempt of the complainants to cut fuel. It was held that the accused were acting in exercise of the right of private defence (AIR 1947 Pat 51).

Where a party has a right to make use of certain property but that right is subject to the permission or consent of another person, and he exercises that right without obtaining such consent, the other party has a right to exercise the right of private defence of property and prevent him from exercising that right. Thus where a co-owner, without the consent of other co-owners tries to build walls in a shamilat, the other co-owners may by force stop him from doing so (PLD 1969 Lah 114).

7. Limitations on exercise of right of private defence.- The right of private defence of person or property is to be exercised under the following limitatons; (i) that if there is sufficient time for recourse to the public authorities the right is not available; (ii) that more harm than necessary should not be caused; (iii) that there must be a reasonable apprehension of death or grievous hurt to the person or damage to the property. It is not the law that a person when called upon to face an assault must run away to the police station and not protect himself or when his property has been the subject matter of trespass and mischief he should allow the aggressor to take possession of the property while he should rule to the public authorities. Where there is an element of invasion or aggression on the property by a person who has no right to possession, then there is obviously no room to have recourse to the public authorities and the accused has the undoubted right to resist the attack and use even force if necessary. The right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. a mere reasonable apprehension is enough to put the right of private defence into operaiton (AIR 1963 SC 612 = (1963) 1 CrLJ 495).

Where a landlord without taking possession of his tenanted land in due course of law or obtaining consent of the tenant for such possession entered on the land. When the landlord was ploughing the land, the tenants instead of re-entering to which they were entitled as they had not aquiesced in such entry attacked the landlord and deliberately shot him dead. It was held that the tenants were clothed with the right of private defence of property but the law does not permit the killing of a man outright in the exercise of the right of private defence of property (22 DLR (SC) 129). They were liable for exceeding the right. A person may collect other people to protect his property because where a person is otherwise justified in using force to defend his property against an unlawful aggression, he does not lose this right if he prepares and then exercises the right (PLD 1961 Lah 415).

The extent of injury on one party as against the other is not in every case a good guide for fixing the quantum of responsibility for the occurrence. It would not be a guide at all where the object of the two parties was quite different. The complainant party had come to demolish the wall. Therefore, they could not be expected to open an assault. They had to be resisted in committing that mischief and in the process they used their weapons but the appellant's party who was subjected to such aggression used the weapons more effectively. Therefore they could not be said to have exceeded the right of private defence (1973 PCrLJ 656).

The defence plea which has been accepted in the courts below does indicate that the paddy crop was ripe and ready for harvesting and it had been grown by the accused persons. The two deceased persons and their men had trespassed into the property and were about to harvest the paddy. Theft and mischief were either being committed or threatened to be committed. When accosted they wanted to forcibly commit the offence of theft and mischief and when the accused persons wanted to exercise their right, grievous blows were given. In the facts of this case, the right of private defence of body and property was available to the accused persons and in the circumstances indicated and on the findings recorded, this right extended causing of death (Abdul Kadir Vs. State of Assam 1985 (2) Crimes 756 (758) SC).

8. Where right of private defence of property is not available.- Private defence of property will not be available to a person who is neither the owner nor a person in possession (1975 CrLJ 968). Where neither party was in possession of the and in dispute and the accused was found to be attempting to obtain possession and a

dispute was pending in a revenue court and the deceased while obstructing the accused was struck dead by the accused; it was held, that he was not protected by the right of private defence (AIR 1962 Oudh 148). But where a person is in lawful possession of property, he has a right of private defence against all trespassers. Where the land in dispute was in the possession of the opposite party who had grown crops and the accused came to reap paddy with the help of a large armed mob to enforce their supposed right and claim over the produce and a riot followed. The accused could not claim any right of private defence (AIR 1957 Orissa 117).

In Chand Mia Vs. The State (42 DLR (AD) 3), an order of temporary injunction was in force but no action was taken to have this order vacated by the deceased Afzal. Afzal violated the inunction by sowing 'Kaun' in the land which grew for over two months and thereby forcibly dispossessed the appellant. The appellant had a right of private defence of property which he could have exercised when Afzal first went to grow the 'Kaun' but he did not do so. But after two months he went to plough up the land to destroy the crop for the purpose of re-establishing his possession. This is not permitted by law as during this period he could have resort to public authorities. His plea of right of private defence of propoerty was rejected.

A trespasser cannot be the very act of trespass immediately and without acquiescence acquire what the law recognises as possession against the person whom he ejects and the latter may if he does not acquiesce, re-enter and reinstate himself provided he does not use more force than is necessary. A trespasser cannot turn his offence into an advantage and plead the right of private defence against a person in *de facto* possession. Thus a casual act of possession by a trespasser not acquiesced in by the person in possession would not have the effect of dispossessing the person in *de facto* possession (PLD 1961 Lah 415). In such a case the owner has a right to regain possession in the absence of the trespasser (AIR 1961 All 38). But where the trespasser was in peaceful possession over the property for two or three weeks, the accused had no right to take possession of the property by using force, and where he did so, he had no right of private defence (1959 All LJ 340). Thus where the tenant continued in possession in spite of the fact that the landlord had taken delivery of possession in execution of an ejectment decree, and the tenant had sown a new crop on the land; it was held that the tenant had a right of private defence if the landlord tried to effect entry into land (AIR 1949 All 564).

The accused were forcibly taking their loaded carts through the field of A on which crops were standing. A had the right to prevent th accused from committing criminal trespass however, short the distance was and the right of private defence did not come to an end till accused left the field (AIR 1961 SC 1541; (1962) 1 SCR 601). The deceased was in actual possession of the field and as such he had a right to go and plant paddy thereon the date of occurrence because he had not been dispossessed, legally nor by force. The accused in exercise of his supposed right went there along with number of other accused and all of them were armed with deadly weapons and assaulted that the land in despute was their field and they attacked the deceased killing four of them injuring six others. It was held that the accused had absolutely no right of private defence of property (1982 CrLJ 1633 All).

Where the accused who were in possession of a plot of land as tenant caused some injuries to the complainants party who had purchased the land in question in public auction, it was held that the accused persons had right of private defence and did not exceed the right in view of the fact that both issue of warrant of delivery and alleged actual delivery were unauthorised (AIR 1968 SC 702).

9. Where the right of private defence held to be exceeded.- Use of force in exercise of the right of private defence to the property must not be disproportionate to the act which calls for exercise of such right. Killing a trespasser in the right of private defence cannot be justified when no apprehension of injury to life is imminent from the trespasser (22 DLR (SC) 129). Where in a dual (both accused and deceased armed) the deceased threw down the accused but became disarmed and the accused struck the deceased with knife and the latter died from the shock. accused was held to have exeeeded the right of private defence (AIR 1934 Lah 332 = 35 CrLJ 1319). In a case where the trespasser is unarmed and there is no threat of grievous injuries to the person who is resisting the trespass he is not entitled to use such force as may result in the killing of a person. If he does so, he can not claim that he was acting in the right of private defence and had only exceeded the right (22 DLR (SC) 129). The right of private defence is a right of defence and not of retribution (Dvilal Anr. v. State of M. P. 1991 (3) Crimes 536 (M. P.).

The right of private defence of property under sections 103 and 104 does not extend to the voluntary causing of death. The exercise of right of private defence of property is itself subject to restrictions mentioned in section 99 which prescribes that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Therefore the accused in the exercise of right of private defence of property are entitled to cause any harm to the wrongdoer other than death (NLR 1979 Cr. 121). In a case where the trespasser is unarmed and there is no threat of grievous injuries to the person who is resisting the trespass, he is not entitled to use such force as may result in the death of a person. If he does so, he cannot claim that he was doing so in the exercise of his right of private deence and has exceeded in his right (PLJ 1974 Cr.L 186).

Where the deceased was digging he field of the accused and when asked to desist he raised his *Kalso* to strike one of the accused persons and the latter warded off the attack by sitting down. The accused were justified in apprehending, from the attack with the Kalso, that grievous hurt might be caused to them. The deceased had, also damaged their field. The accused had, therefore, this right of private defence, both of person and property, against the deceased. But by inflicting injuries with darants on the head of the deceased, and thereby causing his death, they had used more force than was reasonably necessary in the circumstances of the case. The accused were liable for the excessive harm caused (AIR 1965 Him Pra 49). Where accused or any of their companions, received no injury at the hands of complainant party. There was no evidence of any apprehension of death or fear of suffering grievous injury. Right of private defence was held, to have been exceeded (1987 PCrLJ 1518). The land lord without taking possession of his tenanted land in due course of law or obtaining consent of the tenant for such possession entered on the land. When the land lord was ploughing the land the tenants instead of re-entering (to which they were entitled as they had no acquiesced in such entry) attack the land lord and deliberately shot him dead. Held that the tenants in the present case are no doubt clothed with the right of private defence of property but the law does not permit to kill a man outright in exercise of the right of private defence of property. In a case where the trespasser is unarmed and there is no threat of grievous injuries to the person who is resisting the trespass he is not entitled to use such force as may result in the killing of a person. If he does so he can not claim that he was doing so in the right of private defence and he has exceeded his right (22 DLR SC 129). Right of private defence to property to be inferred from circumstances even if not pleaded specifically. In the absence of proof of exact role of the persons making the defence can not be held liable for exceeding such right (AIR 1989 SC 1173 = 1989 CrLJ 1149 (1155).

10. Burden of proof.- Burden of proof rests entirely on the prosecution to establish beyond reasonable doubt all the ingredients of the offence alleged including the *actus reas* and the *mens rea*. Burden of proof resting on the prosecution to establish a case beyond reasonable doubt is neither taken away nor discharged, nor shifted merely because the accused sets up a plea of private defence. The question of right of private defence arises only after the initial burden resting on the prosecution is discharged. The burden of establishng circumstances leading to exercise of right of private defence rests on the defence. But the nature of the burden resting on the defence is different from the nature of the burden resting on the prosecution. The former is not as onerous as the latter. The burden resting on the defence can be discharged as in any other case, by adducing direct evidence or by establishing porobabilities with regard to circumstances pleaded by him. For this purpose he may rely on evidence or defence, answers elicited from prosecution witnesses, presumptions, defence statement and porobabilities. Even if the defence fails to discharge the burden, the matter does not end there and the prosecution can not automatically succeed. The defence may marshal and rely on circumstances, which though not sufficient to establish the defence case, may suffice to raise a reasonable doubt regarding the existence of one or the other of the ingredients of the offence charged. The totality of the circumstances placed before the court may create reasonable doubt in the mind of the court regarding the *mens rea* or other ingredients. There can be no rule as to under what circumstances such a reasonable doubt can be said to arise. The circumstances may be as varied as there are cases (1982 CrLJ 173 Ker).

When the evidence in the case clearly shows that the accused was responsible for the infliction of two injuries on two victims, he can be exonerated from the blame only if he shows that he had justification for inflicting those injuries or rather that he acted in self defence and the burden is clearly on the accused (Lunka Ulahannan Vs. State of T. C. AIR 1955 T.C. 104 (DB). The onus proving the defence plea of the right of private defence of property and the right of defence of life by the accused of murder is upon them (1989 BLD (AD) 110). But the accused need not to prove plea of private defence beyond reasonable doubt (PLD 1981 Kar 184). The onus is on the accused who has establish his right of private defence by showing preponderance of probability (AIR 1979 SC 577 = 1979 CrLJ 584).

In order that the prosecution should succeed, its evidence must be such as to negative conclusively the plea of self defence. Even if the plea of self defence is not positively established but the court is left in doubt that the killing may well have been in self defence, the accused is entitled to be acquitted (Sumran Vs. State, 1959 MPLJ (Notes) 101; Holia Budhoo Gowara Vs. Emperor, AIR 1949 Nag 163).

The burden of proof is always on the prosecution and it is only when a good *prima facie* case has been made out against the accused sufficient to justify his conviction for that offence, that burden shifts on to the accused to prove that he is not guilty of any such offence. It is not right for a criminal court to convict an accused person because the defence theory appears to it to be unreasonable or does not appear to it to have been established (PLD 1958 SC 242; PLD 1964 Dhaka 480 15 DLR 615). Therefore though the acucsed did not adduce any evidence to substantiate their plea, they could establish their plea by relying on the circumstances transpiring from the prosecution evidence itself (PLD 1964 Pesh 143 (DB). An accused pleading the right of self defence need not prove it beyond all reasonable doubt. It is enough if he establishes facts which on the test of preponderance of probabilities made his defence acceptable (1975 SCC (Cri) 512; 1972 crLJ 835).

Even if the accused does not plead self defence it is oopen to consider the defence when raised (AIR 1957 Ker 53). If upon a consideration of the evidence a reasonable doubt is created in the mind of the court the accused is entitled to the benefit of doubt (Parbhoo Vs. State, AIR 1941 All 402 (FB); AIR 1964 Ker 222).

The onus to establish the plea of right of private defence of life and property is upon the accused as specifically provided in section 105 of the Evidence Act and the court will presume the absence of any circumstances which bring the action of the accused within the exceptions described in section 300 of the Penal code. accused did nothing to discharge the onus and their plea was rejected (Tayeb ali Vs. State. 1980 BCR (AD) 86). Prosecution can not take advantage of plea of private defence taken by accused, being either false or suffering from infirmities. Burden of proving its case beyond doubt invariably remains on the prosecution (1982 PCrLJ 781 DB).

98. **Right of private defence against the act of a person of unsound mind, etc.**- When an act, which would otherwise be a certain offence is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against the act which he would have if the act were that offence.

Illustrations

(a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b) A enters by night a house which he is legally entitled to enter Z, in good faith, taking A for a house breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z, were not acting under that misconception.

99. **Acts against which there is no right of private defence.**- There is no right of private defence against an act which does reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

The right of the private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1 : A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2: A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

Synopsis

1. Reasonable apprehension of death or grievous hurt.
2. Right of private defence against act done by public servant.
3. Act not strictly justifiable.
4. Time to have recourse to the protection of the public authorities.
5. Commencement and extent of right of private defence.
6. Explanations.

1. Reasonable apprehension of death or grievous hurt.-There is no right of private defence against an act which does not reasonably cause apprehension of death or grievous hurt, if done or attempted to be done by the direction of a public servant acting in good faith under colour of his office (AIR 1965 SC 871=1965 CRLJ 367). The right arises as soon a reasonable apprehension of danger to the body arises from a threat to commit any of the enumerated offences and the person need not wait till he is hit or actually injured. (AIR 1973 SC 473 = 1973 CrLJ 77; AIR 1975 SC 1674 = 1975 CrLJ 1479).

A person has no right of private defence when mischief is caused to his property but it is not caused under such cirumstances as may reasonably cause apprehension in his mind that death or grievous hurt would be consequence if such right of private defence was not exercised. A mere claim of such apprehension is not enough. The court on objective test and on the facts and cirumstances of each case must arrive at the conclusion that the situation was such as was likely to reasonably cause such apprehension (Mohinder PalIJally Vs. State of POunjab AIR 1979 SC 577 (581). Accused on being injured by sonof deceased gave Lathi blows to deceased mother who was unarmed during the fight. Acts of accused vis-a-vis deceased was not covered by right of self-defence 91993 CRI. L. J. 57 (SC).

It is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehends that such an offence is contemplated and that it is likely to be committed if the right of private defence is not exercised (AIR 1957 Ori 130 (150). The right of private defence has been provided for self protection. Therefore, if by exercise of this right a person escapes grievous hurt or death, it can not be said that he had no apprehension that grievous hurt or death would follow even if he did not act in self defence (1958 MPLJ (Notes) 119). If a man has a reasonable apprehension of danger to his lfie he is justified in disabling his aggressor and in the process even if a slight excess force more than what is necessary is used he can not be held liable (AIR 1961 MP 241). The law gives a person the right to cause death in order to save himself or another from the commission of rape. Where his mother and sister attaked and killed the deceased when he was actually committing rape on his sister, and when he was asked to refrain from this nefarious act he refused to listen to them, they were held to have committed no offence (PLD 1961 BJ 32 (DB).

2. Right of private defence against act done by public servant.- The first clause of the section protects a public servant against the right of private defence even if the authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular, and it merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the

officer goes clearly and widely ouside the duties imposed on him. Even in such cases, where the right of private defence is open, it is not lawful for any person to offer to the public servant more violence than in strictly necessary to resist the unlawful act and if the authority has no defect, the section has no operation (1932) 11 Patna 743).

Where a police officer acting bonafide under colour of his office arrests a person but without authority, the person so arrested has no right of self defence against the officer (41 CrLJ 250; (1939) 2 MLJ 776). This exception applies where a public servant acts irregularly in the exercise of his powers, and not where he acts outside the scope of his powers (1956 CrLJ 987; 1960 CrLJ 214). A police officer attempted without a search warrant to enter into a house in search of property alleged to have been stolen, and was obstructed and resisted. It was held that, even though the officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that the officer was acting otherwise than in good faith and without malice (1964 CrLJ 592).

Section 99 rests partly on the probability that the acts of a public servant will be lawful, in which case resistance must necessarily be unlawful; partly on the theory that resistance to unnecessary since the law will set right what has been rongly done in its name, and, lastly, on the ground that it is good for soceity that a public servant should be protected in the execution of his duty even where he is in error (AIR 1953 Mad 936). The object underlying para (1) is that where an act is done by or attempted to be done by a public servant acting in good faith under colour of his office, it does not give a right of private defence even though act not justified (AIR 1963 SC 612 = (1963)1 CrLJ 495; (1975) 1 CrlJ 132).

Where a police constable saw the appellant carrying a pistol, it was his duty to arrest him by using all means short of death. Deceased though in police uniform but empty handed chased the appellant. Right of private defene of body could not be claimed by appellant against the constable (PLJ 1987 Cr.C. 453). The provisions of section 99 are inapplicable, where the act is not done by a public servant in good faith (AIR 1935 All 913). The mere fact that a Sub-Inspector is dressed up in his uniform does not justify one is saying that he was acting in good faith when as a matter of fact he was acting in entire bad faith and in the most illegal and reprehensible manner (AIR 1934 Oudh 124).

If an act is done or is attempted to be done by a public servant acting in good faith under colour of his office, there is no right of private defence unless it is apprehended that death or grievous hurt would follow in spite of the fact that the act which the public servant was doing was not strictly justifiable by law (PLD 1951 Lah 279). Where constables are acting under colour of their office in executing a search warrant in a village even if their act is not strictly justifiable by law, the villagers have no right of private defence, since the constables were acting in good faith. Any technical flaw in the warrant is immaterial in considering the question whether the villagers have a right of private defence (AIR 1936 All 306).

A person appointed or deputed by a court to perform the functions of a public servant is entitled to the protection given to a public servant under this section. Thus where the court employed a vakil to secure an attachment as the application required immediate attachment and the court could not secure an amin or bailiff to make the attachment. It was held, that at the time of securing the attachment the vakil was a public servant acting in good faith under colour of his office and the mere

omission to record the reason in the order appointing him had no bearing in the case arising out of a quarrel and attack on the muharrir of the vakil and others during the attachment, and did not give rise to any right of private defence, as the provision under O.21, R. 105, Civil Procedure Code, for recording reasons may be taken to be not mandatory (AIR 1935 All 490).

The words 'colour of office' refer to irregular as distinguished from illegal acts. They show that the act was within jurisdiction but that jurisdiction had been exercised irregularly or on insufficient grounds (AIR 1952 Mad 936). There is no right of private defence against an act of a public servant, like a police officer arresting an accused in good faith under colour of his office. It is immaterial whether the arrest was strictly legal, or was not strictly justifiable by law (AIR 1940 Mad 18; 29 CrLJ 69). Where a public servant has a distinctive dress or badge and he wears such dress or badge it is clear as to who he is and any one dealing with such person knows that he is dealing with a public servant. If, however, police officers move without putting their dress on it can not be aid that they are public servant and they can not validly seek protection (AIR 1942 All 74).

Where a court makes an order which is not stirctly justified in law, the public servant executing the order is protected under section 99. The duty of an officer who goes to carry out the orders of the court is limited to seeing that the orders are on he face of them within the power of the court and that they exhibit no defect in form. Apart from this it is no part of his duty to review the discretion of the court. It is his duty to carry out the orders given to him and not to go behind such orders. Where however there is no defect in the authority issuing a warrant of arrest and resistance is offered to persons carrying out the orders of such an authority, a right of private defence cannot be pleaded (AIR 1932 Pat 315). Thus where a notice and warrant for arrest of the judgment debto were issued simultaneously by the executing court, the apprehension of the judgment debtor by the peon executing the warrant of arrest is a lawful apprehension however mistaken the executing court may have been in exercising its discretion to direct that apprehension and escape from and obstruction to that apprehension are unlawful acts under section 225B, Penal Code and the pushing of the peon by the accused not being justified in law amounts to an assault justifying his conviction under section 353 (AIR 1932 Pat 315).

Where a police officer arrests a suspected thief under section 54 Cr. P.C. the arrest is legal even when ultimately the person is found to be not a thief. The arrest having been made in good faith and under colour of his office by the constable, there was no right of private defence even if the arrest might not be strictly justifiable by law (AIR 1964 Ker 185 (DB). But there is no such protection available to the members of the public who arrest a suspected thief and beat him on their own. Thus where the accused was caught as suspected thief and was heavily beaten whereupon he used a firearm and killed one of the attackers. It was held that the acccused had the right of self defence by use of a firearm to the point of killing a person, in the circumstances in which he was placed (PLD 1966 SC 432 = 18 DLR (SC) 299).

Where a person was mercilessly beaten with lathis by policemen during investigating and he reasonably apprehended that he would recieve grievous hurt at the hands of the police. He was justified in fatally stabling a police constable and making good his escape in the exercise of the right of private defence (AIR 1936 Nag 234).

3. Act not strictly justifiable.- Section 99 extends to acts which are not strctly by law (AIR 1965 SC 871). The expression means that there must be jurisdiction, though the act complaint of may not be within jurisdiction (AIR 1940 Pat 696).

Where a constable effected an arrest under colour of his office, it was held that there was no right of private defence against him even though the arrest was not strictly justifiable by law (1927 CrLJ 69).

The section leaves the right of private defence open only when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him. If the authority has no defect the section has no application (AIR 1932 Pat 315). Section 99 applies to cases where there is excess of jurisdiction as distinct from a complete absence of jurisdiction. It applies where an official does wrongly what he might have done rightly; but not to cases where the act could not possibly have been done rightly (PLD 1951 Lah 142). It follows that while the protection of section 99 extends to acts that are not strictly justifiable by law, it does not extend to acts which are ultra vires and have no legal basis (PLD 1968 Lah 1423).

4. Time to have have recourse to the protection of the public authorities.- When there is an ample opportunity to have recourse to law, there is no right of private defence (AIR 1970 SC 1093). Where the accused who knew before hand that the deceased had gone to the field to cut the crop, could have gone to the police station to inform the proper authority of the intentions of the deceased and ask for police helf (AIR 1955 SC 257). If a person prefers to use force in order to protect his property when he could for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable (1970 SCC (Cri.) 59). It may be that going to civil or criminal court would take time but even so the law enjoins that if there is time to have recourse to public authorities, then these public authorities must be approached first before resorting to force to defend oneself or one's property (1968 SCD 293). There is no right of private defence where there is time to move the authorities for protection (AIR 1952 SC 165). In the instant case an order of temporary injunction was in force but deceased Afzal violated the injunction by sowing 'Kaun' in the land and thereby forcibly dispossessed the appellant. The appellant had a right of private defence of property which he could have exercised when Afzal first went to grow the 'Kaun' but he did not do so. After two monthes he went to plough up the land to destroythe crop for the purpose of re-establishing his possession. This is nor permitted by law as during this period he could have resort to public authorities (Md. Chand Mia @ chand Miah vs. state 1989 (AD) 155).

Where an individual citizen or his property is faced with danger and immediate aid from the state machinery is not readily available, the individual citizen is entitled to protect himself and his property (AIR 1963 SC 612). Where the accused are molested and attacked while they are engaged in doing a legal act, they need not abandon the enjoyment of their legal rights and run away to seek the protection of the authorities (AIR 1925 Oudh 425). It is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious (AIR 1963 SC 612). But where the circumstances make it necessary, the accused is entitled to use his gun to defend himself (AIR 1915 Mad 532). Where in a communal riot a crowd was beating on the door of the shop of the accused, it was held that the accused had no time to have recourse to the authorities. Therefore firing on the mob by the accused was justified (AIR 1952 SC 165).

It is not the law that the rightful owner in peaceful possession of property must run away, if there is an actual invasion of his right and an attempt on his

person. The person in possession of property is entitled to defend himself and his property by force and to collect such numbers and such arms as are necessary if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code and when there is no time to get police help. It is lawful for a person who has seen an invasion of his rights to go to the spot and object. It is also lawful for such person, if the opposite party is armed, to take suitable weapons for his defence (AIR 1945 Pat 283; AIR 1933 Pat 434;AIR 1914 Cal 623).Thus where a man is uprooting another man's trees he cannot go to the police station for help because by the time he comes back all the trees would be gone. In normal conditions he would be well advised to protect his property by using all force necessary to stop the uprooting of the plants. In defending his property, he can under section 104 P.C. cause any harm short of death. He is, therefore, justified in attacking the man uprooting his trees with his gurzu and the fact that he did so does not give the person attacked a right of private defence of person (AIR 1940 Pesh 6; 41 Cr.LJ 561). similarly where a man believed that a trespaser is cutting his crop and sent information of that offence to the police, but he also collected some men and went to the place to oust the trespasser; it was held that the trespasser having forced a breach of public tranquillity on the accused, the accused was justified in assaulting him in private defence (AIR 1918 Pat 308; 3 Pat. LJ 653). The right of private defence against an act of tresspass on one's property is not lost by reason of not resorting to the police station which is at some distance from the place of occurrence (18 CrLJ 663). The true owner can dispossess the trespasser by taking recourse to the remedies available under the law (1980 CrLJ 138).

5. Commencement and extent of right of private defence.-The right of private defence of property commences when a reasonable apprehension of danger commences (AIR 1971 SC 1208). In the case of injuring another in self defence, there must be two things: there must be no more harm inflicted than is necessary for the purpose of defence, and there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and the right does not commence until there is the reasonable apprehension (AIR 1971 SC 1208). The amount of force necessary depends on the circumstances of the case, and there is no protection if the harm is caused by excessive violence quite unnecessary to the case (AIR 1971 SC 2143 = 1971 CrLJ 1467).

Section 99 provides that the right of self defence arises only in cases where there is an apprehension of hurt or grievous hurt, but the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence. Where the right of private defence is being exercised and in the exercise of that right more harm is caused than is necessary, the person exceeds the right of self defence (PLD 1964 Lah. 677; AIR 1955 Sau 1). Where the right of self defence does not exist or has ceased to exist, for it exists so long as the apprehension lasts, as provided in section 102, P.C. there can be no right of self defence nor a situation leading to the exceeding of the right arises (NLR 1980 AC 326). The question whether an accused has or continues to have a right of private defence and when or whether it has come to an end is in every case essentially a question of fact, to be decided according to the circumstances of each case (PLD 1964 Lah 677).

In order that a person may avail himself of the right of self defence tothe extent of causing death, it must be proved that the assault by the other side was such as may reasonably cause apprehension of death or grievous hurt and the right ceases when such apprehension ceases (4 Sau. LR 249). The restrictions contained in section 99 and section 300(ii) read together, lead to the following results : (1) That

the right of private defence extends only to the inflicitng of harm which it is necessary to inflict for the purpose of defence; (2) that if the offender in the exercise in good faith of the right of private defence of person exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence, without any intention of causing more harm than is necessary the offence would be culpable homicide and not murder, (3) that if the offender exercises his right of private defence of person not in good faith and exceeds that power, his case would not be covered by section 11, and (4) that if the offender, while exercising his right of private defence of person, though he may exercise it in good faith, exceeds that power with the intention of doing more harm than is necessary for the purpose of self defence, the benefit of section 300 (ii) will not be available to him. It will thus be noticed that a case will be covered by section 300(ii) and the offence would be reduced to culpable homicide only, if two requirements are fulfilled, namely, that the right is exercised in good faith, and that the offender has no intention of doing more harm than is necessary for the purpose of his defence. Conversely, if he has not exercised his right in good faith or having exercised that right in good faith, he did it with the intention of doing more harm than was necessary, his act would amount to murder (PLD 1960 Pesh 194).

The right of private defence is only a right of protection and not of aggression. Such a right cannot extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. If under the guise of such a right the limits prescribed by law for the exercise of that right are exceeded and more harm than is really necessary is caused then the act would become an offence. No doubt the extent of force which would be justifiable depends upon the circumstances of each case. The nature of the attack, the danger apprehended, the imminence of the apprehended danger and the real necessity of inflicting harm by retaliation for the purpose of self defence are all matters to be taken into consideration in deciding whether the right of self defence has been exceeded (1931 Mad . WN. 646). A person on whom lathi blows were being showered is justified in striking the assailant with a spear and he does not exceed his right of self defence (AIR 1928 Lah 900). Where a person is being attacked by a party of aggressors, he is not in a position to distinguish which person in the party is his real assailant and which person is merely an onlooker, and he is not deprived of his right of private defence merely because a person in the attacking party has not attacked him (AIR 1948 Oudh 25).

If a person, while acting in self defence uses greater force than he is entitled to use, he makes himself liable to punishment (AIR 1916 Lah 215). In that event the case is likely to fall under Exception 2 to section 300, Penal Code. But even if the accused were to cause more harm than is absolutely necessary in repelling the attack it cannot be said that he exceeded the right given to him by law (PLD 1957 Pesh 122). But if the court comes to the conclusion that what an accused person intended to do, could not be considered to be an act done for the prevention of harm, it cannot hold it to be a case of exceeding the right of private defence and should hold it to be a case of committing the offence which was committed by reason of the act done (PLD 1960 Lah 88). once the exercise of the right of private defence is established, it is not to weighed, as it were in golden scales (PLd 1983 SC 225).

6. Explanations.- A right of private defence exists in a case where the alleged offender does not know and has no reason to believe that the person doing the act was a public servant (AIR 1924 All 645). Therefore it is not only proper and advisable but really necessary that when police officers act in the discharge of their official duty they should be clothed in their official uniform so that the public may know them to be public servants acting in the discharge of their duty. Even in emergent

cases in which the police officers might act without being clothed in their uniform it is their duty to take some steps to make it clear to the person whom they intend to arrest that they are officers of the law. If they fail to do so they cannot validly seek the protection of the court. Hence, where a police officer who has no right or authority to arrest a person seeks to arrest the person without being in uniform and not declaring to such person that he is a police officer, such person is entitled to a right of private defence and his right is not taken away by section 99 (AIR 1942 All 74). Where the accused went armed to the house of a friend with the object of subsequently going to the house of his enemy to kill him. But his friend secretly informed the police who arrived at his house. The accused thinking that his enemies had come to kill him, fired at the police party which resulted in the death of one of the policemen. It was held that the accused was labouring under a mistake of fact with regard to the identity of the person and by reason of that mistake of fact Expln. I to section 99 applied and the accused committed no offence (AIR 1947 Lah 249).

The section merely gives a right of private defence to accused, but if he exceeds the right and kills an unarmed public servant, he cannot be held to have committed no offence. Where the right of private defence is being exercised and in the exercise of that right more harm is caused than is necessary, the person exceeds the right of self defence. In such a case, Exception 2 to section 300 P.C. is available if there is no intention to cause more harm than is necessary for purposes of defence. Where the right of self defence does not exist or has ceased to exist for it exists as long as the apprehension lasts, as provided in section 102, P.C. there can be no right of self defence nor a situation leading to the exceeding of the right arises (PLD 1964 Lah 677). Thus where the accused not knowing that the unarmed person seeking to arrest him was a public servant killed him by stabbing him several times with a knife; it was held that the accused was guilty under section 302 but as the accused could not be expected to make a balanced judgment; sentence of imprisonment for life would meet the ends of justice (AIR 1960 Pat 62). Explanation 2 applies to acts done or attempted to be done by the direction of the public servant. There is no right of private defence if the warrant of arrest is wholly illegal (AIR 1930 Lah 348). Act of the poolice officer in attempting to make arrest in pursurance of an invalid warrant issued without jurisdiction is a wholly unathorised act (51 Cal 1; AIR 1924 Cal 667).

100. When the right of private defence of the body extends to causing death.- The right of private defence of the body extends under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely :-

First : Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly : Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly : An assault with the intention of committing rape;

Fourthly : An assault with the intention of gratifying unnatural lust;

Fifthly : An assault with the intention of kindapping or abducting;

Sixthly : An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Synopsis

1. Scope and applicability.
2. Reasonable apprehension of death or grievours hurt.
3. Extent of right of private defence under the section.
4. Rape.
5. Aduction.
6. Wrongfully confining.

1. **Scope and applicability.-** Under this section the right of private defence arises against the human body, namely, assault, and if the assault is of an aggravated nature as enumerated in section the right extends even to causing of death (AIR 1960 SC 67). Section 100, Penal Code, provides the circumstances when the right of private defence of the body extends to the voluntary causing of death. This section provides for a right of private defence to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such as may reasonably cause the apprehension that death will otherwise be the consequence of such assault (AIR 1969 Cal 23(30). The right arises only when an offence to human body is attempted or committed (AIR 1960 SC 67). Where there was gap between the attack on the acused and the counter attack made by other party and the accused did not permit the injured persons of the other party to be taken to the dispensary for treatment, the accused persons were not found entitled to any right of private defence (AIR 1989 SC 1515; 1989 CrLJ 1482).

The question whether the accused had the right of private defence is in every case essentially a question of fact to be decided according to the circumstances of each case (1982 PCrLJ 138). In such cases, decided cases are not of much help except as indicating generally the principles which should be borne in mind in deciding the question (PLD 1970 Pesh 6). Four cardinal conditions must exist before the taking of life of a person is justified on the plea of self defence. Firstly, the accused must be free from fault in bringing about the encounter; Secondly, there must be present and impending peril to life of great bodily harm, either real or so apparent as to create honest belief of an existing necessity; Thirdly there must be no safe or reasonable mode of escape by retreat; and Fourthly, there must have been a necessity or taking life (1978 MLJ (Cr) 224; AIR 1959 Punj 332). Where the complainant party were first to open an attack on the accused, the complainant party went to the scene of occurrence with arms and the accused had reasonable cause to apprehend that at least grievous hurt would be the consequence of complainant's assault. It was held, that the accused's right of private defence extended to causing of death of their assailants (1968 PCrLJ 948). But where the complainant party which was unarmed, much smaller in number and non-provocative was attacked by the accused party which was larger in number and armed with spears, leja, lathi, etc. No one was hurt on the accused's side but on the complainant's side one person was killed and two others injured. The accused could not take the defence that they had exercised the right of private defence (1969 DLC 668). Where the accused party had a motive to attack the deceased. They had armed themselves and were hiding before starting a deliberate and fatal attack by giving them repeated blows with the sharp side of the hatchet and one blow by a lathi, having an iron ring at the bottom. The plea of right of private defence is not available to the accused.(PLJ 1981 Cr. C 283 DB); 1981d SCMR 223).

2. **Reasonable apprehension of death or grievous hurt.-** The right of private defence of person extends to the causing of death only if there is a reasonable apprehension that the assault upon a person will cause death or grievous hurt (PLD 1970 Pesh 6). It is very difficult to establish and mark the line of distinction between a fight and the right of self defence, though it does exist in fact, and it is settled law that the right of self defence is available and accrues to the victim not on the infliction of the actual harm but on a *bona fide* apprehension of sufferance of hurt,

etc. and the same extends to the causing of death if the apprehension is that of grievous hurt etc. as recognized in section 100, P.C. (1985 PCrLJ 32). The extent of injuries on one party as against the other is not invariably a good guide for determining question of responsibility nor by itself a conclusive criterion to judge whether accused were aggressors. The question whether accused acted in exercise of their right of private defence was to be determined by keeping in view all relevant facts and circumstances of the case (1982 PCrLJ 138).

The right arises as soon as reasonable apprehension of danger to the body arises from a threat to commit any of the enumerated offences and the person need not wait till he is hit or actually injured (AIR 1973 SC 473; 1973 CrLJ 77; AIR 1975 SC 1674; 1975 CrLJ 1479). The deceased was the aggressor, and the accused had received serious injuries inflicted on him by the deceased with chopper. He had reasonable apprehension of death and that the entire incident took place in one and the same place and time. The accused, therefore, succeeded in proving his defence under section 100 of the Penal Code (1989 (1) Crimes 532 (536 Ker). To claim right of private defene it is necessary to prove that reasonable apprehension which was created in the mind of accused as a result of the act of aggression had continued at the time when he inflicted the injury onthe aggressor/accused (Kochu Pillai Nair Vs. State of Kerala 1992 (3) Crimes 1096).

A person exercising the right of private defence in good faith, is not expected to weight with golden scale (Mukul Chand Mandal Vs. State of UP 1989(3) Crimes 671All).

Whether the apprehension was reasonable or not is always a question of fact. The weapon used, the manner of using it, the nature of assault and the other surrounding circumstances will be taken into accunt for this purpose. It is always necessary that the apprehension of such injury must be natural and probable (1982 PCrLJ 138). Thus if a person has genuine apprehension that his adversary is going to attack him and reasonably believes that the attack will result in grievous hurt, he can go to the length of causing the latter's death in the exercise of the right of private defence even though the latter has not inflicted any blow on him. A subsequent blow will also be justified on the same ground if there is every probability that the latter, if not all together disabled, will try to hit the former (1985 PCrLJ 59). Where a person charged with murder asserts that she killed in self defence, her state of mind at the time of the killing becomes material, and an important element in determining her justification for her belief in impending attack by the deceased. The reputation of the deceased is a circumstance which would cause such a belief (AIR 1952 Ori. 37). Where the deceased, a strong man of dangerous character and brutal nature and reputed to have killed a man previously had some quarrel with the accused, but was taken back to his house. Later he returned armed with a stick, entered the shop of the accused who was comparatively a weaking, threw him on the ground, pressed his neck and hit on his hand and chest. When the accused was extricated he took up a light hatchet and struck three blows on the head of the deceased as a result of which he died. It was held that even though no grievous hurt was actually caused the circumstances were sufficient to raise a strong apprehension of receiving such injury unless he succeeded in disabling his adversary therefore he did not exceed the right of private defence (AIR 1933 Lah 167).

Deceased had initiated aggression by inflicting an injury on head of accused with an air-pump-Accused in self defnece had inflicted head injury on deceased with a brick. After receiving injury on his head accused was justified in apprehending another blow from deceased who was still armed with air-pump. Accused being sole judge of his own danger was permitted under the law to repel the attack even to the

extent of taking life of deceased. Accused having had acted in exercise of his right of private defence had not exceeded his right of self-defence in circumstances (Afzal Vs. State 1990 PCrLJ 540).

The killing of an assailant is justified when the victim of the assault apprehends either death or grievous hurt. The only restriction imposed is that the person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury with which he was threatened (PLJ 1985 Cr.C. 242). However a person cannot be expected to weigh his blows in golden scales while exercising the right of private defence, nor could it be reasonably expected of him to modulate his defence step by step in the heat of the moment. A person faced with apprehension of bodily harm from the deceased cannot be expected to weigh in golden scales the amount of force which would suffice to allay the apprehension of danger from the aggressor (PLJ 1986 SC 199). Therefore where an attack is made on a person with deadly weapons, the right of private defence extends to use of similar weapons even to the extent of killing the aggressors (1971 PCrLJ 956).

Where the deceased was the aggressor, and both he and his friend not only followed the prisoner but inflicted injuries upon him and the deceased felled the prisoner on the ground and caught him by the throat and the latter then inflicted one wound with the knife on his assailant. It was held that the act of the prisoner in taking out the knife and stabbing his adversary was covered by the provisions of section 100 (AIR 1923 Lah 172). Where the accused was caught as a suspected thief and was heavily beaten whereupon he used a firearm and killed one of the attackers. It was held that the accused had the right of self defence by use of a firearm to the point of killing a person, in the circumstances in which he was placed (PLD 1966 SC 432) Where the accused suffered grievous hurt from an attack by the complainants, they were held to be justified in killing one of the attackers in sel-defence (PLD 1964 Lah 177). Where the deceased squeezed the testicles of the accused, or those of his father, the accused was justified in causing his death. (AIR 1937 Lah 108; 6 Sau LR 205; PLJ 1986 SC 199). Where a fight possibly arose in between the deceased and the accused respondent oversome incriminating letters and photographs relating to love affairs with a girl with whom the deceased was earlier betrothed and 'Magne' of the girl was formally celebrated and as those incriminating letters and photographs were in possession of the accused respondent, the deceased tried to take them back. Fight with first might have ensued and as a result the deceased was overpowerd, thrown to the floor and disarmed, the killing by respondent accused with the knife in this circumstances is not at all justified although he migh have received provocation nor he can raise a plea of self defence when there is no apprehension of death or grievous hurt (State Vs. Monzoor Ahmed,18 DLR 1970 (SC) 444).

Where the accused was caught as a supected thief and was heavily beaten whereupon he used a firearm and killed one of the attachers. It was held that the accused had the right of self-defence by use of a firearm to the point of killing a person, in the circumstances in which he was placed (PLD 1966 SC 432).

Where there was a sudden fight between the aprties and an injury caused to one of the victims was very serious although it did not cause any grievous hurt. Such injury on a vital part of the body must have ccaused a reasonable apprehension in the mind of N that his life was in danger or his body in danger of grievous hurt. Such injury on a vital part of the body must have caused a reasonable apprehension in the mindof N that his life was in danger or his body in danger of grievous hurt.

Accordingly, he had the right of private defence of his person which, under section 100 of the Penal Code, exended to the cuasing of death (1971 SCMR 284).

Where there was a sudden fight between the parties and the injury caused by one of the victims was very serious, although it did not cause any grievous hurt. Such injury on a vital part of the body must have caused a reasonable apprehension in the mind of the accused that his life ws in danger, or he was likely to suffer grievous hurt. Accordingly he had the right of private defence of his person which extended to causing of death or grievous hurt. Other accused had also recieved such injuries and they also had a similar right of private defence (1971 SCMR 284).

Where complainant party went to the place of occurrence, carrying with them sharp edged weapons which were used in causing injuries to one of the accused; right of private defence not only accrued to accused but it extended to voluntary causing of death of assailants (1988 Law Notes 255).

Where the deceased attacked the accused with a dah and was going to give a second blow when the accused hit him to protect himself, and killed him. It was held that the accused did not exceed the right of private defence (AIR 1939 Rang 225). Where the deceased who had two dahs in his possession threw one at the accused and advanced to attack with the other weapon. The accused became alarmed and finding that the only way in which it was possible to defend himself was to ward off the attack, struck at the deceased with his spear causing fatal wound. It was held that the accused acted in the right of private defence of the body (AIR 1941 Rang 175).

Where the deceased appeared to have attacked the accused with long knives whereupon the accused fired and killed two of the attackers. The accused was held to have acted in exercise of his right of private defence (NLR 1987 CrLJ 561). Where the deceased who was armed with a cane, got down from his bicycle, launched an attack on the appellant and gave him two or three cane blows. The appellant took out a knife from the fold of his trousers and the deceased started snatching the same from the appellant. The two grapled and fell down on the ground during the course of which the appellant also received a muscle deep knife injury on one of his legs. The two again stood up and were still struggling over the possession of the knife. The deceased had at no stage tried to give up the fight or his efforts to snatch the knife from the appellant. Prior to the infliction of the fatal blow the balance of the injuries on the persons of the deceased and the appellant did not indicate that the appellant was having the upper hand. In these circumstances, there could be no assurance that the deceased would not have used the knife against the appellant if he had succeeded in snatching it away from him. It cannot be said for certain that the appellant had, in giving the fatal blow to the deceased, exceeded his right of private defence (1968 PCrLJ 602). If the knife was in the waist of the deceased and if he took out the knife to stab the accused, the accused would be justified in snatching the knife and in that state of mind to inflict injury on the deceased to avoid further attack by the deceased (1970 CrLJ 547;1982 CrLJ 213). The accused are entitled to right of private defence of body so as to cause death. Where the multiple injuries inflicted on them with gun shot and other lethal weapons like gandasi and kirpan were enough to create a reasonable apprehension in their minds that grievous hurt would otherwise be the consequence (1979 CrLJ 498 (501).

Where the complainant party had come armed with spades to illegally divert water to their own fields and the accused party went to stop them from doing so and to protect their legal right, it was held that the accused did not exceed his right when he used force to defend his person and property and killed two men of the complainant party (1969 PCrLJ 740).

The word "assault" in this section does not mean the assault, if any, already committed, but it is an assault of which an apprehension can reasonably by caused and that assault must be one which would amount to an offence. The right is a defensive one. It is granted to a citizen to be exercised for the purpose of preventing an offence affecting his body being committed. It is not a right of retaliation against the completed offence of assault. If after the commission of an assault of a simple or grievous nature, there is no further apprehension of assault, occasion for the exercise of the right of private defence of the body should not arise (AIR 1952 Ori. 37). Where appellant had previously sustained two danda injuries on his head, a pistol shot fired by him while deceased was locked up in security room could not be hold to have been fired by appellant in self defence (PLJ 1986 Cr. C. 175). Thus if the complainant was holding on to the accused person's wife in order to outrage her, his shooting the complainant with a firearm would be covered by the right of private defence but his giving a blow on the head of the complainant after the complainant fell down by the shot would be punishable under section 334 (3 Sau L.R. 70). Where lathi blows were given to the accused, he is justified in hitting back in self defence and causing death of the assailant (1985 PcrLJ 59). Thus the accused finding themselves amongs hostile people belonging to a dangerous tribe, who had started using their lathis would have an apprehension of receiving grievous hurt and would therefore be entitled to the right of private defnece which would extend to the causing of death (1968 PrLJ 1058).

3. Extent of right of private defence under this section.- The right of private defence of person or property is to be exercised under the following limitations :

(i) that if there is sufficient time for recourse to the public authorities, the right is not available;

(ii) that more harm than necessary should not be caused, and

(iii) that there must be a reasonable apprehension of death or of grievous hurt to the person or damage to the property concerned.

The right of private defence of property or person, where there is real apprehension that the aggressor might cause death or grievous hurt to the victim, could extend to the causing of death also, and it is not necessary that death or grievous hurt should actually be caused before the right could be exercised. a mere reasonable apprehension is enough to put the right of private defence into operation. The question whether a person having a right of private defence has used more force than is necessary would depend upon the facts and circumstances of a particular case (Puran Singh Vs. State of Punjab AIR 1975 SC 1674; 1977 MPLJ 539). While prosecution party attacking accused and her brothers wth lathis and sharp instruments causing injuries and tried to enter into house. accused constrained to fire shot at crowd resulting in death of deceased. Held, accused fired shot in exercise of his right of private defene of his person and his brother (1993 CrLJ 190 SC).

The law relating to self defence makes the accused the judge of his own danger, and permits him to repel the attack, even to the extent of causing death. The courts are to judge him by placing themselves in the same position in which he was placed (PLD 1960 Lah 990). Thus where an individual citizen or his property is faced with danger and immediate aid from the state machinery is not readily available, the individual citizen is entitled to protect himself and his property. But it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably

apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious (AIR 1963 SC 612). No hard and fast rule can be laid down to determine the amount of harm which is legally justifiable or permissible in law in the exercise of the right of private defence. Individual cases have to be considered on their own facts, keeping in view the principal that as soon as a person apprehends danger to his life he could act in self defence and he should not wait till aggressor actually attacks him (1985 PCrLJ 32).

Where the right or private defence is being exercise and in the exercise of that right more harm is caused than is necessary the person exceeds the right of self defence. In such a case, Exception 2 to Section 300 P.C. is available if there is no intention to cause more harm than is necessary, for purposes of defence. Where the accused who had stopped after causing a single injury to deceased in a sudden fight. The injury proved harder than it was held to have exceeded the right of self defence (NLR 1985 Cr.LJ 3). But where the right of self defence does not exist or has ceased under section 102 P.C., there can be no right of self defence nor a situation leading to the exceeding of the right arises (PLD 1964 Lah 677). Therefore if a person uses force when the right of private defence has come to an end, he cannot claim to be treated as if he had acted in the exercise of the right of private defence or merely exceeded that right. He should be held guilty of the offence committed by him (PLD 1955 Lah 575). Where accused was responsibile for causing death of a tender aged child of 8 years after having armed himself with a hatchet while complainant party who were found to be aggressors, were not armed with any deadly weapons. The accused, certainly exceeded her right of self defence (1982 PCrLJ 930).

An accused is perfectly justified in resisting an aggressive murderous attack on him by taking the weapon from the deceased and inflicting injuries on him to the extent that may be required according to his assessment of the circumstances at the time, for the purpose of preventing any further assault on himself by the deceased. If in the course of it he kills the original aggressor, section 100 completely protects him. The apprehension of danger to the accused may not always come to an end by the fact that the weapon had been taken away from the deceased. It may be difficult to judge acurately the moment when the right of private defence comes to an end, but so long as the apprehension of hurt or grievous hurt continue to exist, the right of self defence continues, and an accused person cannot be penalised for not weighing in golden scales the amount of force, which should suffice to allay the apprehension of danger from the aggressor (PLD 1965 Lah 177). Even though the appellant has not sustained any injuries still he was justified in warding of the danger against his father, particularly when the danger so posed had a very high potentially of een killing his father. The right of private defene is available not only to the eprson who is facing the danger, but also to a person who is seeing others facing the dangers of high potentiality. Here is a son who is seeing with his own eyes an assault of very serious nature on his father. He has a right to defend his father irrespective of the fact whether he sustains any injuries or not. The trial Court was not justified in coming to the conclusion that either the appellant had no right of private defence or that he exceeded the right by inflicting severe injury. To repeat it once again, the appellant was never expected to sit quietly with a golden scale in his hand to weigh the apprehension vis a vis danger to his father. If there was a justifiable apprehension in his mind that his father is being subjected to murderous assault, then he is entitled to use that much force which may even kill the aggressor. Act would be justified under section 100 (Sheikh Muntijim Vs. Stat of Maharashtra 1988 (3) Crimes 675 Bom). When the apprehension has disappeared and ceased to exist the right of private defence comes to an end (1984 PCrLJ 2515) Thus where the

accused had overpowered the deceased, thrown him on the ground and disarmed him of the knife and then with it he caused fatal injuries to the deceased, it was held that the accused could not plead justification in the exercise of the right of private defence (PLD 1966 SC 664; 1982 PCrLJ 1279; 18 DLR (SC) 444). Where the accused who when attacked by deceased and his brothers received eight injuries as against seven injuries received by the complainant and deceased,the question fo exceeding right of private defence did not arise (1982 PCrLJ 1150). Where acused suffered eight injuries, out of which two were on his head which is a vital part of the body. Held, in the circumstanes, it can safely be inferred that the appellants had a genuine apprehension that at least grievous hurt would be the consequence of the assault on them if the attack was not repelled (KLR 1986 CrC 155).

Where a person is attacked by two or three men and he has every reason to apprehend that grievous hurt would be inflicted, he has a right of private defence which extends to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence (AIR 1933 Sind 138). Defence in cases of an aggressive attack by several armed persons cannot be minutely planned in calculated manner to be modulated step by step according to the attack, nor can the blows in such circumstances be weighed in golden scales (PLD 1965 Quetta 33). Where the complainant party were armed and they were the first to open attack on the accused and the accused had a reasonable cause to apprehend that at least grievous hurt would be the consequence of the complainant's assault, the case was covered by section 100 and the accused's right of private defence extended to causing of death or heir assailants (1968 PCrLJ 948).

The accused finding themselves amongst hostile people belonging to a dangerous grievous hurt and would therefore be entitled to he right of private defence which would extend to the causing of death (PLD 1963 Kar 857). Where four persons armed with sticks and *bichuvas* came to the place where the two accused were sitting. They were drunk and one of them started the fight by hitting one of the accused. Another person of injuries to the four persons which resulted in death of three of them. It was held that the circumstances fully justified the accused to entertain a reasonable apprehension that death or grievous hurt was likely to be caused to him unless he himself dealt with the persons in the exercise of his right of private defence. He was therefore entitled to acquittal (1957 All WR 17). Where the pursuing party consisting of 60 to 70 persons were fully armed with 'Kulharis' and 'Kirpans', etc. They were all brandishing their weapons. One of them who was ahead of the party was armed with a 'Kulhari'. On reaching the accused the pursuit party surrounded them. One of the accused's party was attacked and injured with sharp-edged weapons and was killed on the spot. One of the accused was found to have received eight injuries when he was arrested. It was held that the killing of one of the aggressors by the accused was justified in view of section 100 P.C. (AIR 1959 Punj 122). Where the accused has a right of private defence but it is doubtful as to whether he has exceeded the right or not, the benefit of the doubt should be given to the accused, and he should be acquitted (PLD 1963 Kar 771 DB); 1968 PCrLJ 602).

Where a person is in peaceful possession of land or premises, no one, including the owner has a right to forcibly evict him from it. If any attempt at forcible eviction is made, the person in possession has a right to use force in defence of property. If while doing so they receive injuries on vial parts, they acquire the right of private defence of person as well and if, in the course of exercise of this

right, they caused an injury which ultimately led to the death of the victim if cannot be said that they had exceeded that right or were criminally liable (1974 SCMR 22). Where some co-owners of a piece of land attacked the co-owners in possession to evict them from the land and to stop their ploughing of the land. A fight ensued and one of the attackers was killed, it was held that the accused had acted in the exercise of their right of defence of property and they were not guilty of any offence (PLD 1956 Pesh 71).

Where the accused were in possession of certain shamilat land. The complainant party also claimed to be in possession of the land. On knowing that the complainant party were ploughing the land the accused party armed themselves and went on the spot to stop the trespass. There was a free fight and one of the complainant party was killed and many of the accused party were injured. It was held that the complainant party being in the wrong, the accused had the right to turn them out of the land of which they were in possession for a long period and no criminal liability could be put upon the accused. The complainant party were in force and armed and it therefore needed force and arms to trun them out (PLD 1962 Kar 495). If five persons go to a shop, some of whom are armed with sticks, and ask the occuipier of that shop to vacate it and their conduct displays that they are in a very excited and angry mood, then the occupier of the shop will have a reasonable apprehension of death or grievous hurt at the hands of those five persons. The occupier may cause injuries to them in the exercise of the right of self defence irrespective of the fact whether he caused the injuries before or after he was himself injured (PLD 1960 Lah 62). Where the accused is in possession and the other party makes an attempt to take possession by force and the free fight results in one death on each side; the accused would be held to have exercised the right of private defence (1972 PCrLJ 789).

Where the accused does not apprehend death or grievous hurt at the hands of his adversaries but he uses a lethal weapon, such as a gun to cause death, he cannot take the plea of private defence (1977 SCMR 450). If a person is armed with a hatchet and disables his adversary by the infliction of one blow on his head, it cannot be urged that he has any reasonably apprehension left that if he did not repeat his blow, grievous hurt will be the consequence (AIR 1934 Lah 748). Where the deceased had been directed by a police offier to apprehend the accused. The deceased came across the accused and asked him to come with him to the police station. The accused told the deceased not to come near him but despite warning the deceased advanced towards the accused. Whereupon the accused fired a shot from his gun, which hit the deceased, who fell down and died. It was held that the case did not come within this section (PLD 1967 Lah 588). Similarly where the accused is only threatened and he brings a heavy stick and strikes a person on his head he cannot claim to have acted in the exercise of the right of private defence (AIR 1939 Rang 225).

Where the brother of the wife of the accused tried to take her away forcibly from him, whereupon the accused shot at and killed him. It was held that the accused had exceeded his right of private defence (AIR 1937 Pesh 86). Where in a first fight the accused received some minor injuries, whereupon he drew his knife and stabbed the accused, it was held that he had exceeded the right of private defence (AIR 1933 Lah 227).

Where it could be reasonably inferred that the fight between the parties who were not in any armed, began with grappling; they extricated themselves and resorted to mutual stone throwing. During he stone throwing the accused as well as the deceased received injuries. The accused being overawed drew out his loaded

revolver, which was slinging round his waist and fired at least two effective fatal shots at the deceased felling him dead. Under these circumstances the accused was not justified as agianst the equally matched stone hurling adversary to get hold of his loaded revolver and fire at the deceased dropping him dead because he could not reasonably expect to be killed or receive grievous injury and could put an end to the aggravation of stone pelting by use of much lesser force or even retreating from the scene. For these reasons the accused was not justified in killing the deceased and he exceeded his right of self defence. As such he was guilty of culpable homicide not amounting to murder (PLD 1970 Pesh 6). Where the deceased abused the sister of the accused and his son hit her with a stick, whereupon the accused hit the deceased with a pitch fork, it was held that, though the deceased and his son acted in a high handed manner the action of the accused in causing death was not justified and could not be brought within section 100 (AIR 1916 Lah 419). Where the deceased came to the accused, and demanded repayment of his debt, he abused the accused in a filthy manner and attacked him with a stick. Actually the accused was not hit and did not receive any injury. The accused thereupon got hold of an axe and hit the deceased on his head as a result of which the deceased died; it was held that the accused had exceeded his right of private defence (AIR 1939 Lah 534). Where there was no cogent evidence to indicate that mother of accused was being beaten by deceased when accused arrived and stabbed him nor did the plea of self defence find corroboration from prosecution evidence. Accused had also suffered no injury at all during occurrence which negatived accused's apprehension of death or any grievous injury at the hand of deceased. Plea of self defence would not prevail in the circumstances (1982 PCrLJ 58). To surround and attack a person in retreat is not an act protected by the right of private defence (28 DLR 341).

4. **Rape.**- The right of private defence of the body of a person's wife extends to the voluntary causing of death, if the offence which occasioned the exercise of the right was an assault with the intention of committing rape (AIR 1934 Lah 620= 36 CrLJ 287). Where the husband and other relations of a girl assaulted a man while he was in the very act of violating her, it was held that they were justified in assaulting him (13 CrLJ 905= 34 CrLJ 882). The accused had every right to save her honour even by causing the death of the person who either committed rape on her or attempted to commit the same. Even who is entitled under law to protect herself from attacks of intending rapist (1989 CrLJ 621(623) Cri). Right of private defence is available to an accused under section 100 of the Penal Code in a situation in which he wanted to prevent the molestation of his wife at the instance of the complainant (Salikram Vs. State of Madhya Pradesh; 1990 (1) Crimes 631 (MP). When place of occurrence was an open public place and not any secluded spot. Accused thus could not have any apprehension that deceased was about to commit an assault on his sister with intention of committing rape. Accused, held, had no right of private defence of person of his sister to the extent of causing deceased's death under part Thirdly of section 100, Penal Code (Muhammad Akram Vs. State 1990 PCrLJ 574).

5. **Aduction.**- The fifth clause of this section requires that there should be an assault which is an offence against the human body and that assault should be with the intention of adducting and whenever these elements are present the clause will be applicable. This clause contempaltes only that kind of abduction in which force is used and where the assault is with the intention of abducting; the right of private defence that arises by reason of such assault extends even upto the causing death (1960) 1 SCR 646; 1960 CrLJ 154). In the case of Mst Sakhu Vs. Crown, AIR 1951 Nag 349, the husband had assaulted his wife, who was major, with a view to abduct her from her father's house. The wife, inflicted injuries with a knife on her husband,

which resulted in his death. It was held that she had not exceeded the right of self defence.

6. **Wrongfully confining.**- Section 100 must be read with section 101 and the effect of so reading is not to render an individual entirely helpless in the matter of his unlawful arrest, but to limit the force which he may exercise to hurt, which is something less than voluntarily causing death (AIR 1946 Sind 17= 47 CrLJ 487). Where the deceased had forcibly taken away and wrongfully confined the sister of the accused in his house against her wishes, the accused was within his right to use necessary force in view of clause 'sixthly' to section 100. But where he killed his unarmed victim with a *Chhuri* the force used by him was not proportionate in circumstances of the case and he had certainly exceeded his right of private defence (NLR 1985 CrLJ 91). Where the appellant who was wrongfully confined but not attaked by anybody, fired his gun and killed a person it was held that pela of self defence under section 100 (sixthy) was not available (1966 All Cr. R 144).

101. When such right extends to causing any harm other then death.- If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99 to the voluntary causing to the assailant of any harm other than death.

102. Commencement and continuance of the right of private defence of the body.- The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such, apprehension of danger to the body continues.

103. When the right of private defence of property extends to causing death.- The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrong doer, if the offence, the committing of which or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely :-

First : Robbery;

Secondly : House-breaking by night;

Thirdly : Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property;

Fourthly : Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Comments

Under section 103 of the Penal Code, the right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death in case of theft or mischief,when such theft or mischief is committed in succh circumstances as may reasonably cause an apprehension that death or grievous hurt will be the consequences if such right of private defence is not exercised (AIR 1968 Pat 258 (264).

This section recognizes the right of a person to kill a person committing offences attended with force or surprise. Where there were absolutely no circumstances as may reasonably cause apprehension that death or grivious hurt will be the consequence to the acused, if the right of private defence is not exercised, it was held that section 103, the clause, had no application. The right of private defence of property could not, therefore, extend to the causing of death (1969) 35 Cut L.T. 322 (325).

A person in possession of property is protected even if he causes death in safeguarding his property when there is reason to apprehend that the son whose death is caused was about to commit one of the offences mentioned herein (1968 CrLJ 1676; 1970 UJ (SC) 559).

In the case of the plea of reasonable apprehension of death, whether the apprehension was reasonable or not is a question of fact. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances will be taken into consideration in determining the question of reasonable apprehension. Where the assault has once assumed a dangerous form, every allowance should be made for one, who with the instinct of self preservation strong upon him pursues his defence a little further than to perfectly cool bystander would seem absolutely necessary. The question in such cases will be not whether there was an actually continuing danger but whether there was reasonable apprehension of danger (PLD 1957 Dhaka 281).

Where several accused commit the murder of a person by doing an act or acts in furtherance of common intention they would not be liable for the said act or acts only if they are able to establish that they had the right of private defence to voluntarily cause the death of the person. Hence all the accused would be liable for murder if they are not able to establish that the offence which made them voluntarily cause death fell in one of the categories enumerated in the section as all of them participated in the offence pursuant to the common intention to murder (AIR 1965 SC 257).

Where the deceased was cutting the crops under ploice protection and none of the deceased was in possession of a deadly weapon cutting of rops will not amount to robbery and the right of private defence was held to be not available (AIR 1965 SC 257). In the case of robbery, the causing of death may be justified as having been done in private defence but the measure of self defence must be in proposition to the quantum of force used to repell the attack. It is not in every case of robbery that the accused will be entitled to cause death of the assailants. (AIR 1919 Pat 534).

It is only when the act which amounts to theft, mischief or house tresspass causes reasonable apprehension that death or grievous hurt will result that the causing of death or grievous hurt in exercise of the right of private defence will be justified. It is not every house tresspass that will justify causing of death or grievous hurt in exercise of the right of private defence. It will not apply when the apprehension of death arose by reason of the intervention of the person exercising the right of private defence (AIR 1966 Pat 464= 1967 CrLJ 102=1979 CrLJ 502).

The owners of a property is entitled to defend the possession by force against any sudden attempt by trespassers to take forcible possession of it. If in defending the property he knows he is in danger of receiving grievous hurt he is justified in carrying the force even to the extent of killing one of the trespassers who had come to take forcible possession (AIR 1948 Lah 117). Where the accused were in peaceful possession of heir property, and some men attacked them disturbing such possession they were held to be justifed in resisting the attack in exercise of their

right of private defence under section 103 to the extent of causing death (NLR 1980 Cr. 9). A person is entitled to round up cattle trespassing on his land for taking them to the cattle pound. Therefore where the complainant who was dispossessed of his cattle went with his party to the field of the accused armed with hatchets to take them back by force, and in resisting the attempt of the complainant party the accused caused death of one of them; they could not be held to have exceeded the right of private defence of property which was in their possession (1980 PCrLJ 40).

A person entitled to the land but not in possession has no right to dispossess even a tresspasser by force if the tresspasser is in settled possession of the land. In such a case unless he is evicted by due process of law the tresspasser is entitled to defend his possession even against the rightful owner (AIR 1968 SC 702). Where there was reasonable apprehension that the person who was using the bhala against him may cause his death or cause grievous hurt to the owner, the accused who used his bhala reasonably apprehended grievous hurt or death of his companions he would be entitled to acquitteal (AIR 1972 SC 244).

When the act which amounts to theft, mischief or house tresspass it is *per se* sufficient to cause of a reasonable apprehension that death or grievous hurt will result, then the causing of death to prevnt the commission of the act is justified (1971 CrLJ 1595). Where the accused went to the rescue of woman whose husband forcibly dragged her from her father's house against her will and in the attempt caused the death of the husband, there was no such apprehension as stated in clause (4) of this section and the accused could not claim the right of private defence under the said clause (AIR 1957 All 714 (716); 1957 CrLJ 1195).

104. When such right extends to causing any harm other than death.- If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong doer of any harm other than death.

Comments

When a person is committing or attempting to commit criminal tresspass, upon his property the owner or the person in possession in exercise of the right of private defence is entitled to defend his property and in doing so is entitled to cause any harm to the wrong doer other than death. Where death is caused to the wrong doer this section is inapplicable (AIR 1973 SC 665; 1976 CrlJ 1347). Where a police constable knocked the premises of a person who was regarded by the police as of a suspicious character whereupon the person came out, abused the constable and lifted his stick to stricke him. It was held that the constable was not exercising his right as a public servant but was technically guilty of house tresspass and that the person alleged to be of suspicious character was justified in inflicting harm on the constable (27 Mad 52).

A right of private defence of property extends to the causing of grievous hurt in case of criminal tresspass (1969 PCrLJ 533). But in a case where the tresspasser is unarmed and there is no threat of grievous injuries to the person who is resisting the tresspasser, he is not entitled to use such force as may result in killing such person. If he does so, he can not claim that he was doing so in the right of private defence and he has exceed that right (1980 PCrLJ 420).

The harm which is intended in section 104 should be of such a nature as may be helpful in defending the property and not any other kind of harm (1955 All L. J.

264). A person in lawful possession of land has every right to defend his possession against persons committing criminal trespass thereon and in doing so, he is entitled to cause any harm other than death (48 CrLJ 590). If a man is uprooting another man's trees, the owner cannot go to the police station for help because by the time he comes back all the trees would be gone. In normal conditions he would be well advised to protect his property by using all the force necessary to stop the uprooting of the plants'. In defending his property he can under section 104 cause any harm short of death (AIR 1940 Pesh 6). Where a Zamindar's men on protest from the tenants abandoned an attempt to saw a tree but made a second attempt in which they got serious injuries. It was held that zamindar's men were not justified in cutting the tree and the tenants had a right of private defence which they should not have exceeded (AIR 1924 All 441).

If it does not appear that the harvesting party is armed with any deadly weapons and there can not be any fear of death or grievous hurt on the part of the party of the accused under section 104, Penal Code, their right is limited to the causing of any harm other than death (Nathan Vs. State of Madras AIR 1973 SC 665(667). The rightful owners of the land has the right to eject the tresspassers with the use of minimum amount of force in exercise of the right of defence of property. As soon as attempt of rightful owner to eject the tresspasser, was resisted by force and violence was used, the rightful owner acquired the right of defence of person also (PLD 1959 WP (Lah) 606).

105. **Commencement and continuance of the right of private defence of property.**-The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house breaking by night continues as long as the house trespass which has been begun by such house breaking continues.

Comments

Private defene of property cease to exist where the offender has effcted retreat with the property.

The right of private defene of property against the thief continues till the offender has effected his retreat with the property and once this has happened the right ceases to exist. Although the third alternative in para 2 of section 105 of the Penal Code provides that the right of private defence of property continues until the property has been recovered yet this third altornative cannot override and render nugatory the first alternative.

Under section 105 of Penal Code as soon as the offender has effected retreat with the property no right of private defene of that property against theft subsists

and the clause 'till the property has been recovered' is subject to the clause till the offender has effected his retreat with the property (Allah Bachayo Vs. State (1964) 16 DLR (WP) 194).

106. **Right of private defence against deadly assault when there is risk of harm to innocent person.**- If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

CHAPTER V

OF ABETMENT

107. Abetment of a thing.- A person abets the doing of a thing, who -

First : Instigates any person to do that thing; or

Secondly : Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspirary, and in order to the doing of that thing; or

Thirdly : Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1: A person who, by wilful misrepresentation, or by wilful concealment of a material fact with he is found to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2: Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Synopsis

1. Scope and application.
2. Abetment by instigation.
3. Abetment by conspiracy.
4. Abetment by aid.
5. By illegal omission.

1. Scope and application.-Abetment is an instigation to a person to do an act in a certain way or aid some other person in doing an act which is an offence. In other words, it is a preparatory act and connotes active complicity on the part of the abettor at a point of time prior to the actual commission of the offence (1981 MLJ

287 (289). Abetment of a thing as defined in section 107 will become an offence if the thing which is abetted is an offence and the offence of abetment is constituted a separate and distinct offence (AIR 1924 Mad 487). In order to amount to abetment there must be *mens rea*. There can be no abetment without knowledge or intention and knowledge and intention must relate to the crime (AIR 1930 Sind 64). The assistance must be something proximate to be something more than a passive acquiescence (ILR 47 All 268). Intentional aiding and active complicity is the gist of the offence of abetment (Annandah Thandavan & others Vs. Udaya Sundaram 1989(3) Crimes 209 Mad).

According to this section a person abets the doing of a thing when (i) he instigates any person to do that thing or (ii) engages with one or more other person or persons in any conspiracy for the doing of that thing or (iii) intentionally aids, by any act or illelgal omission, the doing of that thing. In either of the first two cases it is immaterial for the conviction of the abettor whether the person instigated commits the offence or not, or the persons conspiring together actually carry out the objects of the conspoiracy. A person abets by aiding when by the commission of an act he intends to facilitate and does facilitate the commission thereof (AIR 1959 SC 673 (676); 1959 SCJ 643).

Abetment can be committed only when there is positive evidence of either instigation or conspiracy or intentional aid. If none of these three elements stated above is available then abetment does not stand proved (NLR 1986 Cr. 861).

The definition of abetment in section 107, includes not merely instigation, which is the normal form of abetment, but also conspiracy and aiding, and those three forms of abetment are dealt with in the proviso to section 111 (AIR 1940 Bom 126). For convicting a person of abetment it must be shown that he instigated the person who committed the offence or that there was an agreement to commit the offence btween him and the person committing the offence (67 Cal LJ 41). It is however to be noted that where a person who abets the commission of an offence is present and helps in the commission of the offence, he is guilty of the offence and not merely of abetment except in few cases like rape or bigamy (AIR 1955 Trav-Co 266).

The principal can be made responsible for and found guilty of the acts of his agent under the criminal law only where it is proved that he has instigated or otherwise abetted the acts of the person who actually committed the crime. The law of abetment was enacted to deal with such cases (AIR 1937 Rang 117).

Ordinarily where a charge is not proved against the principal offender, his abettor cannot be convicted (22 DLR(1974) 572). Where the accused was alleged to have held the legs of a dead body when it was ripped open by another. It was held that as the person was already dead when his dead body was ripped open, the accused was not guilty of having committed any offence as the other person alleged to be the principal offender did not commit any offence (1970 PCrLJ 1172). But it cannot be said that in every case where an abettor and principal are tried together the abettor if charged with having abetted the principal in the commission of the offence must be acquitted if the principal is acquitted. In the majority of cases this would necessarily follow but there might be exceptions to the general rule (PLD 1966 Dhaka 269; 16 DLR 147). There may be a case where an abettor on his own confession or plea of guilty to the charge may be convicted of the offence of abetment although the principal is acquitted for insufficient evidence. Another type of such case may be where it is held by the Appellant Court that the substantive offence was committed by an unknown person or persons is consequence of abetment of the culprit (PLD 1966 Dhaka 269; 17 DLR 222).

As a general rule a charge of abetment fails if the substantive offence is not established against the principal. But there may be an exception where the substantive offence was undoubtedly committed, and there is evidence, such as a retracted confession by the abettor, on which the injury might have been found, as against him, that the offence was committed by the principal, though, as against the latter, the confession would be sufficient for a conviction of murder (1924) 52 Cal 112). The Indian Supreme Court has held that it can not be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequnece of the abetment, has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted and the manner in which the abetment was made. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under section 115 or section 116, even if the offence abetted is not committed in consequnece of the abetement. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment aginst him would be expected to fail when the person alleged to have committed the offence is aquitted of that offence (AIR 1967 SC 553=1967 CrLJ 541).

Thus where the accused persons were charged with aiding and facilitating the theft of railway coal and the original accused were acquitted of the charge of theft, the court said that as the accused persons were charged with aiding the commitment of the offence they could not be convicted of abetment when the original accused were acquitted. The position however would have been otherwise had it been added in the charge that the accused had aided and abetted certain other unknown accused persons. In such cases the charge should always provide that the offence in question had taken place not only by aiding and assisting the named persons but other unknown accused persons also (1975) Guj LR 994). In th case of Gullu Sha, AIR 1958 SC 813, one G who was a member of an unlawful assembly was said to have abetted one B to set fire to a house. One of the memdbers of the unalwful assembly had set fire to the house in question though it was not proved that B had set fire to the house. It was held that the conviction of G under section 436 read with this section was not bad in law.

For the purposes of the first two clauses of this section it is immaterial whether the person instigated commits the offence or not or the persons conspiring together actually carry out the object of the conspiracy (1959 CrLJ (SC) 917). Abetment by itself being a substantial offence an abettor can be convicted in the case of abetment by instigation even if the offence is not committed. In the case of abetment by aiding if the offender is acquitted of the main offence, the abettor can be convicted (1969 MLJ (cr) 842; AIR 1959 SC 673; 1959 CrLJ 617).

2. Abetment by instigation.- A person is said to instigate another to an act, when he actively suggests or stimulates him to the act by any means or language, direct or indirect, whether it takes the form express solicitation, or of hints, insinuation or encouragement (23 CrLJ 466; AIR 1923 Bom 44). The word 'instigate' means to goald or urge forward or to provoke, inceite, urge or encourage to do an act. A mere intention or preparation to instigate is neither instigation nor abetment (1953 CrLJ 995).

To constitute abetment person must instigate any other person to do a particular thing or he must engage himself with one or more persons in a

conspiracy of doing that thing or he must intentionally aid by any act or illegally omit the doing of that thing. The definition of abetment under section 107 of the Penal Code portrays that to constitute abetment, the abettor must be shown to have intentionally aided the commission of the crime (1989 LW (Cr) 190 (191) Mad).

'Instigation' necessarily indicates some active suggestion or support or stimulation to the commission, of the act itself which constitutes an offence. 'Advice' can become 'instigation' only if it is found that it was meant actively to suggest or stimulate the commission of an offence (AIR 1920 Pat 502) Adivce *per se* or temptation to do a forbidden thing does not amount to instigation (AIR 1920 Pat 502; AIR 1918 Mad 738).

Instigation must have reference to the thing that was done and not to the thing that was likely to ahve been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation (AIR 1953 Trav-co 251) Therefore to ask a person as a mere threat to fire a gun without intending that he should really fire it, is not to instigate him to fire the gun. The threat would become instigation only if it is found that in the event of the threat having no effect, the gun should in fact be fired (AIR 1953 Madh. 155=1953 CrLJ 995 DB).

In the case of abetment by aid, a person can be said to abet by aiding only when by the commission of an act he intends to facilitate the commission of the offence and does facilitate the commission thereof. Therefore where a person is charged with abetment by aid of an offence under section 161 and the principal offender is acquitted on the ground that he had not committed the offence, no question of intentionally aiding by any act or omission the commission of that offence arises, and the conviction of the abettor cannot be allowed to stand (AIR 1959 SC 673).

Abetment to get accused arrested : Where a person instigates another to commit a crime with the object of catching him in the act of committing the crime, the instigation amounts to abetment (AIR 1938 Mad 893). It follows that the offer of a bribe to a public servant to lay a trap for him and expose his dishonesty and bring him to justice constitutes the offence of abetment of bribery under sections 109 and 161 (AIR 1918 Mad 738). It is further to be noted in this connection that any act committed by a person which amounts to instigation as defined in section 107 would attract the provisions of section 165A, Penal Code (AIR 1955 Bom 61).

3. **Abetment by conspiracy.**- In order to constitute abetment by conspiracy it is essential, (i) that the person abetting must engage with one or more persons, (ii) that the conspiracy must be for doing the thing abetted, (iii) an act or illegal omission must take place in pursuance of conspiracy. Under the second limb of the section it is seen that where the abetment is by conspiracy the elements to be established are - (1) two or mroe persons must combine in conspiracy, and (2) an act or illegal omission must take place in pursuance of that conspiracy. If one or two persons charged is acquitted the conviction of the other can not stand (ILR 4 Cal 10; AIR 1956 SC 33=1956 CrLJ 138).

Abetment by conspiracy consists in combination and agreement of persons to do an illegal act or to do a lawful act by illegal means (AIR 1944 Lah 380). The agreement to do an unlawful act may be inferred from circumstances. If the abettor is a party to an agreement in pursuance of which the offence is committed it will be sufficient (43 CrLJ 227).

Where two person conspired to do away with deceased while sitting in company of main culprits, one of them asked accused to kill deceased immediately on his entering the village while the other one, a police officer, undertook to look

after police side. Prima facie such persons appeared to have instigated main accused to commit murder (1987 PCrLJ 226). Where several persons combine to attack with lathis a common enemy each can be said to be abetting the conduct of the other within the meaning of section 107. When each of them is present, Section 114 applies and although none of the parties thought of causing grievous hurt to the enemy yet under section 114 such of them as were not directly responsible for the grievous hurt caused to the enemy can be deemed to have abetted the causing of grievous hurt by the person who actually caused it provided grievous hurt was the probable consequence of the assault. The test is whether in the circumstances of a given case, grievous hurt should have been forseen as the probable result of their concerted action (AIR 1936 All 437).

It is very difficult to obtain direct evidence of conspiracy which is generally inferred from certain criminal acts of parties accused, done in pursuance of an apparent criminal purpose in common between them. In order to constitute the offence of abetment by conspiracy there must be a combining together of two or more persons in the conspiracy and an act, or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing when parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of them all (AIR 1951 Raj 89).

4. **Abetment by aid.-** The third mode of abetment described in the section is by intentionally aiding any act or illegal omission in the doing of a thing. Any facility afforded to the doing of an act is, as the explanation has it, equivalent to aiding in the doing of the thing. Intentional aid may then consist of (i) either the doing of an act, directly assisting the commission of the crime; (ii) it may consist of an act which, though not directly assisting its commission, affords facilities for its commission; or again (iii) it may not be an act at all, but an illegal omission resulting in the same consequence.

In order to constitute abetment, the abettor must be shown 'intentionally' aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of section 107. A person may, for example, invite another causally or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the comission of the murder, the person inviting can not be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active compolicity is the gist of the offence of abetment under the third paragraph of section 107 (AIR 1975 SC 175; 1977 CrLJ (SC) 254). In the case of abetment by aid a person can be said to abet by aiding only when by commission of an act he intends to facilitate the commission of the crime and does facilitate the commission thereof (AIR 1959 SC 673).

In order that there may be abetment by intentional aid, the commission of the crime must have been facilitated by either an act on the part of the abettor or by his illegal omission. The act may be one which directly assists the commission of the crime or one which merely affords facilities for its commission. In either case the person who does such an act is an abettor (36 Trav-co 46). Where a crowd which was accompanying a funeral procession encouraged the wife of the deceased to commit sati by shouting slogans in her favour and surrounded her so that the police could not stop her from committing sati. It was held that all those persons who joined that procession were aiding the widow in committing sati (AIR 1958 Raj 169). Similarly

where a police constable accompanied by two civic guards attempted to extort money from a person and though the civic guards did not actually demand any money yet they did push about the man so as to make him pay up. It was held that they were guilty of abetment by aiding the accused to extort money (AIR 1948 Cal 47).

The mere fact that a person omitted to do a thing would not be sufficient to make him an abettor. Thus merely allowing one's premises to be used for the purpose of a bigamous marriage does not prove abetment of bigamous marriage (AIR 1960 Bom 393). Similarly mere receipt of an unstamped instrument, or receipt from another does not make the person receiving an abettor in the offence of executing an unstamped instrument (7 Bom 82; 1 All 18).

5. **By illegal omission.**- For proving abetment by illegal omission under section 107 the accused must be shown to have intentionally aided the commission of the offence by his non-interference (24 Suth WR (Cr.) 26). The prosecution must be able to establish that such illegal omission was likely to have lent support to or to have encouraged the principal offender to commit the offence in question (36 Trav LJ 46).A person, who identified another, who intended to cheat the Treasury Officer by personation, made the identification on the assurance of another in whom he had confidence, but did not tell the Treasury Officer that he identified only on such assurance, could not be convicted of abetting the offence unless it is definitely proved that he knew that an offence was being committed, that is to say that the man whom he identified, was not the same (AIR 1929 Pat 157). To prove abetment by "illegal omission" it is necessary to show that the accused intentionally aided the commission of the offence by his non-interference (1975) 24 WR (Cr) 26), and the omission involved a breach of a legal obligation (AIR 1928 Nag 257). Thus evry police officer is bound to shelter a person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury and if he omits to perform this duly, he is guilty of abetment (20 Bom 394).

Abetment by omission would only be puishable if the omission were an illegal omission that is in disobedience of an obligation imposed by law (33 Pat 901; AIR 1947 Nag 113). Thus where some persons were being beaten in the thana by the police and officer incharge did not take notice of the beating. It was held that he intentionally by illegal omission committed the abetment of the assault on those persons. He may therefore, be convicted under section 323/109 (9 DLR 41; PLR 1957 Dhaka 260). Where the wife knowing that her paramour was likely to waylay and kill her husband did not warn the latter when he was going out. It was held that in the circumstances the conduct of the wife in not warning her husband though certainly open to censure did not amount to abetment of murder committed by the accused (AIR 1955 HP 15).A newly married girl who was 3 to 5 months pregnant committed suicide. The atmosphere in the house prior to sucide was very tense and the girl had no food for three or four days before committing suicide. The husband and in laws did not persuade the girl to take food. It was held that due to his omission the accused cannot be held guilty of abetting the crime of suicide and the deceased must be deemed to have dropped down as a sensitive girl not able to withstand the normal jolts of life (1981 CrLJ (NOC) 178 P&H).

Abetment by aiding or instigating necessarily means some active suggestion or support or stimulation to the commission of the offence itself. If the offence had already been completed before anything was done by the alleged abettor, any subsequent action of his which might, in any way help the main offender, will not be abetment within section 107, being an accessory after the fact which is no offence under law (PLD 1986 Lah 418).

108. **Abettor.**- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1: The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2 : To constituting the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustration

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3 : It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequnece of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment or death.

(c) A instigates B to set fire to a dwelling house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling house, and is liable to the punishment provided for that offence.

(d) A intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A, B takes the property out of Z's possession in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4: The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be

punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5 : It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

Illustration

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.

[1][**108A. Abetment in Bangladesh of offences outside it.-** A person abets an offence within the meaning of this Code who, in [2][Bangladesh], abets the commission of any act without and beyond [1][Bangladesh] which would constitute an offence committed in [2][Bangladesh.]

Illustration

A, in [2][Bangladesh], instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting muder.]

109. **Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.-** Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation : An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in section 161.

(b) A instigateds B to give false evidence. B, in consequence of the instigation commits that offence. A is guilty of abetting that offence and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

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1. Section 108A was added by Indian Penal Code Amendment Act, 1898.
2. The word 'Bangladesh' was substituted for the word 'Pakistan' by Act VIII of 1973.

Synopsis

1. Scope and applicability.
2. Section 109 and 120B.
3. Charge and conviction.
4. Acquittal of principal offender; - effect.

1.Scope and applicability.- This section deals with punishment for abetments where punishment therefore have not been separately provided in the Code. Punishment for abetments are stated to be the same as that for the main offence (AIR 1933 Bom 162). A person who aids and abets the performance of the crime at the time the crime is committed, is punishable under this section (42 CrLJ 796).

In order to make this section applicable the act abetted must in consequence have been committed of the abetment and there are no other provisions in the Coide making the abetment punishable (12 CrLJ 495). Abetment of an offence which was not ultimately committed can not be punished under this section (AIR 1925 Oudh 499).

Section 109, Penal Code may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission (AIR 1971 SC 885 (888, 889). The offence of abetment falls through if the principal offence is not substantiated (61 I.C. 800 Cal ; ILR 52 Cal 112).

To sustain the charge of abetment of an offence, it is necessary that there must be some evidence of an overt act or omission so as to suggest a preconcert or a common design to commit a particular offence. So long as the design rests in intention only short of overt act directed to the commission of the offence, it is not indictable in law (PLD 1970 Kar 15). Section 109 has no application where the offence is never committed (AIR 1933 Rang 297).

Unlike the proviso to section 111, Penal Code in which the expression 'probable consequence of abetment' and 'that act done or committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment appear, and will have to be given their proper meaning, there is no such requirement in section 109 P.C. Further more, section 109 P.C. is obviusly a residuary section whereas section 111 P.C. is a special section applicable only to the facts of the case of present kind. Section 109 P.C. from its language contmeplates the abetted act to have been completed that is, if murder is instigated and the victim is killed, only then it provides for the punishment of abetment but only when there is another specific provision in this behalf; whereas section 111 deals with the case where a different act has been committed as a probable consequence of abetment. The different act in section 111 would include an offence under section 301 P.C. or for that matter any other section of the Penal Code. The distinction thus is apparent between the two sections. In one the abetted act is completed and in the other a different act is committed as a probable consequence of abetment; and where the code provides a specific penal provision for dealing with a situation where a different act is committed, section 109 will have no application; for, that is a residuary provision. It is section 111 which will be applicable. Accordingly, it is idle to contend that the abettor can be convicted under section 301 read with section 109 (PLD 1979 SC 53).

This section is attracted even if the abettor is not present at the place where the offence is committed provided he had instigated or conspired with one or more persons to commit the offence and even on failure of that conspiracy did some act or

illegal omission had taken place or that he aided the commission of the offence (AIR 1971 SC 885=1971 CrLJ 793). Where two persons are charged for abetment and the case against them is inextricably mixed up and can not be separated, on the acquittal of one, the other should be given the benefit of doubt and should also be acquitted (1978 CrLJ 256). What the law punishes is only abetment of an offence and not abetment of mere acts which are not offences by themselves (1978 CrLJ 555).

A person by mere offering of bribe in detecting a crime cannot be said to be an abettor as there is no mens rea (157 CrLJ 127; AIR 1954 SC 322). If in consequence of abetment by a person murder is committed section 109 is attracted (AIR 1939 Bom 452).

In order to make an accused liable for commission of any crime, it must be shown that he had committed the crime or aided or instigated in the same form or manner as other accused did. It is settled principle of law that mere presence of the accused near at the place of occurrence does not constitute the offence under section 109 of the Penal Code. Intentional aiding and active complicity is the gist of the offence of abatement committed by the accused, otherwise charge for abatement must fail (Mostain Mollah Vs. The State (1991) 11 BLD 552).

A person is said to instigate another to an act when he actively suggests or stimulates him to do an act by any means or language direct, or indirect whether it takes the form of express solicitation or of hints, insinuation or encouragement. It is not necessary that express and direct words should be used to indicate what exactly should be done by the persons to whom directions are given (AIR 1953 Trav Co 251). The instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation (AIR 1953 Trav-co 251).

Abetment is an offence under the Penal Code and a person may be charged for abetting an offence punishable under a special law even though the word 'abetment' may not be mentioned as an offence under the Special Act (Hussain Mohammad Ershad vs. The State; (1994) 14 BLD (AD) 178).

2. **Sections 109 and 120B.**- Offences created by sections 109 and 120B, Penal Code, are quite distinct. There is no analogy between section 120B and section 109, Penal Code. There may be an element of abetment in a conspiracy but conspiracy is something more than an abetment. Conspiracy to commit an offence is itself an offence and a person can be separately charged with in respect to such conspiracy. (AIR 1970 Cal 110 (116). Conspiracy to commit an offence is itself an offence and person can be separately charged with respect to such conspiracy. There may be an element of abetment in a conspiracy, it is something more than an abetment (AIR 1961 SC 1241=(1961) 2 CrLJ 302).

There is vital difference between the two crimes (i) abetment in any conspiracy, (ii) criminal conspiracy. It may be sufficient to state that the gist of the offence of criminal conspiracy created under section 120A is a bare agreement to commit an offence. It has been made punishable under section 120B. The offence of abetment created under the second clause of section 107 requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy that would be evidence by the wordings of section 107 "Secondly - engages in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy....." The punishments for these two categories of crimes are also quite different. Section 109 Penal Code is concerned only with the punishment of abetments for which no

express provision is made under the Penal Code. A charge under section 109 should, therefore, be along with some other substantive offence committed in consequnece of abetment. The offence of criminal conspiracy is on the other hand, an independent offence. It is made punishable under section 120B for which a charge under section 109, Penal Code, is unnecessary and indeed, inappropriate (1989 CrLJ 1 (66, 67); AIR 1988 SC 1983=1988 (3) Crimes 209).

When an offence is committed in pursuance of a conspiracy to commit it, the conspiracy amounts to an abetment, and where conspiracy amounts to an abetment under section 107, it is unnecessary to invoke the provisions of section 120A and 120B, because the code has made specific provision for the punishment of such a conspiracy (AIR 1936 Pat 346(348)=1937 CrLJ 893).

Abetment need not be by instigation. It may be by conspiracy, the proof of which is generally a matter of inference (AIR 1948 All 168). Abetment be conspiracy presupposes a deliberate and previous act on the part of the abettor (AIR 1935 Oudh 468).

There is no bar to prosecuting an offender for abetting under section 109 Penal Code, an offence which has in fact been committed in pursuance of a conspiracy notwithstanding the fact that a prosecution under section 120B. Penal Code could not be launched without previous complaint or consent (AIR 1945 Sind 51). Section 120B applies where any other crime has not been actually committed. Where the matter has gone beyond the stage of mere conspiracy, and offences are alleged to have been actually committed in pursuance thereof, sections 120A and 120B are wholly irrelevant. Conspiracy is one form of abetment and where an offence is alleged to have been committed by more than two persons such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy, should be charged with the offence of abetment under section 109 (1957 CrLJ 234).

3. **Charge and conviction.**- It is open to the prosecution to charge abetment generally and then if the evidence does not establish abetment other than in one particular form, to rely on that particular form for a conviction (AIR 1938 Cal 125). Where more than one offence appear to have been committed, the charge must be for the more serious offence. Thus where the case for the prosecution is that the person abducted was in fact murdered, there can be no scope for a charge under section 364 of the Penal Code and the abductor should be charged either with murder or at least with the abetment of murder (54 Cal WN 68).

An abettor cannot the convicted for the same offence that of principal offender, if principal offender could commit the offence for which he is held punishable even without aid; he (Abettor) can be convicted in such a case for abetment of a lessor offence than that for which principal offender is convicted (Sattar Abdul Gafar Sipai Vs. State of Gujarat; 1990 (1) Crimes 587 Guj).

A mere mention of the relevant section in the charge to which the accused persons are called upon to plead or when entering conviction against them, will not satisfy the appellate court that the lower court has applied its mind to the question whether the elements attracting the application of the rules relating to constructive liability for crime are present in the case, nor would such mere mention of the sections clothe the accused with proper notice of the crimes for which they are sought to be made constructively liable. These remarks apply with equal force to a charge relating to the abetment of an offence (AIR 1956 Trav-Co 230).

It cannot be laid down as an inflexible rule that a convictin for abetment cannot be made in a case where the accused is charged with the main offence only, and no

separate charge has been framed under section 109. If the accused had notice of the facts, which constituted abetment, although the charge was one for the main offence and if there has been no prejudice to the accused by the omission to frame a separate charge for abetment, he can be convicted for abetment even though the charge for the main offence fails (PLD 1961 Lah 212).Section 114, Penal Code applies to a case where a person abets the commission of an offence some time before it takes place and happens to be present at the time when the offence is committed, and is not applicable to a case where the abetment is at the time when the offence takes place and the abettor helps the commission of the offence. The evidence against the second accused clearly shows that he has abetted in committing the crime and actively participated in the whole incident. When charge has been filed against him for the substantive offence, it is permissible for the court to convict him for the offence under section 109, Penal Code. No prejudice is caused to the accused by altering his conviction from section 302 to an offence under section 109 Penal Code 1989 Crimes 771 Ker).

Where the court frames a charge for substantive offence but it is found that some of the accused had conspired with others to commit the offence, persons in consipracy to do that offence should be tried for abetment under section 109 P.C. (AIR 1938 Mad 130). Where the High Court finds that the accused ought to have been convicted for abetment but had wrongly been convicted for a substantive offence, it can alter conviction for principal offence to one for abetment thereof (AIR 1931 Oudh 274). Where however the accused were tried for murder and acquitted on their proving alibi. The High Court found that there was a conspiracy to murder in which they took part though not in actual murders. The High Court did not convict them but the case was sent back to retrial (PLD 1951 Lah 66). A ordered B to set fire to the hut and the hut was accordingy burnt. A was charged under section 436. B was acquitted of the charge as the evidence that B set fire to the hut was not believed. The evidence that A ordered B to set fire to the hut and that hut was accordingly burnt by one of the members of the unlawful assembly was believed and was convicted under section 436 read with section 109. The Indian Supreme Court held that the conviction of B under section 436 read with section 109 was legal (AIR 1958 SC 813= 1958 CrLJ 1352).

Where it is doubtful as to whether an offence of kidnapping or of abetment of kidnapping has been committed the accused can be charged in the alternative with kidnapping as well as abetment of kidnapping. Where the accused is not charged in the alternative but is charged with the substantive offence of kidnapping, he can be convicted of abetment only and not the actual offence of kidnapping if the evidence proved is only abetment (1957 CrLJ 688). Where there is a charge under section 120B/467 and section 109/467 the charge under section 120B/467 can be cancelled if no sanction for prosecution has been obtained and the accused can be convicted under section 109/467. It is hoever to be noted that if there is only one charge under section 120B/467, it cannot be changed to one under section 109/467 because the offence under section 120B is a An accused charged with having abetted a known person may be convicted of having abetted an unknown principal, subject hoever, to the limitation only that when such conviction is likely to cause prejudice to the accused, the charge should be formally amended in suitable terms and the accused should be given the benefit of a retrial so as to afford him due opportunity to meet the amended charge properly (16 DLR 147). Where in the original complaint there was no allegation of abetment of an offence, but subsequently the evidence disclosed that there was abetment. It was held that although in the complaint there is no allegation that one of the accused abetted the other in the commission of any offence, the court can frame proper charges for offences disclosed in the allegations

and in proper cases even alter it at any stage of the trial in accordance with the evidence, provided no prejudice is caused to the accused. There is no question of prejudice when the case is still at the stage of charge (AIR 1962 Bom 21).

charge.- The charge should run as follows :

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

That A (name of the principal offender on the..... day of ..... at ..... committed the offence of ..... punishable under section ..... Penal Code and that you ..... on ..... at ..... abetted the said. A in the commission of the above said offence of ..... which was committed in pursuance of your abetment and that you have thus committed an offence punishable under section 109 read with section ..... Penal Code and within my cognizance.

I hereby direct that you be tried on the said charge by the said court.

When the abettor is charged with the principal offender, the charge should run as follow :

That you ..... on or about the ..... day of ..... at ..... abetted the ..... commission of the offence of ..... by ..... which offence was committed in consequences of your abetment, and that you have thereby committed an offence punishable under section 109 Penal Code and ..... of Penal Code and within the cognizance of any court (or the court of session) and I hereby direct that you be tried on the said charge.

4. Acquittal of principal offender; effect.- There is no rule to the effect that if the principal offender is acquitted, an abettor must also be acquitted. There may be a case where an abettor on his own confession or plea of guilty to the charge may be convicted of the offence of abetment although the principal is acquitted for insufficient evidence. Another type of such case may be where it is held by the Appellate Court that the substantive offence was committed by an unkown person or persons in consequence of abetment by the culprit (PLD 1966 Dhaka 269). In such cases the criterion for convicting the abettor is not the fact of acquittal of the principal but the grounds thereof. As a rule of general application it is limited only to those cases in which the acquittal is founded on the ground that the prosecution fails to prove the commission of the alleged substantive offence itself. In all other cases, it will depend upon the nature of the evidence appearing against him and if it is found sufficient and satisfactory to so warrant, there can be no reason why the abettor cannot be convicted of the offence of abetting the commission of the substantive offence by the principal, even though the principal may be acquitted (16 DLR 147).

Conviction of the abettor is ordinarily not dependent upon the conviction of the principal offender. Abetment by itself is a substantive offence. So the abettor can be convicted before the principal is apprehended and put on trial (1969) 13 MLJ 842(844). A charge of abetment fails ordinarily when the substantive offence is not established against the principal offender (AIR 1959 SC 673; AIR 1970 SC 436).

Unless the substantive offence against the principal offender is established, the question of abettor being held guilty under the circumstances does not arise (AIR 1990 SC 1210).

A person can be convicted of abetting an offence if the person alleged to have committed that offence in consequence of the abetment has been acquitted. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment might fail when the person alleged to have committed the offence is acquitted (AIR 1967 SC 752).

110. **Punishment of abetment if person abetted does act with different intention from that of abettor.**- Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

111. **Liability of abettor when one act abetted and different act done.** When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it :

Proviso.-Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations

(a) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation by mistake puts the poison into the food of Y, which is by the side of that of Z. Here if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(b) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose, B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

112. **Abettor when liable to cumulative punishment for act abetted and for act done.**-If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration

A instigates B to resist by force a distress made by a public servant. B, in consequence, resist that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress A will also be liable to punishment for each of the offences.

113. **Liabilite of abettor for an effect caused by the act abetted different from that intended by the abettor.**- When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which

the abettor is laible in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

114. Abettor present when offence is committed.- Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

115. **Abetment of offence punishable with death or [1][imprisonment] for life if offence not committed; if act causing harm be done in consequence.**- Whoever abets the commission of an offence punishable with death or [imprisonment] for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration

A, instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or imprisonment for life. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and, if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

116. **Abetment of offence punishable with imprisonment - if offence be not committed.**- Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision if made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to onefourth part of the longest term provided for that offence; or with such fine as is provided for that offence, or with both;

If abettor or person abetted be a public servant whose duty it is to provent offence.- and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence,

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

for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(b) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(c) A, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(d) B abets the commission of a robbery by a, A police-officer, whose duty it is to prevent that offence. Here though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

117. **Abetting commission of offence by the public or by more than ten persons.**- Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

118. **Concealing design to commit offence punishable with death or [imprisonment] for life - if offence be committed; if offence be not committed.**- Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or [imprisonment] for life,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence or makes any representation which he knows to be false respecting such design,

shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to fine.

Illustration

A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the

commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

119. **Public servant concealing design to commit offence which it is his duty to prevent.**- Whoever, being a public servant intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed.-shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

if offence be punishable with death, etc.-or, if the offence be punishable with death or imprisonment for life, with [imprisonment] of either description for a term which may extend to ten years;

if offence be not committed.-or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment or with such fine as is provided for the offence, or with both.

Illustration

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.

120. **Concealing design to commit offence punishable with imprisonment.**- Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

if offence be committed ; if offence be not committed.-shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.