(e) Bangladesh Shilpa Bank established under the Bangladesh Shilpa Bank Order, 1972 (P. O. No. 129 of 1972);

(f) Bangladesh House Building Finance Corporation established under the Bangladesh House Building Finance Corporation Order. 1973 (P. O. No. 7 of 1973);

(g) Bangladesh Krishi Bank established under the Bangladesh Krishi Bank Order, 1973 (P. O. No. 27 of 1973)

(h) Investment Corporation of Bangladesh established under the Investment Corporation of Bangladesh Ordinance, 1976 (XL of 1976);

(i) Grameen Bank established under the Grameen Bank Ordinance, 1983 (XLVI of 1983);

(j) Rajshahi Krishi Unnayan Bank established under the Rajshahi Krishi Unnayan Bank Ordinance, 1986 (LVIII of 1986);

(k) a bank conducted in accordance with Islamic shariah.]

CHAPTER XVIII

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS

463. **Forgery.**— Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Comments

An analysis of the provision of section 463 of the Penal Code, which defined foregery, would show that two essential ingredients of the offence of forgery are, firstly, the making of a false document and secondly, doing it with a fraudulent intention to cause damage or injury to any person, to suopport a false claim or title or to cause a person to part with the property covered by the false document. The offence of gorgery by its very definition consists of an act and its consequence and these together constituted the offence (Sree Jagenath Chandra Bakshi Vs. The State 1989 BLD 247 (para-7.).

Ante-dating of a document with any of the intentions such as causing damage or injury to a person by way of depriving him of his right already acquired by a kabala constitutes forgery (Amjad Molla v. Syeduzzaman Molla and others (1994) 46 DLR (AD) 17).

The claim of being admitted into first year class of M. B. B. S. course on the basis of false mark-sheet is a claim within the meaning of Section 463 of the Penal Code (Jahangir Hossain Vs. The State 40 DLR 545 = 1987 BLD 366).

In the case of Kotamraju Venkatrayadu, 28 Mad 90 (FB)d it has been held by the Full Bench of Madras High Court that offence of forgery is complete if a document, false in fact, is made with the intent to commit fraud, although it may not have been made with any-one of the other intents specified in section 463 of the Penal Code.

Accused Jahangir Hossain by presenting false mark sheets not only intended to defraud the college aughority but also intended to obtain an advantage of admission

and there by to deprive other students of the benefit of admission. Therefore, the mark-sheets submitted by the appellant Jahangir Hossain was a forged one (Jahngir Hossain Vs. The State, (1988) 40 DLR 545).

The claim of being admitted into first year class of M. B. B. S. course on the basis of false mark-sheet is a claim within the meaning of section 463 of the Penal Code. The document was also made fraudulently as having been made with the intention that appellant Jahangir Hossain should by use of it deceive a college authority. Illustration (K) in section 464 of the Penal Code makes this clear (Jahangir Hossain Vs. The Stated, (1988) 40 DLR 545).

464. Making a false document.— A person is said to made a false document-

First.— Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document with the intention of causing it to be believed that such doecument or part of a dcoument was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed ;or

Secondly.— Who, without lawful authourity, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration ; or

Thirdly.— Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him he does not know the contents of the document or the nature of the alteration.

Illustrations

(a) A has a letter of credit upon B for [1][taka) 10,000, written by Z. A, in order to defraud B, adds a cipher to the 10,000, and makes the sum 1,00,000, intending that it may be believed by B that Z so wrote that letter. A has committed forgery.

(b) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B and thereby of obtaining from B the purchase-money. A has commitred forgry.

(c) A picks up cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand [1][taka]. A commits forgery.

(d) A leaves with B, his agent, a cheque on a banker, singed by A, without inserting the sum payable and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand [1][taka] for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand [1][taka]. B commits forgery.

(e) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to decieve the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

1. The word "taka" was substituted for the word "rupees" by Act VIII of 1973, and Sch. (with effect from 26-3-71).

(f) Z's will contains these words-"I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government promissory note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order" and signing the endorsement. B dishonestly erases the words "Pay to Z or his order" and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A, A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain aims from Z and other persons. Here as A made a false document in order to induce Z to part with property, A has committed forgery.

(k) A without B's authourity writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery inasmuch as he intended to dceive Z by the forged certificate, and thereby to induct Z to enter into an express or implied contract for service.

Explanation 1.— A man's signature of his own name may amount to forgery.

Illustrations

(a) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a place of paper and signs it will Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been acepted by Z. A. is guilty of forgery ; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c) A picks up a bill of exchange payable to the order of a different person of the same name. A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable, here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate, to Z at a nominal rent and for a long period and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors ; and in order to give a colour to the transaction, writes a promissory note, binding himself to pay to B a sum for value

received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2.— The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration

A daws a bill of exchange upon a ficitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

Synopsis

1. Scope and application.
2. Making false document.
3. Dishonestly and fraudulently.
4. Clause 1.
5. Clause 2.
6. Explanation (2).

1. **Scope and application.**- Section 464 deals with making of false document. First clause of section 464 speaks that a person is said to make a false document who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document or makes any mark denoting the execution of a document with the intention of causing it to be believed that such document or part of document was made, signed, sealed or executed (Lalit Mohon Nath Vs. State (1987) 39 DLR 398).

The essential ingredient of an offence of forgery is the making of a false document or part of it; the making of a document or part of a document does not mean 'writing or printing it but siingng or otherwise executing it. Mere making of a false statement in a document does not render it a false one within the meaning of section 464 of the Penal Code, where the document is executed by a person who purports to execute it and there is no intention of causing a belief that it was executed by some other person or by his authority. Where the accused executed a kabulyat in favour of certain person writing there in that he was executing the kabuliyat with the approval and consent of those persons, which statement however, was found to be false. Held that the accused could not be held guilty of an offence of forgery (Shamsul Huda Khan Vs. Aminul Islam Chowdhury, 3 DLR 200; 1987 BLD 367).

To bring the case within Clause (1) of Section. 464, Penal Code, it is necessary to establish that the accused intended to induce a belief that a dcoument was made, signed, sealed or executed by the authority of a person who did not make, sign, seal or execute it or that it was made, signed, sealed or executed at a time when it was not so done. Evidently Sec. 464 cannot be invoked to cases where a public officer knowingly makes false entries initdally in the public record on his own authority. When the case against the accused clearly is that he initally at the time of making entires in the girdawari record made wrong and unauthorized entires made by the accused cannot amount to constitute the making of false documents under Section. 464, Penal Code (Stated v. Parasram, AIR 1965 Rj 9 (11); Hasand Ali v. State of M. P. 1983 Cr. LJ. 691 (2) = AIR 1983 S. C. 352 (2) = 1983 (i) Crimes 989).

"In principle, I do not find any difference between making a false certificate in order to obtain an employment and making a false maksheet in order to obtain an admission in a college as in both cases the intention is to deceive another and there by to obtain an advantage or privilege which without such deception could not have

been obtained. In this view of the matter, I am of the opinion that the mark-sheets were false documents within the meaning of section 464 also" (Jahangir Hossain Vs. The State 40 DLR (1988) 545 = 1987 BLD 366).

In the instant case, the writing was not in existence on which date the accused filed his written statement, but had come into existence later and was shoved into the file as if it was really the written statement originally filed by him. Held that the case set up by the complaint would be clearly convered by Cl. (1) of Section. 464 though it did not come within the offence charged, such a case not being one of an alteration of document within Cl. (2) of Section. 464 of the Penal Code (Dharmendra Nath Shastri v. Rex. AIR 1949 All. 353 (354).

2. Making false document.— Making false document is the soul of forgery. The expression "making false document" is to be understood in its literal sense. It has a special connotation in the Code. The contours of the said expression is delineated in sec. 464 of the Penal Coded. It consists of three divisions and the document should fall atleast in one of these three divisions for making it a false document. The first division relates to the making, signing, sealing or executing a documnent with the intention of causing it to be believed that such document was made by the authority of person by whom the maker knows that it was not made. The second division relates to the dishonest or fraudulent cancellation or alteration of a document without lawful authority. The third division deals with that of causing another person to execute or alter a document with the knowledge that the maker thereof does not know the contents of the documents or the nature of the alteration (Mathew v. George, 1989 (1) Cr. L. C. 726 (728) (Ker).

The word 'makes' means creates or brings into existence (AIR 1928 Lah 681). A person is said to make a false document who dishonestly or fraudulently signs, seals or executes a document or part of a document or makes any mark denoting the execution of such a document (PLD 1979 Pesh 227). In order to be a false document it must satisfy one of the two alternative conditions, i.e. it must have been made; (i) with the intention of causing it to be believed that such document or part of document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority the acccused knows that it was not so made, signed, sealed or executed, (ii) Alternatively, that if the authority of executant is not disputed, the intention, to cause it to be believed that it was made at a time at which the accused knew that it was not amde, signed or executed (1971 PCrLJ 799). Making a false and incorrect report by an official on some application does not amount to making a false document (1986 LN 393).

The making of a false document does not mean writing or printing it but sealing or signing it as a document, knowing that the person making it has no authority to do so (PLD 1951 Dhaka 109). Where the accused printed and issued false marriage invitations under the names of two persons without their authority announcing the celebration of his marriage with the complaint it was held that the invitations were forged instruments and as such were false documents within the meaning of section 464 (AIR 1954 Mys 116). Making a bank guarantee by bank manager with intention of causing it to be believed that it was made by authority of bank when in fact it was without authority of bank, falls squarely within the peripheri of a false document as defined in clause first of section 464 and would be forgery within the meaning of section 463 (NLR 1987 PCrLJ 153).

The simple making of a false document constitutes forgery, it is not necessary that the document should be issued or made known to the injury of a persons's reputation before the offence is comopleted or the offender is made liable to punishment (2 Beng. LR (All) 12 DB).

3. Dishonestly and fraudulently - meaning of.— The terms 'fraudulently' and 'dishonestly' are defined in the code, the former as implying an intent to defraud and the latter as implying an intention to cause wrongful gain to one person or wrongful loss to another (1 Weir 542 DB). Therfore where a bank officer is charged with shortage. Plea of accused that the shortage was a genuine shortage due to his having not counted cash was not believed by any statement of any P.W. (NLR 1986 CrLJ 84). He cannot be found guilty of acting dishonestly and fraudulently.

The term fraudulently means that there must be deception actual or intended and injury or risk of injury, though it may not be to any particular person (AIR 1954 Madh B 73). To defraud in its ordinary meaning is to deprive one of a right by deception or withhold a right by deception (1Upp. Bur Rul 356). It follows that in order to be fraudulent, there must be some advantage on one side with a corresponding loss on the other. Each case has to be decided on its own facts (AIR 1932 Bom 545 DB).

Antendating a document to defeat the provisions of an Act, in absence of proof that this was done dishonestly or fraudulently regarding the persons affected by it, is not making a false document under Section. 464 (Joti Prasad (1962) II Cr LJ 722; (1962) AIR All 582; Shiv Bahadur Singh (1954) AIR SC 322).

4. Clause 1.— A mere false description would not make the document a forgery unless it can be shown that the accused by giving a false description intended to make out or wanted it to be believed that it was not he who was executing the document but a fictitious person (9 CrLJ 85). Thus where the accused falsely represented himself to be one V at the university examination got a hall ticket under that name and wrote answer papers signing his name as V. It was held that the accused committed forgery and cheating by personation as the acts of the accused clearly indicated an intention on his part to lead the university authorities to believe that the examination papers were answered by V and by this means to endeavour to procure the grant of a certificate to the effect that V had passed the examination, (12 MAD 151 DB), or where F sent an application for employment on the Railways to the locomotive and carriage Superintendent of the railways. On the paper on which the application was written was an endorsement purporting to be a certificate by F's superior officr certifying that F had been empoloyed as driver for a certain period of time and that his character was good, his act fell with the mischief of this section (4 CrLJ 355 DB). But where there is no intention specified in clause (1), there can be no conviction under this section for merely making a false entry in a document or for cheating. Thus no offence under section 464 was committed where A, the compolainant, requested the accused to make an entry in his account book to the effect that the accused was indebted to the compolainant for a certain sum. The accused instead wrote, in a language unknown to the complainant that the amount was paid (12 MAD 114 DB), or where in making out a cheque the accused intended to pass it off as a genuine cheque drawn by himself in his own favour (AIR 1925 Cal 14). Where the accused did not make the bills purporting to be made by or authorised by some person although his intention in issuing the bills may be fraudulent and he may be punishable for some other offence, no offence under section 465 can be said to have been committed (AIR 1955 Andh 82).

5. Clause 2.— Material alteration is one which changes the nature of the document. An alteration which does not purport to affect the terms of a contract or its identity or validity is not a material alteration (11 CrLJ 505). The alteration of the date of the bond is alteration in a material part as expressed in section 464 (1881 Pun Re. No 14 p. 21). But when a document need not be attested interpolation of the name of a subscribing witness does not constitute an offence under section 464,

there being no material alteration (11 CrLJ 505). A document does not become a forged document where a wrong entry of payment happens to be made therein or where the accused has made unauthorised alteration in a T A bill (8 SAU LR 226).

Where the accused altered the date on a document, with the intention of making the registering officer believe that it was executed on some other date than the date in fact. There was no intention to support a false claim or any other dishonest or fraudulent intention. It was held that the conviction ought to be under section 463 and not under section 465 (6 Cal 482). A thumb impression in account books means a signature on the receipt for money or acknowledgement of liability. The erasion of the thumb impression in account books, therefore, constitutes total destruction of the receipt or of the acknowledgement and not a mere alteration in the document. The offence does not fall under section 463 or 464 but under section 477 and a complaint by the court (because the erasion was made while the account books were in the court) is incompetent (1936 Mad WN 489).

6. Explanation (2).— Where the accused signed a document as a patwaree, but he was not a patwaree at that time; it was held that assigning to the accused the character of a patwaree was not equivalent to the making of a false document in the name of a ficitious person (21 Suth WR 41). Where the accused advertised that a book on English idioms by one Robert S Williams was ready and would be despatched against money sent. Writing a letter under the signature of Roberts. S Williams he requested the postal authorities to pay money sent to R. S. Williams to one Seshagiri Rao, and got the money himself signing receipts as Seshagiri Rao. Both Rober S. Williams and Seshagiri Rao were fictitious beings. It was held that the accused was guilty of cheating and forgery (13 Mad 27 DB). Persons who signed a bail bond with names which were not their own were not guilty under section 464 as they had informed the Magistrate that their names were the names they afterwards signed on the bail bond and therefore they could not be held to have intended to cause the Magistrate to believe that the bond was signed by any real or fictious poersons other than the accused (11 CrLJ 440 DB).

465. **Punishment for forgery.**- Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope and applicability.
2. False attestation.
3. Evidence and proof.

1. Scope and applicability.—The accused had executed a marriage deed in favour of one Aimona whose wealth he conveted. He as not married to Aimona and the deed contained a false recital of his marriage to her. It was held that though the deed was false the accused could not be convicted of this offence for making it because it was in reality a document executed by him, though his motive for executing it was fraudulent (Gunjar Mohammad, 69 I. C. (Cal) 451).

Where the addition complained of was merely an assertion or allegation in writing by the creditor himself and it was to effect that if the debt was not paid as agreed upon, he would make 1-1/2 times the amount, it was held that the entry could not operate to impose any liablility to pay interest upon the debtors and therefore would not have the tendency referred to in Section. 463, Penal Code. Therefore, no false document could be said to have been made within meaning of Section. 464, Penal Code, (Badan Singh v. Emperor, AIR 1923 Lah. 11 (1) (11)= I. L. R. 3 Lah. 373).

Under Section 41 of the Evidence Act, the judgment of the probate Court is conclusive proof only with respect to the various legal characters or declarations made in these proceedings, in so far as they are within the scope of the proceedings. The Civil Court has no jurisidction to decide that the document is forged within the meaning of the Penal Section under the Penal Code. Hence, the declaration that the will was forged cannot be binding on the Session Court (State of Maharashra, v. Yeshwantrao Dattatraya Rananavare, 1978 Cr. LG. 1434 (1435) (Bom.).

The accused had agreed to prepare forged Railway Passes with intention to cause wrongful loss to the Railway. And in pursuance of the conspiracy they did prepare foreged passes. It was held that theyd wered guilty under Secs. 120-B and 465, Penal Code (Bajrang Lal v. State of Rajasthan, (1976) (3)d Bihar Cr. C. (S. C.) 104 (108).

2. False attestion.— If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed at all, his is guilty of forgery just as well as the scribe (Ambar Ali (1929) 31 Cri LJ 564 = AIR 1929 Cal. 539. Motisinh (1961) II Cri LJ 76).

Where the accused did not himself affix impression as deponent on the affidavit but identified X as the deponent before the Oath Commissioner he was held guilty under S. 467 read s. 114 (Calcutta Singh (1978) Cri LJ 477 (P & H).

Where a clear allegation was made in the report filed before police that names of fictious persons with fictitious licence number had been entered by the dealer in the books maintained by him in the course of business the Magistrate was right in taking cognizance of offences under ss. 465 and 468 (Radha Kishun Kasera 1985 Cri LJ 651 (Pat).

3. Evidence and proof.—The points requiring proof are:

(1) (a) That the accused made, signed, sealed or executed the document in question, or any part thereof, or (b) that it was made by some one else.

(2) That it was made under any of the circumtances stated in Section. 464.

(3) That the accused made it dishonestly or fraudlently, or with any of the specific intents enumerated in Sec. 463.

Under Sec. 463, Penal Code, the complainant has to make out that even if the document is proved to be false document, it was made with intent to cuuse damage or injury to the public or the the complainant.

In order to establish an offence of forgery, the presence of the original document before the court is necessary. A Photostate Copy does not form primary evidence of the original (K. V. R. Iyyanger v. State of A. P. & anr. 1988 (2) Crimes 882 (A. P.).

In order to establish an offence of forgery under section 463, Penal Code, which is punishable u/s 465 Penal Code; the presence of the original document before the court concerned, is necessary. If the original document is not before the court and what is produced is merely a copyd albeit a photostat copy, still it cannot be determined as to whether the document, has been forged or not. There are many intricacies attached to establish forgery of a document, to mention only a few, or instance, the style of the signature of a person, the alleged pressure on the pen at the time when it was signed, the variation in the ink if there are other portions of ink wirtten in the same document, the quality of the paper used and so forth. All these things necessitate that the original document should be before the Court to establish the offence of forgery. A photostat copy which has come into being as a result of improvement in scientific photography of the documents cannot reflect all

these matters (K. V. R. Iyyanger v. State of A. P. and anr. 1982 (2) Crimes 882 (A. P.); Sanmukh singh v. The king AIR 1950 P. C. 31 relied on).

Thed point is whether the obtaining of Left Thumb Impression (L. T. I.) of the victim on a blank stamp will attract the mischief of section 467 of the Penal Code, Held: A. L. T. I affixed on a blank stamp paper simpliciter cannot signify acknowledgement of legal liability nor can it signfy that the person who put his L. T. I has not a legal right. It is, therefore, difficult to hold that mere L. T. I on a blank paper is either a valuable security itself or purports to be a valuable security. Evend though the appellants cannot be convicted of the offence under section 467 of the Penal Code, they are guilty of the offence under section 465 having committed forgery. Conviction is altered from sections 467/34 to 465/ 34 of the Penal Code (Subal Chandr Das Vs. State, 1987 BCR 10).

In om prakash v. State of Haryana (A. I. R. 1979 S. C. 1266 (1270), the case for the prosecution was that the two accused conspired to dispose of unauthorised stocks of tobacco or that after transporting first quality tobacco they created records to show that only second quality was transported and only the lower duty was payable. It was held that the case of the prosecution was not borne out from any of the recods.

In Labhshanker Maganlal Shukla v. State of Gujarat (A. I. R. 1979 S. C. 1012 (1014 = 1979 Cr. L. J. 890 (892), the witness was very much interested in denying his responsibility following from the documents and in disclaiming his signatures thereon. A part from the word of the witness, there was no evidence at all to show that the signatures purporting to be his were not in his hand-writing. It was held that in this situation the High Court erred in relying on the word of witness and thus giving the benefit of doubt to him rather than to the accused who deserved it, the onus of proof being alwyas on the prosecution to establish beyond reasonable doubt all the ingredients of an offence with which a person accused thereof is charged mere fact that the accused was found to be in possession of forged document that would not ipso facto show in the absence of other material that he knew or had reason to believe that they were forged documents (Santosh Kumar padhy and another v. State 1991 (3) Crimes 569 (Ori.).

In the absence of the document alleged to be forged it cannot be said that the Court can in no case hold the offence of forgery to be established but in the absence of the document the evidence must exclude all possibility of a reasonable doubt (Rama Shankar Lal 1972 SCC (Cri) 153).

In similar vein the Supreme Court said that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a hand-writing expert. It is unsafe to base a conviction solely on expert opinion without substantial corroboration (Magand Behari Lal 1977 SCC (Cri) 314 ; State v. Prasanna K Mdohappatra 1983 Cri LJ (NOC)d 49 (Ori); Dalagobina Das 1983 Cri LJ (NOC) 116 (Ori).

Charge.— I (name and office of Magistrate, etc,) hereby charge (name of accused) as follows:

That you, on or about the..........day of........at....., forged a certain document, to wit..........., (Describe it), with intent to cause damage or injury to AB, with regard to (mention the object) or with intent to commit fraud (state the fraud); and that you thereby committed an offence punisable under s. 465 of the Penal Code, and within my cognizance.

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

If the prosecution case is that the document was prepared dishonestly, the charge must state whether dthe intention with which the document was prepared was to cause wrongful gain to someone or wrongful loss to another (Gangadhariah Main re, (1967 Cri LJ 787; AIR 1967 Mys 86).

466. **Forgery of record of Court or of public register, etc.**— Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a register of Birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

467. **Forgery of valuable security, will, etc.**— Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive the deliver any money, movable property, or valuable security or any document pruporting to be an acquittance or receipt acknowledging the payment of money , or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Synopsis

1. Scope and applicability.
2. Forgery of document.
3. "Purports to be valuable security".
4. Evidence and proof.
5. Sentence.
6. Practice and procedure.

1. Scope and applicability.— Section 467 provides punishment for forgery not only of a document purporting to be a valuable security but also of any document which purports to give authority to any person "to receive or deliver any money" (AIR 1933 Pat 488=34 CrLJ 892 ; Sunil Chandra v. state (1985) 37 DLR 255).

Where a public servant entrusted with money to procure paddy, suppressed voucher for payment received and fabricated another voucher to a lesser amount and forged the signature of the party, the accused was held guilty under this section (Sivanandan Vs. State 1955 CrLJ 1539). Where a person received the amount under a money order from the postman by causing the signature of the payee to be made false on and did not inform the payee, held, he has committed an offence under this section (AIR 1922 Bom 82=23 CrLJ 264).

Where a false bill is made and presented by a person so as to receive payment for the work which he has not in fact done for the Government he would be guilty of an offence under this section (AIR 1963 Pat. 262 (DB). In a charge under section 467 Penal Code the intention of the accused either to obtain wrongful advantage for himself or to cause an injury or a possible injury to somebody also must be specifically established by the prosecution and where that has not been done the conviction under section 467 Penal Code is illegal (M. A. Motalib Vs. The State, 13 DLR 436; 8 DLR 708, 12 DLR 453).

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

When supporting documents, which have been seized from the petitioners, have been prepared with a fraudulent intdention to cheat the Government and they are referred to and mentioned in the certificates of the Chartered Accountants submitted to the department for getting the subsidies, those documents have to be treated as forged documents for the offence under Section 467 of the Penal Code (Prem Kumar Parmar & Ors. etc. v. State (Delhi Admn.) 1990 (2) Crimes 385 (Del).

The maker must dishonestly execute the document with the intention of causing it to be believed that such document was executed by or by the authority of a person by whom or by whose authority he knows that it was not executed (Al-haj Md. Serajuddowlah Vs. state (1991) 43 DLR (AD) 198).

2. Forgery of document.— The essentials of the offence under S. 467 are that the document should be altered, that the alteration should be done with the intention of causing injury or damage to some person and that it should be done dishonestly or fraudulently (1931 Mad. W. N. 361 (DB).

Antedating a kabala with intention to defraud holder of an earlier kabala is forgery. "Forgery" means making of a false document with certain intentions, such as to cause damage or injury to a person, to support any claim or title, to commit fraud. A person is said to make a "false document" within the meaning of section 464 when he dishonestly executes a document with the intention of causing it to be believed that such document was executed by a person by whom he knows that it was not executed or "at a time at which he knows that it was executed". It therefore, clearly appears from the language of section 464 that antedating of a document with any of the intentions as mentioned above constitutes forgery (Md. Amjad Molla Vs. Syedzzaman Molla, 5 BSCR 355; AIR 1936 Oudh 381, 1 BSCD 249).

Original not in existence.—Where no copy of the original document was in existence and therefore none was produced in Court. The question of loss or destruction thereof does not arise and no offence of forgery in respect thereof could be committed (1974 P. Cr. L. J. 516 (DB) (Kar). In order to establish an offence of forgery, the presence of the original document before the court is necessary. A Phoostate Copy does not form primary evidence of the original (K.V.R. Iyyanger Vs. State of A.P. & anr. 1989 (2) Crmes 882 (AP).

No dishonest intention.—The offence of forgery or abetement thereof is complete, if a document, false in fact, is made with intent to commit a fraud (AIR 1949 Trav. Co. L. R. 113 ; AIR 1926 Cal. 581, Rel, on). But, where there is intention to cause injury to a party in fact no innury was caused, there can be no conviction under this section (1974 P. Cr. L. J. 516 (DB).

Where the accused purchased a motor car with her own money in the name of her minor daughter N, had the insurance policy transferred in the name of her minor daughter by signing her (minor's) name and also received compensation for the claims made by her in regard to the two accidents to the car. The claims were true claims and she received the moneys by signing in the claim forms and also in the receipts as N. The accused in fact and in substance put through her transactions in connection with the motor car in the name of her minor daughter Nwas in fact either a benamidar for the accused, or her name was used for luck or other sentimental considerations. Neither the accused got any advantage either pecuniary or otherwise by signing the name of N in any of the said documents nor the Insurance Company incurred any loss, pecuniary or otherwise, by dealing with the accused in name of N. The Insurance Company would not have acted differently even if the car had stood in the name of the accused and she had made the claims and received the amounts from the insurance company in her own name. The accused was held to be not guilty of an offence under this section (AIR 1963 SC 1572).

False attestation.- If a person falsely puts his name down as an attesting witness to the signature of somebody who he knows has never signed, at all, he is guilty of forgery just as well as the scribe. The persons attesting like the above must be put on their trial on a charge under section 467 read with section 120-B (AIR 1929 Cal 539=31 CrLJ 564 (DB).

But this view not accepted in a case where it was held that a person who merely attests a forged signature on a document of receipt cannot be convicted of forgery. Before an attestation can amount to forgery, one of the essential requirements is that it must be made or signed by a person by whom it does not purport to be made or signed (AIR 19[illegible](Guj. 117).

Execution of document.—In the absence of any evidence to show that the accused wrote the signature on the forged document, the admission by the accused that he wrote the body of the document, would not be sufficient to supports chagre under section 467 of the Code (PLD 1949 Dhaka 35).

Execution of part of document.—The definition of making a false document as given in section 464, Penal Code, 1860 is very wide and it is not confined only to the execution of a document. It refers to dishonestly or fraudulently signing, sealing or executing a document or part of a document with the intention of causing it to be believed that such document or part of a document with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority he knows that it was made, signed, sealed or executed or at a time at which he knows that it was not made, signed, sealed or executed. Where therefore though a kobala was not signed by accused, yet it was registered on his putting his thumb impression to it. It was held that the accused was guilty of an offence under this section (PLD Dhaka 975 = 12 DLR 453).

Forging a copy of valuable security.—There can be no conviction under Section 467, for forging a copy of a document which is a valuable security. It is the original document which is a valuable security within the meaning of the section and not a copy of it (AIR 1962 Cal. 174 (DB). A conviction under section 467 for forgery of copy of a valuable security is bad (Gobinda Prasad Parsi Vs. State, AIR 1962 Cal 174=(1962) 1 CrLJ 316; (1964) 1 CrLJ 555(SC).

Offence by several accused.—Where several accused persons join hands to create and fabricate false documents and commit specific acts of forgery individually independent of each other, an offence under S. 467 is brought home to all the accused. The case is not of constructive but actual liability of the individual accused, and therefore all of them may be convicted, under S. 467. But when an accused did not commit any specified act of forgery himself but actively aided and abetted other accused persons to commit acts of forgery he would be held guilty of an offence under S. 467/109 (1968 P. Cr. L. J. 290 = 19 DLR 862 (DB).

3. "Purports to be a valuable security."—The maning of the words "which purports to be" is that the document should on the face of it appear to be a valuable security and not that it should, in fact, be a valid and enforceable security. For the purpose of the Penal Code it is sufficient if the document on its face purports to create, extend, transfer, restrict or extinguish a right for that brings it within the definition of a valuable security (9 DLR 626 = PLR 1957 Dhaka 905; AIR 1918 Mad. 140 (DB).

Receiving money against such demand draft by forgery constituted an offence under S. 467, Penal Code, and not under S. 468 (1985 P. Cr. L. J. 1849). Certificate forged by college student to get admission is not valuable security (Bhansaheb Kalu Patil V. State, AIR 1981 S. C. 80 = 1980 Cr LJ 1392).

Where during the pendency of proceedings against a lessee of a forest from the Government, the lessee used a transit pass book, the entries in the original of which were forged, and a complaint was made charging the lessee with having fraudulently or dishonestly used as genuine the transit pass book, and he was convicted under Ss. 467/471. It was held that the transit passes were 'valuable securities' within the meaning of S. 30 and that the offence, if any, was punishable under S. 467/ 471 (AIR 1932 Cal. 390 = 59 Cal. 1233 = 33 Cr. Lour 685 (DB).

4. Evidence and proof.— In a charge under Section 467 of the Penal Code, the intention of the wrong doer either to obtain wrongful advantage for himself or to cause injury or a possible injury to somebody else must be specifically established by the prosecution and where that has not been done, the conviction under Section 467 of the Penal Code can not be maintained (Abdul Hakim Vs. State (1992) 12 BLD 400.

It is settled principle that to sustain a charge under Section 467 P. C. document in question must be proved to be valuable security and that accused must be identified to be the author of forgery. Petitioner Lalit's name appears in the impugned sale deed in the category of vendee. No doubt sale deed in question is a valuable security. No where in the complaint petition filed before anti-corruption authority, it is stated that the petitioner Lalit Mohan impersonating Niranjan and Kalidas, and forging their signatures executed and registered the impugned sale Deed. In other words it is not mentioned in the complaint petition the role played by the petitioner in bringing the sale deed in question into existence. Unless it is proved by cogent, convincing and unimpeachable evidence that the petitioner is the author of the signature purported to being the hand writing of Niranjan and Kalidas, the charge of forgery cannot stand against him (Lalit Mohan Nath Vs. The State 1988 BLD 48 (Para 9)= (1987) 39 DLR 398).

Accuseds claiming title on the basis of registered document which they assert to be genuine. In such a criminal proceeding they will get reasonable opportunity to prove genuineness of their title deed which they will get in a civil proceeding. Section 467 Penal Code is not attracted to the case (Monu Mia & Sayedur Rahman Vs state 42 DLR (190) 191 = 1990 BLD 229).

The petitioner by showing false documents induced the purchaser to enter into an agreement to purchase the house on receipt of Taka 12 laces on a plea that he would refund Taka 14 laces in the event of failure to execute sale document. The contention of the petitioner to the effect that it was a civil dispute and that the Court of Settlement had given a final decision over all the disputes including the question of criminal liability is not sustainable. The criminal proceeding cannot be held to be liable to be quashed. (Aga Kohinoor Alam Vs. State (1991) 43 DLR 95).

Where the intention of the wrongdoer either to kobtain wrongful advantage for himself or to cause injury to somebody has not been specifically established conviction under section 467 Penal Code cannot be maintained (Abdul Hakim Vs. State (1993) 45 DLR 352). To sustain a charge under Section 471 read with Section 467, Penal Code, prosecution has to establish that the documents alleged to be forged are valuable securities (AIR 1955 NUC (Bom) 4257).

Where, besides the expert's evidence, there are intrinsic good reasons in the document itself which prove it conclusively to be a forged document and where there can be no doubt that the document was scribed by the accused with dishonest motive, he can be convicted under Section 467 (AIR 1936 Oudh 381).

Where there is no conclusive evidence to prove that the accused has forged the cheque in question and the handwriting expert has also not able to express any opinion due to the highly distorted specimen writings given by the accused. It was

held that the prosecution did not succeed in indentifying the accused as author of the forgery and his conviction under section 467 was set aside (1970 P. Cr. L.J. 308 = 1970 DLC 73 (DB).

Where evidence is conflicting mere suspicion could not take the place of a proof and in such circumstances conviction cannot be sustained (Arjan Singh Vs. State AIR 1979 SC 1236=1979 CrLJ 1029). Where the expert evidence was disbelieved in material particulars, it was held unsafe to convict the accused (Kanchan Singh Dholak Singh, Vs. State AIR 1979 SC 1011). Petitioners acting in collusion with each other caused fabrication of the documents. Demand Draft, and by using it Co-accused dealer lifted goods without paying a single farthing. No interference is called for. Petition dismissed (Insan Ali Vs. The State, 1987 BCR (AD) 146).

Low consideration money by itself would not show that the accused persons dishonestly inserted excess area of Land in two document. Appeal allowed. (Abdul Mannan Vs. The State, 1987 BCR (AD) 128).

The accused was entrusted with a number of Pakistan Postal Orders with forwarding memos, by a Bank for encashment of the same at the GPO. Accused mixed up some extra PPOs with those sent by the Bank and at the sometime altered the original figure of rupees in the memos, for higher figures to equal the total of the PPOs sent by Bank as well as PPOs added by him. Accused received the entitre amount due on the PPOs and keeping the money which are payable on the extra PPOs despatched by the Bank. On a charge of forgery the accused is acquitted on the ground that he neither defrauded the Bank to which he deposited the amount that is payable on the PPOs despatched by it nor the GPO which has received all the PPO for which payment was made (Ashrafur Rahman Khan Vs. The State, 22 DLR 466 ; 17 DLR 90 (WP).

Nikah Registrar's of Muslim marriages on the strength of licence issued to them by Union Council and that does not clothe them with the character of a public servant. Anisur Rahman at the root of the foul game of procuring which forms as well as at two registrers from the railway station where on Abdus Sattar practised the signature of the girl and forged the signature of Afroza. He actively aided and abetted the other accused to commit acts of forgery, accordingly the accused was found guilty under Sections 467/ 109 Penal Code instead of section 467/34 Penal Code, inasmuch as there is no specific act of forgery to his credit. But the documents in question where actually forged in consequence of his abetement (Abdus Sattar and others Vs. The state, 19 DLR 862).

Where a Photostat copy of an official authority letter was alleged to be forged and the prosecution neither examined the signing official nor specimen signature was compered by the handwriting expert not any inquiry was made in office of issue with regard to the original copy or its despatch. The alleged documents where also not recover from the accused's custody. The document could not be made basis for a charge of forgery in those circumstances. (1969 DLR 569) (DB).

Where the accused a public servant was entrusted with money to purchase certain goods, and he fabricated a false cash memo showing inflated quantity of goods and at a fictitious rate of purchases and thereby miss appropriated a certain sum. The cash memo was in the opinion of the handwriting expert definitely forged in the handwriting of the accused. Expert's opinion was corroborated by presence of impression of seal of the accused's office on the cash memo, and such affixation of the seal was not possible without knowledge and assistance of the accused, was held guilty (1970 SCMR 826).

5. Sentence.— Section 467, requires that some imprisonment should be awarded if a person is convicted under that section. The sentence of fine alone is not in accordance with law (AIR 1939 Mad 730 = 41 Cr.L. 11).

Where the accused, a Head Constable of Police, who was posted as an accountant in the National Volunteer Crops Office was convicted of an offence under Section 467, read with Section 471, Penal Code, the embezzlement charge which was levelled against him in regard to a sum of Taka 11,579 ultimately failed. The High Court in appeal confirmed sentence of 4-1/2 years rigorous imprisonment awarded by the trial Court and also imposed an additional fine of Taka 11,579 on the accused and the accused appealed to the Supreme Court. It was held that the sentence of 4-1/2 Years rigorous imprisonment was a deterrent sentence deliberately imposed on the accd. The embezzlement charge regarding Taka 11,579 had also failed. In these circumstances the High Court should not have imposed an additional fine on the accused (AIR 1955 SC 322 = 1955 Cr. L. J. Jour 871).

Where the accused a public servant was convicted for affences under Sections 409 and 467, Penal Code and sentenced to 7 years and 4 years R. 1 for respecitive offences, having regard to the circumstances of the case and the fact that the accused would have been awarded a sentence of 7 years' R. 1. only had he been prosecuted under Prevention of Corruption Act, sentences were reduced to three years for each offence, directing them to run concurrently (AIR 1954 SC 715 = 1954 Cr.L. Jour 1797).

6. Practice and Procedure-Complaint.— Where on the facts alleged offences under section 193 as well as those under Sections 467 and 471 read with Section 463, Penal Code, could be said to have been made out, the procedure for filing a complaint provided under Section 476 instead of the procedure provided under Section 479-A, is not illegal (AIR 1962 Pat. 282).

Forged document used in Court.— Suit for specific performance of contract filed by the appellant on the basis of the allegedly forged document must be concluded by the trial Court and if on evidence the trial Court was satisfied that tampering had been made certainly, the Court could take cognizance of the offence under section 195 read with section 476 Cr. P. C. (Syed Ebadat Ali Vs. The State, 5 BCR 1985 AD 218 ; 3 DLR 3 P. C.).

Where prior to the filing of complaint, accused had already filed a civil suit wherein he placed reliance on allegedly forged sale agreement, which was subject matter of dispute in both cases, and produced in civil Court. Section 195 (1) (c), was attracted to case and entertainment of complaint was barred except at the instance of Court, in proceedings before which the offence was committed. Proceedings pending against accused in Court of Sessions were quashed (1986 P. Cr. L. J. 1218).

When the bainaptra in question was given in evidence in court no court can take cognizance of any offence u/s. 467 of the Penal Code without a complaint in writing by the Court concerned or by a court to which the said court is subordinate. (Sona Miah Vs. Md. Zakaria (1989) 41 DLR (1989) (Dha) 433).

Territorial jurisdiction in a case of forgery.— The Court of competent Magistrate of Noakhali district where the false documents were made and the Court of Addl. District Magistrate, Comilla where the consequence thereof ensued had both jurisdiction to try the offence of forgery complained of (Sree Jagenath Chandra Bakshi Vs. The State 1989 BLD 247).

Sections 420, 467.— Where the accused is charged for an offence under Sections 467 and 420, but he is acquitted of the offence under Section 420, he can be convicted under Section 467 notwithstanding acquittal under Section 420 (AIR 1954 Mad. 240 = 46 Cr. L. Jour 744).

But where the acquittal was for an offence under Sections 467, 471 on the ground that the document was not used with a dishonest intention or with knowledge or belief that it was a forged document, there could be no conviction under Section 420, Penal Code (AIR 1955 Cal. 175 (DB).

Sections 477-A, 467.— Where the charge is under Section 467 against a Government servant for making false entries in transport permits with intent to defraud the Government, the conviction of the accused under Section 477-A is not illegal though the permits may not amount to accounts (AIR 1960 S. C. 400 = 1960 Cr. L.Jour. 541).

Forging of judicial record by an advocate is both an offence under Penal Code, as well as a serious professional misconduct, complaint against it has to be proceeded with despite later compromise between complainant and the accused advocate (Ranbir Singh v. State 1990 (3) Crimes 208 (Del).

468. **Forgery for purpose of cheating.**— Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating shall be punished with mprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

469. **Forgery for purpose of harming reputation.**— Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to there years, and shall also be liable to fine.

470. **Forged document.**— A false document made wholly or in part by forgery is designated "a forged document'.

471. **Using as genuine a forged document.**— Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Synopsis

1. Scope and applicability.
2. Uses.
3. "Knows or has reason to believe to be forged document."
4. Use of copies of forged document.
5. Evidence and proof.
6. Punishment.
7. Practice and procedure.
8. Charge.

1. Scope and applicability.— The language of this section most obviously suggests that this provision is expressly directed against some person other than the forger himself and an actual forger can not be punished both for forging a document and for using it as genuine (AIR 1926 Nag 137=26 CrLJ 1387). A person may, for instance, produce a document purporting to be the copy of a deed, horoscope or a will, in which cases if either the original or the copy is false he may be charged under this section provided, of course, that there is evidence of his criminality (Lala Ojha V. State I. L. R. 26 Cal. 863.

The essential ingredients of the offence is that (1) the document was a forged one; (2) the accused used such document; (3) he used it as a gejuine one; (4) he knew, or had reason to believe, that it was a forged one. All that this section requires is that there must be fraudulent or dishonest user of a document as genuine and knowledge or reasonable belief on the part of the person using the document that it is a forged one (AIR 1961 Pat 451).

The petitioner by showing false documents induced the purchaser to enter into an agreement to purchase the house or receipt of Taka 12 lacs on a plea that he would refund Taka 14 lacs in the event of failure to execute sale document. The contention of the petitioner to the effect that it was a civil dispute and that the Court of Settlement had given a final decision over all the disputes including the question of criminal liability is not sustainable. The criminal proceeding cannot be held to be liable to be quashed (Aga Kohinoor Alam Vs. State 43 DLR (1991) 95).

An offence is committed under this section whenever a document is used as genuine with the intention that some person thereby should be deceived, and by means of such deception that either advantage should accrue to the person so using the document or injury should be fall some other person or persons (AIR 1926 Cal 89=27 CrLJ 177).

2. "Uses".— Where the accused, who was a witness in the suit, from some interest in, or desire to assist, the defence filed certain document for the purposes of the suit in advance of a trial, it was held that he "used" the document without the meaning of this section (AIR 1929 Cal 203 = 30 Cr LJ 656).

Where a Bench Clerk received a sum of money paid in as fine and misappropriated it, and made a false receipt to cover up such misappropriation, it was held that the offence came under the provisions of Section 467 and this section (AIR 1924 Rang. 331 ; 25 Cr LJ 1378).

Petition for leave to appeal.— Where an offence under this section was committed in a petition for leave to appeal to the Supreme Court. it was held that an offence was committed in the proceedings before the Supreme Court (PLD 1975 Lah. 1407 = PLJ 1976 Lah. 134 (DB).

Use must be fraudulent or dishonest.— The fact that the document is forged and was so known to the accused is not decisive of his guilt. For in order to make him criminally liable he must have used it "fraudulently" or "dishonestly" (Madan Mohan Sharma v. Smt. Renuka Sharms. (1981) 29 B.L.J.R. 509 (514).

The offence under section 471 will be completed only when a forged document is fraudulently or dishonestly used as genuine one and if the offence is completed in a court during proceeding pending in it then it is not understood why that court is debarred from filing the complaint before the *ilaqa* Magistrate against the offender (Mahabir Singh Vs. State of Haryana (1985) 1 Rent LR 114(117) P&H). This is a some what general section intended to punish a person for making use of a forged document. In order to constitute this offence, there must be both knowledge and fraudulent intention. And this is necessary, for a person may intend to practice fraud upon another by the use of a document which he may not know to be forged, in which case to convict him of this offence would be to convict him for fraud and not for using a forged document. On the other hand, a person may know, that a document is forged and he may use it, but he could not be convicted of this offence if he did not use it fraudulently or dishonestly.

For an offence under Section 471, Penal Code, the necessary ingredient is fraudulent and dishonest use of the document as genuine (Sri Madan Mohan Sharma v. Smt. Renuka Sharma, 1981 B.L.J. 310 (320).

Although a forged bank guarantee bond was filed by the accused before the public works department but as soon as the forgery was detected he immediately withdraw the bond and paid Rs. one lakh and forty thousand by way of fixed deposit reeipts. It was held that even if the accused had used forged documents, no loss had been caused to any body. Indian Supreme Court, however, while upholding the conviction reduced the sentençe of imprisonment to the period already served (AIR 1979 SC 1343=1979 CrLJ 117).

Using a forged cheque as genuine with the intention of gaining time for repayment of loan, amounts to an offence under this section even though loan was repaid and the cheque returned by the creditor and it was not known who the forger was (3 Sau LR 8). The handing over forged receipts to the vakil and their production in court in support of the defence amounts to using the forged receipt as genuine (AIR 1936 Mad 280=37 CrLJ 421).

A person giving a forged document to the investigating officer during the police investigation, and thus causing that officer to do something which otherwise he would not have done is guilty of having used forged document within this section (AIR 1920 Pat 80=22 CrLJ 274).

Forged demand draft.— Using a forged demand draft of a Bank as genuine and withdrawing on its basis a sum of money constituted an offence under section 471, Penal Code (1985 P. Cr.L.J. 1849).

Production of forged document in Court.— Where accused filed forged documents along with writ petition knowing them as such. He was held to have committed offence punishable under Section 471 read with Section 465, Penal Code, and sentenced to six month's R. 1. (1983 P. Cr.L.J. 2405).

Where a forged certificate was filed in pursuance of Intra-Court Appeal which was subsequently dismissed as not pressed. Conviction and sentence of one year's R. 1. awarded by Intra-Court Appeal Bench after suo motu trial of accused was maintained by Supreme Court (NLR 1983 SCJ 474).

User resulting in no loss or gain to any one.— Where filing of alleged forged documents and false affidavit in a writ petition which is withdrawn for having resort before competent form does not attract Section 471, No advantage whatsoever having been obtained by writ petitioner he could not be made liable under Section 471/465 (NLR 1986 UC 459).

The use of a forged document is fraudulent and dishonest under Section 471 even though the document itself was unnecessary for the case of the party using it (1985 P. Cr. L.J. 9882).

Use by accused necessary.— It is immaterial whether the party files the document personally or though a pleader (AIR 1932 Cal. 545 (DB) ; AIR 1924 Cal. 718 (DB).

Where accused used fictitons certificate knowing the same was forged. Conviction under Section 471 Penal Code, was maintained. (1985 P. Cr.L.J. 1764).

3. "Knows or has reason to believe to be a forged document".— Where there is no evidence to show that the accused knew or had reasons to believe that the cheque was forged document and with that knowledge he had used cheque it was held that the accused, could not be convicted under the section (AIR 1979 SC 1506).

Accused No. 1 forged receipts and collected donation from various persons with the help of accused No. 2. There was no evidence to show that accused No. 2 was taken in confidence or that he knew that the receipts were forged. Accused No. 2 merely accompanied accused No. 1 for coll ecting donation and, therefore he cannot be convicted (AIR 1979 SC 1342 = 1979 Cr LJ 1078).

The mere fact that the document bears a suspicious appearance on the face of it cannot be regarded as *prima facie* evidence of guilty knowledge of the accused that it is not a genuine document but a forged one (AIR 1952 Hyd 7 ; 1952 Cr LJ 215). Use of a document knowing that the document was not genuine but a false document constitutes an offence under section 471. (NLR 1989 UC 79 (DB).

The mere circumstances that documents had been forged would not be sufficient to justify a conviction. It is necessary to prove in order to obtain such a conviction that the use has been fraudulent or dishonest and in addition that the person putting in the document knew, or had reason to believe, that the originals were forged (1986 P. Cr. L.J. 2072 ; 14 DLR 281 (DB).

One of the essential ingredients of section 471 is the knowledge or reasonable belief on the part of the person using the document that it is a forged one (1981 CrLJ 1301). But the mere fact that accused was found to be in possession of a forged document would not justify a conclusion, in the absence of any other material that he knew or had reason to believe that the document was forged (AIR 1963 SC 822).

Accused Jahangir Hossain fraudulently or dishonestly used as genuine the forged mark-sheets of S. S. C. and H. S. C. Examination which he knew or had reason to believe to be forged document. Therefore, he is guilty of the offence under section 471 of the Penal Code (Jahangir Hossain Vs. The State 40 DLR (1988) 545 = 1987 BLD 366).

Mere possession of forged document is not enough (50 Cr LJ 581 ; AIR 1949 Mad. 434 ; 1949 MWN 16). The fact that a man who files a document is interested in establishing its contents does not raise a presumption that he filed it knowing it to be forged. Conduct is the principal criterion of guilty knowledge (17 CWN 94 ; 13 Cr LJ 449). Where there is no evidence at all to show that the accused know or had reason to believe that the cheque in question was a forged one, and with the required knowledge the accused had used the cheque the accused could not be convicted under section 47 (AIR 1969 SC 1506; See also AIR 1979 SC 1342).

4. Use of Copies of forged document.— The use of certified copies of forged originals by a person who knows that the originals are forged amounts to making use of forged documents within the meaning of this section (28 All 402 ; 1957 ALJ 491 ; 26 Cr LJ 929 ; AIR 1925 Oudh 413).

These decisions are well-grounded as when a person files a copy he is using in substance that original itself, if the filing is with the knowledge that the copy is the copy of a forged document. In the result it must be held that the filing of the certified copies with the knowledge that they are copies of forged documents would amount to user of the document (Jai Narain Singh v. State, AIR 1956 Pat. 354 (357) = 1955 B. L. J. R. 641 = 1956 Cr.L.J. 1091).

The Supreme Court has observed that the section penalises the use of a forged document as genuine but where an attested copy would serve the purpose of the original forged document, production of such a copy would amount to use of the original forged document as genuine (1963) (3) SCR 376 ; 1973 (2) Cr LJ 698 ; 1963 SCD 186).

Where the accused forged documents as genuine knowing it to be forged, it was held that whether original document was first forged and the copy was made of forged document or copy was false document makes little difference and the conviction was upheld (1970 SCD 471 = 1970 UJ (SC) 507).

Mere filing of a copy of forged document itself does not amount to user of the original document. But the filing of such copy with the knowledge that it is a copy of forged document would amount to user of forged document (1970 SCD 471). A person may, for instance, produce a document purporting to be the copy of a deed, horoscope or a will, in which cases if either the original or the copy is false he may be charged under this section provided, of course, that there is evidence of his criminality (Lala Ojha Vs. State, ILR 26 Cal 863).

5. Evidence and proof.— In order establish an offence under section 471 of the Penal Code it shall be necessary to prove by independent evidence that the person accused of such offence used the questioned document knowing or believing it to be a forged document. The mere proof that a certain document is a forged one is not sufficient to establish an offence under the said section, because no conclusion can be drawn from the document itself that it was also used and that too fraudulently or dishonestly (Md. Tinkari vs. State, 14 DLR 281 ; AIR 1940 All. 55, 6 BCR 34 (AD) ; 5 BCR 218 (AD).

In order to convict a person for dishonestly or fraudulently using a forged document the prosecution has to prove beyond reasonable doubt that he know that the document was forged. It is not sufficient merely to prove that the document was not executed by the person by whom it was alleged to have been executed. (AIR 1947 Pat. 251 ; AIR 1955 N. U. C. (Bom) 4257 (DB). So far charge under section 471 is concerned no evidence has been adduced to prove that the petitioner used impugned sale deed as a genuine document knowing it to be a forged one. In fact that document was never used by the petitioner anywhere and as such charged under section 471 Penal Code falls through because of total absence of evidence about user of that document (Lalit Mohan Nath Vs. State, (1987) 39 DLR 398).

Where accused had not made any forgery on loan application or supply order, the mere fact of his having brought an application to an officer was not sufficient to show that accused knew or believed that such applications were forged documents. (PLJ 1986 Cr. C 464 = NLR 1986 Cr.L.J 484).

Where a forged document was found with the accused but it was not explained by the prosecution how it came to be with him nor that he used the same, and the accused specifically alleged that the case was false. It was held that his conviction either under Section 468 or under Section 471 was not maintainable (14 DLR 281 (DB) : AIR 1925 Nag. 294; AIR 1952 Hyd. 17 (DB).

Forgery cannot be presumed as a matter of law. It must be established as any other fact. The mere fact that the purchaser of a property is in possession of a document which is shown to be a forgery would be a forgery would be no evidence of the guilt of the purchaser (AIR 1952 Hyd 7 ; ILR 1951 778; 1952 Cr LJ 215). Where a cheque was forged by co-accused but it was presented to the bank and enceashed by the accused who knew that it was forged. Conviction of accused was upheld (1984 P. Cr. L. J. 1123).

Ordinerily in determining whether a document is forged or genuine, comparison of handwriting is valuable aid (AIR 1933 Pat 481 = 34 Cr LJ 828). But evidence of handwriting expert without corroboration was held insufficient to bring home the guilt to the accused (40 Mys. LJ 880).

Where the handwriting deposed that the body of forged cheque was in the accused's handwriting but he was not certain about the signature, it was held that it could not be said that the accused forged the cheque (AIR 1975 Sc 1843 = 1975 Cr LJ 1645 = (1975) 4 SCC 252).

Under this Section what is to be determined is whether the use made of the document constituted only an attempt to use it as genuine or whether it constituted the completed offence of its user as genuine. If the attempt does not bear fruit at all, the user does not go beyond an attempt. Something must be done (or omitted to be done) by any body else to show that the document was treated to be genuine. The degree of success met by the accused in using the document is immaterial (1970 All AWR (HC) 734 = 1970 All Cr. R. 534).

Merely because explanation given by accused regarding possession of forged cheque is not convincing, no adveerse interence can be drawn against defence (AIR 1979 SC 1956 = 1979 UJ (SC) 359 = 1979 Cr. LR (SC) 720).

Accused 1 forged a number of receipts and passed the same as genuine and collected donations from various persons in aid of a famine relief fund. There is absolutely no allegations that either when the receipts were printed by accused 1 or at any other time the appellant was taken into confidence and had any knowledge that the receipts had been actually forged by the accused, nor is there any evidence that the appellant got any money or derived any profits from the amounts realized by accused. 1. The only limited role played by the appellant was that he accompanied accused 1 wherever he went for collecting donations. It was the duty of the prosecution, before the appellant could be convicted under Section 420/34 or 471/34 to prove that the appellant knew from before that the receipts used by accused 1 were forged. Secondly, it must also be proved that accused 1 had shared the fraudulent intention with accused 1 in passing as genuine forged receipts and obtaining donations from various persons on false pretexts (Dasrathlal Chandulal Joshi v. State of Gujarat, (1974) 4 SCC 338 (338, 339) = 1979 Cr. L. R. 111 (SC) = 1980 S. C. Cr. R. 146).

In the matter of the user of the forged documents as genuine the appellant was no where concerned and the only manner in which criminal liability was foisted upon the appellants was by making the averments in the complaint. That accused no. 2 Smt. Manju Gupta, who is the Sectetary of the said Society has been benefited from the said forgery and fraud. It was held that such an averment is clearly inadequate and insufficient to bring home criminality to the appellant in the matter of the alleged offences. In such basis even the other office bearers of the Society such as the Chairman, Vice-Chairman, Treasurere or even the Members of the Managing Committee could be said to have been benefited by the alleged forgery and fraud and ven such office bearers or members would become criminally liable which would be manifestly incorrect. Simply because the appellant was the Secretary of the Society, it does not mean process must be issued against her unless her connection or complicity with the offences is at least *prima facie* indicated (Manju Gupta v. Lt. Col. M. S. Pointal, (1982) 2 S. C. W. 198 (201).

When a fact has to be proved before a Court or a Tribunal and the Court or the Tribunal calls upon the person who is relying upon a fact to prove it by best evidence, it cannot be a defence as to the offence of forgery if that best evidence which, in this case was the invoices, turn out to be forged documents,. A person who produced those documents cannot be heard to say that he was required to prove his case by the best evidence and because he was so required he produced forged documents (Jagannath Prasad v. State of Uttar Pradesh AIR 1963 S. C. 416 (419) = 1963 A.L.J. 1).

The case for the prosecution was that the first accused used to give false T. P. I. numbers in his sale-notes. The prosecution cannot rely on the number in T. P. I. form for showing that the quality of the tobacco transported was the first quality. It may be that the first accused gave a wrong number but that would not prove that he transported the first quality tobacco on which higher duty is payable under the guise of the second quality (Prakash v. State of Haryana 1979 Cr. L.R. 467 (472) (SC). Where A forges an endorsement on a passport which would unable B to travela foreign country which B is not otherwise entitled, B would be guilty under this section, and A would be guilty of abetment provided he made the endorsement in his own hand (AIR 1971 SC 2593).

The offence under Section 471, Penal Code, is clearly made out when the accused used forged certificates by handing them over to two persons which led

them to believe that they were genuine appointment letters issued by the concerned department (State of Uttar Pradesh v. Ram Dhani Pandey, 1980 All. L.J. 1067 (1069).

Using forged document as genuine in the absence of *mens rea* is not an offence.— Where the accused was laid down on account of an accident and the treatment of his injured family members and himself was entrusted to his uncle-in-law and the documents given by the latter to the accused were accepted by him as genuine and were utilized for the purpose of medical re-imbursement. In the absence of *mens rea* on his part, his conviction under Section 471 Penal Code, was held to be improper and set aside (Bhagaban Shu v. State of orissa, 1989 Cr. .J. 556 (Orissa) ; Bank of India v. yeturi Meridi shamear Rao, (1987 Cr.L.J. 722 (725) SC = AIR 1987 SC 821).

Where Court came to the conclusion that there was reasonable possibility that explanation put forward by accused was true, or in any case prosecution version was also not satisfactorily proved beyond doubt. Defence plea was accepted and accused acquitted. (1986 P. Cr. L.J. 449 (DB); Lalit Mahan Nath v. state (1987) 39 DLR 398).

Where the accused was proved to have encashed a forged cheque, by independent evidence, though be denied its encashment ; it was held that accused was guilty of using the cheque fraudulently and dishonestly as genuine knowing the same to be forged and as such was guilty of an offence under Sections 420 and 471 (1970 P. Cr. L.J. 308 = 1970 DLC 73).

Circumstantial evidence.— Where an offence is sought to be proved by circumstantial evidence, no link in chain, should be broken and circumstances should be such as to be incapable of being explained away on any hypothesis other than guilt of accused. Circumstances brought on record against accused where not found to be sufficient to prove him guilty beyond all reasonable doubt. Circumstantial evidence was disbelieved (1986 P. Cr. L.J. 449 (DB).

Burden of proof cannot be laid on accused.— Conviction by placing burden on accused to prove his innocence rather than laying burden on prosecution to prove its charge suffers from incurable deficiency (NLR 1987 Cr. L. J. 249 = 1987 P. Cr. L.J. 755).

The onus of proof of the existence of every ingredient of the charge always rests on the prosecution and never shifts. It was incumbent therefore on the State to bring out, beyond all reasonable doubt, that the number of labourers actually employed in carrying out the work was less than that stated in the summaries appended to the bills paid for by the Government. (Abdulla Mohammed Pagarkar v. State (Union Territiory of Goa, Daman and Did) AIR 1980 Sc 499 (503) = 1980 Cr. L.J. 220).

When an accused is prosecuted under Section 471, onus is on the prosecution to establish by adducing cogent and convincing evidence that the accused knew or had reason to believe the lottery ticket to be a forged document when he presented it to the Treasury Officer and later before the Director to claim the third prize on the basis thereof (Chatt Ram v. State of Haryana, 1980 Bihar Cr. C. 61 (63).

Absence of the forged document.— It can not be laid down as a proposition of law that in the absence of the forged document the court can in no case hold the offence of forgery to be established, but to claim such a finding the court in the absence of the document said to be forged, the evidence must be free from all reasonable doubt (1972 SCC (Cri) 153).

6. Punishment.— Where using of forged permit is very common, deterrent punishment is justified (1965) 2 Cr LJ 822 = AIR 1965 SC 192 (1965) 2 SCJ 474, 1957 Cr LJ 1424 = 1955 Cr LJ 871 = AIR 1955 SC 322).

Where the accused withdrew forged bank guarantee bond after detection of forgery and paid the amount, sentence of one year's R.I. was reduced to period already served and fine of taka 1,000/- reduced to taka 500. (AIR 1979 SC 1343).

A person who is found guilty of offence of forgery, if he makes use of such forged document, then he can equally be punished under Section 471, Penal Code, but the measure of punishment would depend upon the conviction of the accused of offence which may be under any of the sections 465 to 469 of the Penal Code. When a person is found guilty of two offences, he can be awarded two separate punishments and therefore a forger can also be punished for making use of such forged document under Section 471 Pean Code (S. V. Rama Rao v. State of Mysore, (1966) 1 Mys. L. J. 500 (507).

Although a forged Bank Guarantee Bond was filed by the appellant before the Public Works Department but as soon as the forgery was derected the appellant immediastely withdrew he bond and paid taka one lakh and forty three thousand by way of fixed deposit receipts. Thus no loss was caused to anybody. In this view of the matter we are inclined to take a lenient view of the matter. The Supreme Court while upholding the conviction of the appellant reduced the sentence of imprisonment to the period already served. For the balance of sentence remitted an additional fine of taka 4,000 was imposed. The total fine imposed was taka 5,000. (Dasrathlal Chandulal Joshi v. State of Gujarat, AIR 1979 SC 1342 (1343)= (1979) 4 SCC 716.

A person dishonestly using as genuine a forged document can be punished under Section 471 with the punishment provided under Section 467 (AIR 1927 Oudh 630 = Cr.L.Jour 631).

Protracted trial.— Where accused had suffered a protracted trial, sentence of imprisonment was reduced to one already undergone (1984 P. Cr. L.J. 1123). Where accused faced trial for sufficiently long time and remained in Police custody for 1-1/2 months, and under went imprisonment for over five months. His sentence was reduced to imprisonment already undergone (1986 P. Cr. L. J. 1953 (DB).

Where accused remained in jail for 15 days after his conviction, lost his job and suffered agony of trial. Remaining sentience of 2-1/2 months R. I. was altered to fine of taka 700 (1985 P. Cr. L.J. 1764).

7. Practice and procedure.— A person convicted under Sections 467 and 109 cannot be further convicted and sentenced under Section 471 for using that document as genuine (AIR 1926 Nag. 137 = 26 Cr.LJ 1387).

A person charged under section 467 can be convicted under Section 471, though not charged with it, provided it appears in evidence that he has committed an offence under Section 47 (21 Cr LJ 410).

. **Sanction.**— A postman was charged under Sectiion 409, 467 and 471 for misappropriating amount of money order and forging thumb impressions and using such forged documents, it was held that section of Governor General was necessary for prosecution under Samction 471 but that the trial Could proceed for other offences (AIR 1941 Mad. 38=42 LJ 2631940 MWN 1116 = (1940) 2 MLJ 564).

Where the suit is based on a forged cheque and the criminal court has taken cognizance of offence under Section 471, sanction of the Civil Court is not necessary(AIR 1969 Guj 195 Cr LJ 902). If the person using the document alleged to be forged was a party to a proceeding, then the sanction of the Court is a necessary preliminary condition to the institution of a prosecution under this section. But no such sanction is required where the person producing such

document was only a withiness (Gopalkrishna Menon V. D. Raja Reddy, 1983 Cr .L.J 1599= AIR 1983 SC 1053= 1983 Cr. L.R(SC) 449).

Compromise.— Where leniency in sentence was sought on the ground that after conviction, parties had entered in to a compromise on the basis of which disputed property was inherited by parties according to Muslim Law. Sentence of imprisonment was set aside till rising of Court and amount of fine was reduced from Rs. 2,000 to Rs. 1,000 on each count (1985 P.Cr. L.J. 1738).

Complaint, who may file.— For taking proceedings against a person who is found to have used a false document dishonestly or fraudulently in any judicial proceedings, resort may only be had to Section 476 of the Code of Criminal Procedure. (AIR 1964 SC 725 = (1964) (1) Or. L. Jour 489 (SC).

For prosecuting an accused under section 471 a complaint by the court may not be necessary as required under section 196(1) (b) of the Cr. P.C. which may be made only when the offence is committed by a party to any proceedings in any court (AIR 1981 SC 1417).

It is held that since the document alleged to have been forged was not in the present case produced in the Court, the provisions of section 195 (1) (b) (ii) of the Code of Criminal Procedure have no application (Sushil Kumar v. State of Haryana, 1988 Cr. L. J. 427 (428) (SC) = AIR 1988 S. C. 419).

Place of trial.— Where an offence is a continuing offence, such as the use of a forged permit by a pubic vehicle, the driver and owner of the vehicle may either at the place where the permit was recovered or where the forgery was committed (AIR 1965 SC 1921).

8. **Charge.**— The charge should run as follows :

I (name and office of the Magistrate/ judge, ete.) hereby charge you (name of accused) as follows : That you, on or about .... day of ...., at fraudulenty (or dishonesty) used as genuine certain document, to wit ....,which you knew, or had reaseon to be beived, at the time you used it, or had reason to be belived, at the time you used it, to be forged document, or Government promissory note that you thereby committed an offence punishable under Section 465 and 471 o the Penal Code, and within my cognizsnce.

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

Where two persons where charged and one of them pleaded guilty, held charge against the other should be proved independently (1986) Cr LJ 1191 Mad = 1985 Mad LW (Cr) 148).

Again, since the offence of having a forged document in one's possession with intent to use it and punishable under Section. 474 is necessarily implied in the offenec under this Section a person cannot be convicted of the two offences, at the sometime (Nuzar Ali, v. state 6 N.W. P.H. Cr. 39).

Moreover, the terms of this section may at times overlap those of Section 196. In that case the proper course for the Magistrate is to charge the accused under this Section and commit the case for trial to the Court of Session (Kherode Chunder Mozumdar, I.R. 5 Cal. 717).

Where the accused files a number of forged documents in one case, he may be charged with and tried in respect of all the documents as one offence. The accused was charged with using as genuine eleven froged receipts which put in by him in sets on three separate occasions, each set with a written statement, in there suits pending against him, it was held that as the accused had used the document in three

sets, he could be convicted on three counts and not separately for each document (Raghunath Das, I. R. 20 Cal. 413).

Where a person was charged having committed one offence only but the lower appellate Court could, under the provision of Sections 237 or Section 238, having convicted that accused without a charge of other offence also, the appellate Court can, in an appeal against the conviction for an offence for which charge was framed, alter the conviction for other offence (AIR 1952 S.C. 167; Followed in Jakangir Hossain V. State (1988) 40 DLR 545).

"In the case of state , Vs. Mohammad Latif, reported in PLD 1962 Kar 756 (DB), Karachi High Court has also held that where the accused is convicted for one offence but on appeal the appellate Court finds him guilty of another offence he may be conivicted and sentenced for that offence. In this view of the law and judicial pronouncements made in the aforesaid decisions I alter the conviction passed by the trial judge on the appellant Jahagir Hossain from under Section 468 to section 471 of the Penal Code maintaining the sentence passed upon him" (Jahangir Hossain Vs. The State, (1988) 40 DLR 545).

472. **Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.—** Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467 of this Code, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punishable with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

473. **Making or possessing counterfeit, seal, etc., with intent tocommit for ery punishable otherwise.**-Wnoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or, with such intent has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term wihch may extend to seven years and shall also be liable to fine.

474. **Having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine.—** Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in section 466 of this Code, be punished with imprisonment of either description for a trem which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in section 467, shall be punished with [1][imprisonment] for life, or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

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

475. **Counterfeiting device or mark used for authenticating documents described in section 467. or possessing counterfeit marked material.—** Whoever counterfeits upon, or in the substance of, and material, any device or mark used for the purpose of anthenticating any document described in section 467 of this Code, intending that such device or mark shall be used for the perpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in this possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

476. **Counterfeiting device or mark used for authenticating documents other than those described in section 476, or possessing counterfeit marked material.—** Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the pupose of authenticating any document other than the documents described in section 467 of this Code, intending that such device or mark shall be used for the pupose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall slso be liable to fine.

477. **Fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security.—** Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces, or attempts to cancel, destroy or deface, or secretes or attempts to secrete any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such documents, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[2][477A. **Falsification of accounts.—** Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possesion of his employer, or has been received by him for or on behalf of his employer, or willfully, and with intent to defraud, makes or abets, the making of any false entry in, or omits or alters or abets the omission or alteration of any material particalar from or in, any such book, paper, writing, valuable security or account, shall be punished with imprionment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation.— It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was commtted.]

1. Substituted by Ordinance No. XLI of 1985, for "transportation".
2. 477A was inserted by the Criminal Law Amendment Act, 1895 (II of 1895), s. 4.

Synopsis

1. Scope and applicability.
2. Falsification of accounts.
3. "With intend to defraud".
4. Falsification to defraud.
5. Wilfully.
6. "Clerk, officer or servant."
7. Evidence and proof.
8. Sentence.
9. Practice and procedure.
10. Charge.

1. Scope and applicability.— The section speaks of two offences (1) falsification of accounts and (2) making of false entry or omitting or altering or abeting the omission or alteration of an entry both with intent to defraud. These two offences are distinct and not interdependent. The section makes falsification of accounts punishable even though there is no evidence to prove misappropriation of any specific sum of money (AIR 1955 U. U. C. (Mad) 3922). The section only requires the falsification of accounts with intent to defraud. It does not require any deprivation of property (AIR 1951 Mad. 894 = 52 Cr LJ 1093 = 1951 MWN 384 = 1973 MLJ (Cr) 533 = 1973 Cr LJ 1534).

Where, therefore, the President and a clerk of a co-operative society prepare false and bogus bills regarding sales of certain goods and enter them in the accounts of the society, their act is done with an intent to defraud and is fraudulent within Section 477-A, even though nobody is actually deprived of any property (AIR 1951 Mad. 894 = 52 Cr LJ 1093 = 1951 MWN 384 = 1973 MLJ (Cr) 533 = 1973 Cr LJ 1534).

2. Falsificationof accounts.— When there is a charge under S. 467, Penal Code, against a Government servant for making false entries in transport permits of Excise department with intent to defraud the Government (AIR 1960 SC 400 = 1960 Cr L. J. 541), or where bogus entries have been made by the accused in Bank account books to defraud the Bank of money (NLR 986 Cr L. J. 490; NLR 1986 Cr. L. J. 510 = 1986 P. Cr. L. J. 2076), or where a Bank employee signed as Bank Manager to show that payment had been made to an account holder (NLR 1989 Cr. C. 79 (DB), or where the supervisor of a society gets affixed a false thumb impervisor of a society gets affixed a false thumb impression to a debit entry in the account and misappropriates the money (AIR 1935 BOm. 30 (DB), or where thed accused A purchased 60 Paras of paddy from B but credited only 14 paras in the Government account and misappropriated the rest. In the receipt given to B the quantity of paddy purchased and amount paid therefore was shown correctly but in the counterfoil A entered only 14 paras (AIR 1955 TRav-Co. 271 = 1955 Cr. L. Jour 1539 (DB), or where the complainant entrusted certain amount to the accused, an employee of post office, for sending the money order but the accused did not despatch the money and omitted to enter the amount in account books and registers but in the counterfoil of the receipt issued for the amount, the accused entered the particulars of the earlier money order. It was held that the accused had dishonestly misappropriated the amount entrusted to him and had falsified the account (AIR 1953 Trav. Co. 557 = ILR 1953 Trav-Co. 600 (DB).

Where accused failed to credit various amounts received by him from account-holders in their repective accounts and further made no entry regarding amount so received in ledger. By falsification of ledger, accused hnd intended to defraud Bank or Account-holders, as such charge under S. 477-A, Penal Code, was fully brought home to accused (1987 P. Cr. LJ 1866 (DB).

In Rasul Vs. State, AIR 1972 SC 621 the accused a head clerk in an office withdraw a certain sum from treasury for payment of the office building and made a false receipt of such payment allegedly granted by the landlord, and sent the same to

the office of the Accountant General. But no entry was available in the books of the Accountant General and the landlord also accepted rent for the subsequent period under such circumstances, it was held that the mere fact that receipt is missing from the office of Accountant General does not establish that the original was not sent and accordingly the charge of falsification of accounts must fail.

Time of falsification immaterial.— In order to sustain a conviction under section 447-A, Penal Code, the prosecution is not required to show at what point of time the falsification of accounts had been made. The charge is brought home by proving the factum of falsification of accounts wilfully with the intention of defrauding a person (1979 P. Cr. L. J. 255 = 1970 DLC 5 (DB).

3. "With intent to defraud".— The expression "intent to defraud" contains two elements viz, decit and injury. A person is said to decive another when by practising 'suggestis falsi' or suppressio vori, or both he intentionally induces another person to believe a thing to be true which he knows to be false, or does not believe to be true (AIR 1976 SC 2140; AIR 1962 SC 1821). Accused cannot be convicted under Section 477-A, in the absence of proof that the alterations were made in the handwriting of accused (1957 Cr LJ 1431 = AIR 1957 Crissa 8).

The accused, Nazer of Special Judicial Magistrates Court received the amount of fine but did not dposit in the Treasury. He made entries in the Register of Judicial fines that money had been deposited. The entries were found to be false to cheat the Government. The accused was held guilty of offence under Sections 467, 468 and 477-A (1984 Cr LJ (NOC) 153 (P & H).

The expression "Fraudulently" and "with intent to defraud" are synonymous. If there is an intention by deceit practised to cause wrongful loss, that is dishonesty, but even in the absence of such an intention, if deceifful act wilfully exposes anyone to risk of loss, there is fraud (PLJ 1988 Cr. C. 39). In order to make a person liable under Ss. 464 and 477-A, he must be proved to have made a false statement or fraudulently altered any book or register with intent to defraud (PLJ 1988 Cr. C. 39; 1970 P. Cr. LJ 255).

Where the accused employee made entries as directed by his officer. There was no evidence on record suggesting that accused had forged entries dishonestly in order to defraud the Government. Offence was held not to have been proved against accused (1985 P. Cr. L. J. 2091).

No actual loss or injury caused.— The expression "intent to defraud", implies conduct coupled with intention. An act done with intent to defraud is fraudulent within the meaning of section 477-A, Penal Code, even though nobody is actually deprived of any property (PLJ 1988 Cr. C. 39 = AIR 1988 Pat. 165 (DB).

4. Falsification to conceal fraud.— If the intention with which a false document is made is to conceal a fraudulent or dishonest act which had been previously committed, that intention could not be other than an intention to commit fraud. The concealment of an already committed fraud is a fraud. A man who deliberately makes a false document in order to conceal a fraud already committed by him is undoubtedly acting with intent to commit fraud, as by making the false ddocuments he intends the party concerned to believe that no fraud had been committed (AIR 1962 SC 1821).

5. "Wilfully".— The word "wilfully" used in the Code means "intentionally and deliberately" but it does not by itself mean with "intent to defraud". The latter expression carries the import of two elements, deceit and injury. Deceit may arises by "suggest is false" or "suppressio veri" or both i. e. , the accused intentionally induces another to believe a things to be true, while, he knows it to be false or does

not believe to be true. As far 'injury' it denotes 'any harm wheterver illegally caused to any person in body, mind, reputation or property' (AIR 1976 LC 1490).

6. "Clerk, officer or servant."— Offences contemplated by this section can be committed only in respect of documents mentioned in Section 477-A, belonging to inter se is that of principal and agent. Therefore, in the absence of any special arrangement to show that a particular partner was in fact appointed to act, in the capacity of clerk, officer or servant, it could not be said that the said partners had committed an offence under Section 477-A (1972 Guj LR 617).

C was servant of the Insurance Company as he was its agent and received payment for doing work as an agent. He being a full time servant of the Union Agencis does not mean that he could not be a servant of any other company, or other employer (1962) 2 Cr LJ 805 = AIR 1962 SC 1821).

The president of a co-operative society is "officer"employed by the society for management of the affairs of the society and is liable to conviction under Section 477-A, (1972 Guj LR 198).

7. Evidence and proof.— In order to bring home an offence under this section the prosecution has to establish three points viz (i) that at the material time the accused was a clerk, officer, or servant under employment, (ii) that acting as such he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him and on behalf of his employer etc, and that (iii) the accused acted wilfully and with intent to defraud (AIR 1976 SC 2140). Where the accused is charged with embezzling certain amounts from Government treasury and falsifying the accounts to cover up those defalcations during a particular period, evidence relating to similar entries admissible under S. 15 of the Evidence Act. In a prosecution under S. 477-A, Penal Code, it is not sufficient for the prosecution to prove that the entries which are subject-matter of the charge are wrong entries and that they were made by the accused, the prosecution must go further and prove that those entries were false entries and the accused made those entries wilfully and with intent to defraud the State. Therefore, the prosecution could prove similar instances to prove that the accusedd made the entries in question wilfully and with intent to defraud. Those instances could also be proved to rebut the accused's plea that he innocently made those entries at the behest of his superiors. But that evidence could not be used to show that the accused was guilty of temporary misappropriations in the past or to probabilies the charge levelled against him by proving his past bad conduct, if any (AIR 1965 Mys. 128).

A conviction under the section cannot be sustained where the prosecution has failed to show in what way the accounts were falsified or altered by accused (1970 SC Cr R 275).

Over act of an accused in altering, mutilating or falsifying any book or paper with intent to defraud must be proved. Mere commission to make entry in eash bookd is not sufficient (1970) 35 Cut LT 1256).

Pertitioners acting in collusion with each other caused fabrication of the documents. Demand Draft and by using it, co-accused dealer lifted goods without paying a single farthing. All these five persons were put on trial together on common charges under sections 467/477-A P. C. for committing forgery. No interference is called for. Petition dismised (Md. Insan Ali Vs. State, 1987 BCR 145 (AD).

Petitioner, an M. B. B. S, was a demonstrator in the Dhaka Medical College. He held a post mortem examination on the dead body of one Nurjahan Begum, In the first report he opined that the death was caused by drwoning and suicidal in nature.

Subsequently he prepared another post mortem report stating that death was caused by starngulation and was homicidal is nature. He pleaded that he was an inexperienced doctor. He contended that he carried out the order of the superior officer who asked him to prepare the second post-mortem report finding the first one to be incorrect. He was senrtenced to one years rigorous imprisonment. Held: Explanation that he carried out the order of the Superior officer who found the first report incorrect is unacceptable in that when the second report was going directly opposed to the first report the petitioner should have taken duc care to the order of the Superior officer in writing stating the circumstances in which a fresh report was being called for, stating the reasons justifying a redical departure from what was stated in the first report. He was endangering the neck of some one under section 302 Penal Code. In discharging his professional duties, a doctor must strictly observe the rules of medical ethics and jurisprudence as well as have regard to the laws of the country which do not spare the kind of conduct for which he now stands convicted (Azizul Haque khan Vs. The State, 1985 BCR (AD) 61).

Acquitted in the first trial on a charge under section 409 Penal Code on the finding that signatures in question were made in good faith. Second trial started under section 477-A Penal Code for falsification of accounts not maintainable as the same question was in issue as in the second trial (Abdul Majid Vs. The State (1962) 14 DLR 550).

Opportunity of defence not given to accused.— Where accused was convicted under S. 477-A, Penal Code, after being acquitted of charge under S. 409, Penal Code. Hed was not given an opportunity to meet the allegations of charge under S. 477-A, Penal Code and a such had no opportunity to defend himself against charge levelled against him. There was manifest danger of miscarriage of justice. Conviction was set aside and case remanded for retrial (1986 P. Cr. L. J. = PLJ 1986 Cr. C. 338 = NLR 1986 (Cr. 344 (2).

Handwriting.— In the absence of proof that the alterations are in the handwriting of the accused, the accused cannot be convicted of an offence under this section (AIR 1957 Orissa 268 = 1957 Cr. L. J. 1431 (DB).

Where the accused denied that he had his signature on the impugned document and the prosecution witness who attested signatures of the accused neither deposed to having seen the accused signing the document nor any documents signed by the accused was received by them in reply or submitted to them. It was held that to be acquainted with a persons signature or initials or handwriting, the person must actually see the signatory signing or writing or when he receives documents purporting to have been signed by the person in answer to his own letters or when the document is submitted to him. Therefore the accused could not be convicted on such evidence (PLD 1970 Dhaka 690).

Where none of prosecution witnesses stated that overwriting and manipulations in bills were in the handwriting of accused. Mere non-existence of overwriting and maniupul-ations before bills were handed over to accused, would not make him liable for the same. Accused was given benefit of the doubt and acquitted (1984 P. Cr. L. J. 2861 = NLR 1984 A. C. 147).

8. Sentence.— Where the accused is guilty of falsification of account and abetment in order to facilitate black-marketing and evasion of sales tax, sentence of fine should be deterrent and the accused should not be allowed to enjoy illgotten wealth (1953 Mad. W. N. 722).

Where the amount involved is very small, a long sentence of imprisonment should not be passed. Thus where the amount involved was only one hundred

reupees, a sentence of 5 years' rigorous imprisonment was held to be unduly severe and was reduced to one year R. I. (1959 Ker. L. R. 847). Where record did not show that accused derived any pecuniary gain for himself from the amount for which he was convicted under s. 477-A, Penal Code. Sentence of fine was reduced in the interest of justice (1984 P. Cr. L. J. 512).

9. Practice and procedure.— Under S. 222 (2), Cr. P. C. serveral defalcations made at different times provided they are made within the course of one year, can be joined together as one offence of criminal breach of trust, and such a charge can be joined with another charge ot charges under S. 477-A, Penal Code, even though there may be a number of false entries made to cover several acts of defalcations, provided the case falls under S. 235 (1). If false entries are made for the purpose of covering a defalcation their plurality would not preclude them from being joined in one charge. A charge under S. 477-A, is one of falsification of accounts and not for making false entries. Several false entries made for screening an offence of criminal breach of trust may, therefore, constitute, on offence (AIR 1963 Guj. 15).

But this view was not accepted in a later case and it was held that each group of false entries made in the account books to cover up any distinct offence of criminal breach of trust or dishonest misappropriation by themselves constitute a distince offence of falsification of accounts. Every one of them should be charged separately. Hence a series of charges under Section 477-A, Penal Code even though committed in the course of one year or less are not permitted to be lumped together (AIR 1965 Mys. 128).

Joinder of several charges of misappropriation and corresponding charges of falsification of accounts for more than three offences in the same trial is illegal (PLD 1963 Dhaka 494 = 14 DLR 398). When charge was only for an offence punishable under section 468 of the penal Code, there could be no conviction under section 477-A (State of keraln V. C. P. Ahmed Koya 1985 M. L. J. (Cr) 326 (331).

Acquitted in the Ist trial on a charge under section 409, Penal Code on the finding that signatures in question who made in good faith. Second trial started under section 477-A, Penal Code for falsification of accounts is not maintainable as same question was in issue as in the second trial (Abdul Majid Vs. The State, 14 DLR 550; 14 DLR 398).

Who can complain.— The complaint under this section can be made only by a person with whom the accused is connected in any of the capacities mentioned in the section. Therefore a manager or director of a bank cannot be made liable under S. 447-A by a customer of the bank (1950 All. L. Jour 808).

Sanction.— The provisions of this section are not covered by the provisions of Section 195 (1) (c), Criminal P. C., 1898 and consequently, no sanction is required for in institution of a prosecution under this section with regard to document produced in Court (AIR 1932 Sindd 53 = 33 Cr LJ 328).

Where section for complainant under Section 120-B is not obtained, trial on substantive charge under Section 477-A, is not vitiated (AIR 1967 SC 1590 = 1967 Cr LJ 1401).

10. Charge.— The terms of Section 477-A, indicate that a certain elsticity is permissible in framing a charge under it and it is not necessary to confine the charge to one particular false entry, and a general falsification of specified books, papers or accounts may be alleged in combination with an allegation of fraudulent intent, no details of the person affected by the fraud or the amount involved, or the date or dates on which the offence was committed being required. A number of falsification can be included in a single charge provided they are connected with the same fraud;

that is to say, although it is possible to regard them as separate offences, the law provides that they may also be regarded as one offence (AIR 1944 oudh 122 = 45 Cr LJ 538; 1944 OWN 1).

The offence of criminal breach of trusted of falsifying muster rolls month after months for a full year can be tried together (1930) 6 Luck 411).

Of Trade, Property and Other Marks

[2][478. **Trade mark.—** A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark,

and for the purposes of this Code the expression "trade mark" includes any trade mark which is register in the registered of trade marks kept under the [3]Patents, Designs and Trade Marks Act, 1883, and any trade marks which, either with or without registration, is protected by law in any British possession or Foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are under Order-in-Council, for the time being applicable.

[2]479. **Property mark.—** A mark used for denoting that moveable property belongs to a particular person is called a property mark.

[2]480. **Using a false trade mark.—** Whoever marks any goods or any case, package or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark.

[2]481. **Using a false property mark.—** Whoever marks any moveable property or goods or any case, package or other receptacle containing moveable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be belived that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

[2]482. **Punishment for using a false trade mark or property mark.—** Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Synopsis

1. False trade mark.
2. Evidence and proof.
3. Burden of proof.
4. Civil remedy.

1. **False trade mark.—** A person is said to have used a false trade mark if he marks any goods or uses any case, package or other receptacle with any mark thereon in a manner reasonably calculated to cause it to be believed that goods so marked or contained in any such receptacle are manufacture or merchandise of a

2. Ss. 478 to 489 were substituted by the Indian Merchandise Marks Act, 1889 (IV of 1889), s. 3, for the original sections.
3. Since rep : see now the Patents and Designs Act, 1907 (7 Edw. 7029).

person whose manufacture or merchandise they are actually not (PLD 1986 Lah 107). Under section 482, it is necessary to prove that the accused's article is marked in a manner reasonably calculated to make people believe that they are articles manufactured by the complainant. Mere differences in detail do not prevent two designs from being essentially the same. The degree of resemblance necessary is a matter incapable of definition a *priori*. An accused renders himself liable to conviction under section 482, if he uses a false trade mark on any goods which may or may not have been manufactured by him. On the other hand, the ingredient of an offence under section 486 is the sale or exposing or possession for sale of goods or things with a counterfeit trade mark. The offence under the first section will be complete as soon as a false trade mark has been used, but under the latter section , it will be necessary that goods should be sold or be possessed or exposed for sale. Therefore it is perfectly legal to sustain conviction under both sections provided that the mark on the goods of the accused is a false trade mark and also a counterfeit trade mark. (AIR 1941 All 87).

It is not necessary to prove actual sale for the purpose of bringing home to the accused a charge under section 482 or section 485. It would be enough if circumstances are proved to establish that the goods bearing counterfeit trade mark were actually stored for sale. The elements of the offences charged do not require proof of any person having been actually deceived. It is enough if the circumstances proved are sufficient to establish that prospective buyers were likely to be deceived (AIR 1961 Cal 240).

2. Evidence and proof.— A court deciding whether one trade mark is colourable imitation of another must place itself in the position of an unwary customer. It is sufficient if there is such similarity between the two that an unwary or illiterate customer will not be able to distinguish between them. (AIR 1936 Pat 579).

The court must also have regard to the class of purchasers by whom the goods would normally be bought. Prosecution cannot be said to have made out a case under section 482, if looking at the two marks together, it could be most emphatically said not only that no person seeing the two side by side would confuse the one with the other, but also that no person, who had seen one of the marks and retained the slightest recollection of what it looked like, could by any possibility mistake the other for it, and there was no evidence to show that any person had in fact been deceived and had been led to purchase the goods of the accused believing them to be the merchandise of the complainant (AIR 1929 Rang 345). It must howevr be remembered that where the mark used by the accused is likely to deceive the public, evidence of actual deception is not necessary for conviction (AIR 1925 Cal 149).

3. Burden of proof.— Under sections 482 and 486, prosecution has not to prove *mens rea*, the burden is on the accused to prove his innocence and in the case of a limited company, innocence can be proved by the evidence of its agents or servants or otherwise (AIR 1914 Low Bur 15 DB). Even though no case of purchasers having been deceived by the use of false trade mark is proved, this fact standing alone is insufficient to justify the contention that the accused acted without intent to defraud. The state of mind of the persons responsible for the introduction of the trade mark is a most relevant fact which can be established by evidence. In the absence of such evidence, the accused cannot be held to have discharged the onus of proving want of intention which was upon him (AIR 1929 Rang 322).

4. Civil remedy.— Where there is a genuine dispute relating to the use of a trade mark, the aggrieved party should seek his remedy in a civil court. (AIR 1939 Rang 145). If the case is before a criminal court the criminal court may in view of the peculiar circumstances of the particular case, stay its own hand and direct the complainant to establish his right in a civil court (AIR 1928 Lah 186).

In cases of prosecution for infringement of a trade mark the High Court will not pass any order in revision in respect of costs or confiscation of accused's goods. If the complainant has in fact suffered any damage, he must seek his remedy in the civil court (AIR 1941 All 87).

[1]483. **Counterfeiting a trade mark or property mark used by another.—** Whoever counterfeits any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[1]484. **Counterfeiting a mark used by a public servant.—** Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particualr time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term whcih may extend to three years, and shall also be liable to fine.

[1]485. **Making or possession of any instrument for counterfeiting a trade mark or property mark.—** Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possesion a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punsihed with imprisonment of either description for a term which may exted to three years, or with fine, or with both.

[1]486. **Selling goods marked with a counterfeit trade mark or property mark.—** Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or thing with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other recepatacle in which such goods are contained, shall, unless he proves-

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently,

be punished with imprisonemnt of either descripton for a term which may extend to one year, or with fine, or with both.

[1]487. **Making a false mark upon any receptacle containing goods-** Whoever makes any false mark upon any case package or other receptacle containing goods, in a manner reasonable calculated to cause any public servant or any other person to believe that such receptacle contains goods

which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonemt of either description for a term which may extend to three years, or with fine, or with both.

[1]488. **Punishment for making use of any such false mark.—** Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

[1]489. **Tampering with property mark with intent to cause injury.—** Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

[2][489A. **Counterfeiting curency-notes or bank-notes.—** Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with [3][imprisonmen] for life, or with imprisonemt of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.— For the purposes of this section and of sections 489B, 489C and 489D, the experession"bank-note" means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for, money.

489B. **Using as genuine, forged or counterfeit currency-notes or hank-notes.—** Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the some to be forged or counterfeit, shall be punished with [3][imprisonment] for life, or with imprisonemnt of either description for a term which may extend to ten years, and shall also be liable to fine.

[2]489C. **Possession of forged or counterfeit currency-notes or bank-notes.—** Whoever has in his possession any forget or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

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1. Ss. 478 to 489 Were substituted by the Merchandise Marks Act, 1889 (IV of 1889), s. 3, for original sections.
2. Ss 489A to 489D were inserted by the Currency-Notes Forgery Act, 1899 (XII of 1899), s. 2.
3. Substituted by Ordinance No. XLI of 1985, for "transportation ".

Synopsis

1. Possession.
2. Evidence and proof.
3. Practice and procedure.

1. Prossession.— Mere possession of forged currency notes is not an offence (AIR Asghar v. State 1992 P. Cr. LJ. 1913). In order to bring a case within the purview of Section 489 it is also necessary to establish that at the time of his possession, he knew the notes to be forged or had reason to believe them to be so, and that he intended to use them as genuine or that they might be used as genuine (AIR 1931 Lah 24 = 32 Cr LJ 351; 1976 Cr LJ 228).

Where the currency notes were of such nature that mere look at them would not convince anybody that they were counterfeit, presumption that accused knew that notes in possession were counterfeit cannot be drawn (AIR 1979 SC 1705 = 1979 UJ (SC) 271).

Mere possession or use counterfeit currency notes is not punishable. The accused must have knowledge or reason to believe that the notes were counterfeits or forged (Gaffoor v. Stated of Kerala 1988 (1) Crimes 73 (Ker).

At the time of the recovery of the alleged currency, the accused was at his own house, sitting in his verandah all alone, it was held that under such circumstances it could not conclusively be inferred that, whill possessed of the forged notes, the accused also intended to use them as genuine or they might be used as genuine and that his conviction could not be upheld (1961 (2) Cr LJ 536 = AIR 1961 Pat. 405).

The accused, a box shop owner, gave the victim in need of change for a ten rupee note, currency notes which included one counterfeit two rupee note. When the police party came to investigate, he produced 13 such notes from his pocket, saying that he had one more note of that kind in his house and took the party to his house and produced one note from a shaving box, it was held that the accused was guilty under Section 489-B and 489-C (1976 Cr LJ 228).

Where the accused is not found to be in exclusive possession of counterfeit currency notes, he cannot be held guilty under this section (1976 Cr LJ 228).

2. Evidence and proof.— The onus lies on the prosecution to prove circumstances which lead clearly indubitable and irresistibly to the inference that the accused had the intention to foist the notes on the public and such intention can only be proved by collateral circumstances such as that the accused had palmed off such notes before, or that he was in possession for any other purpose is inexplicable (32 Cr LJ 351; AIR 1931 Lah 24; 1961 (1) Cr LJ 617).

Forged currency notes were not proved to have been recovered from the possession of the accused. No direct or presumptive evidence was available in record to prove that the accused had reason to believe that the currency notes found in their possession were forged or that they intended to use the same as genuine. Accused were acquitted in circumstances (Ali Asghar v. State 1992 P. Cr. LJ 1913).

In a case where the prosecution had proved that box containing the counterfeit notes belonged to, or was in the exclusive possession of, the accused and that he intended to use them as genuine, the conviction, for the offence under section 489-C was held not substaninable (1966 (1) Andh LT 154 = 1966 Mad LJ (Cr) 178 = 1966 (1) Andh LT 161).

Where there was no evidence to show that the counterfeit note was such that a mere look at it would convince any person of average intelligence that it was forged, conviction under section 489-B and 489-C could not be sustianed (Madan Lal Sharma Vs. State, 1990 CLJ 217 (Cal); 1979 CrLJ 1383 (SC) relied on).

Where the prosecution have discharged their burden and no reasonable explaination is forthcoming from the accused inference is that accused is guilty (1971 Madd LJ (Cr) 400 = 1971 (1) Mays LJ 508).

3. Prectice and procedure.— Where no specific questions were Put to the accused in his examination under Section 342, Cr. P. C. to find out whether he knew that notes in his possession were counterfeit his conviction under Sections 489-B and 489-C was not held proper (AIR 1979 SC 1705).

[1][489D. **Making or possessing instruments or materials for forging or counterfeiting currencey-notes or bank-notes.—** Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument or material for the purpose of beig used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with [2][imprisonment] for life, or with imprisonemtn of either description for a term which may extend to ten years, and shall also be liable to fine.]

[3][489E.— **Making or using documents resembling currency-notes or bank-notes.** (1) Whoever makes, or causes to be made, or uses for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any way resembling, or so nearly resembling as to be calculated to deceive, any currency-note or bank-note shall be punished with fine which may extend to one hundred [4][taka].

(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse, to disclose to a police-officer on being so required the name and address of the person by whom it was printed or otherwise made, he shall be punished with fine which may extend to two hndred [4][taka].

(3) Where the name of any person appears on any document in respect of which any person is charged with an offence under isub-section-(1) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that that person caused the document to be made.]

CHAPTER XIX

OF CRIMINAL BREACH OF CONTRACTS OF SERVICE

490. [Breach of contract of service during voyage or journey.] Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (III of 1925), s. 2 and Schedule.

491. **Breach of contract to attend on and supply wants of helpless person.—** Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred [4][taka], or with both.

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1. Ss. 489A to 489D were inserted, by the Currency-Notes Forgery Act, 1899 (XII of 1899). s. 2.
2. Substtuted by Ordinance No. XLI of1985, for "transportaion".
3. S. 489E was inserted by the Indian Penal Code (Amdt.) Act, 1943 (VI of 1943). s. 2.
4. Subs. by Act VIII of 1973, s. 3 and 2nd Sch. (with effect from 26-3-71), for "rupees".

492. [Breach of contract to serve at distant place to which servant is conveyed at master's expense.] Rep. by the Workmen's Breach of Contract (Repealing) Act, 1925 (III of 1925), s. 2 and Schedule.

CHAPTER XX

OF OFFENCES RELATING TO MARRIAGE

493. **Cohabitation caused by a man deceitfully incducing a belief of lawful marriage.—** Every man who by deceit casues any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years; and shall also be liable to fine.

Synopsis

1. Essence of the offence.
2. Cohabitation caused by man deceitfully inducing a belief of lawful marriage.
3. Evidence and proof.
4. Procedure.

1. Essence of the offence.— To constitute an offence under Section 493 of the Penal Code the following ingredients must be present:-

(1) Before admitting herself to co-habitation or sexual intercourse with the accused the woman must believe honestly that she was the lawfully married wife of the accused; and

(2) Such belief must be caused to the woman by the accused by deceit.

In other words the gist of the offence is that co-habitation or sexual intercourse must be caused by the accused by deceitfully inducing the woman to a belief of lawful marriage.

So if a major man and woman out of their infatuation or passion for each other secretly with each other even supposing themselves to be husband and wife that cannot constitute an offence within the meaning of Section 493 of the Penal Code unless the woman is deceived by the accused to believe that she is the lawfully married wife of the accused.

The complainant being a woman aged about 23 years could not honestly believe a lawful marriage merely by the fact that accused proposed to marry and she accepted the proposal and to start co-habitation then and there as has been represented in the prosecution case (Jalal Uddin @ Badsha Vs. State (1986) 38 DLR 119 (para-10).

The essence of the offence under Section 493 of the Penal Code is the practice of deception by a man on a woman in consequence of which a false belief is created in the mind of the woman that she is lawfully wedded to the accused although, in fact, they are not lawfully wedded, mere promise of marriage made by the accused to her or to her guardian intending never to fulfil his promise does not warrant a conclusion that a false belief was caused in her mind that she was the lawfully married wife of the accused. In order to prove that by deceit she was led by the accused to believe that she was lawfully married to him and on the basis of such belief she was induced to have sexual intercourse with him, is obvious that the prosecution has to prove that some form of marriage which is not valid and legal was gone through with a fraudulent intention. Thus the prosecution has to prove that there was some form of contracting a marriage or an apology for contracting a

marriage which in the context of the social and religious background of the woman would cause a belief in her mind that she was a lawfully married wife of the accused (Abed Ali Vs. State 34 DLR (1982) 366 = 1983 BLD 201).

Where the entire evidence of the prosecution was consistent with the view that both parties though that the ceremonies performed would suffice to consitute a valid marriage, the element of deception was wanting in the case (Raghunath Padhy v. State, 1956 Cut. L. T. 503 (504), (505); A. I. R. 1957 Orissa 198 = 1957 Cr. L.J. 989); State of Gujarat v. Batuk Hiralat Mehta, 1974 Guj. L. R. 391).

A mere promise of marriage made by the accused to a woman or to her guardian intending never to fulfil his promise does not warrant a conclusion that a false belief was caused in her mind that she was the lawfully married wife of the accused (Makham @ Putu Vs. The State; 1994 BLD (AD) 123).

Under Section. 493 Penal Code, what is required is that by deceitful means, the accused must induce a belief of lawful marriage and then make the woman cohabit with him. It is obvious that a from of marriage which not valid must have been gone through with a fraudulent intention. If all the froms of a valid marriage have been gone through even with an unwillding bride or bride groom, the marriage cannot be said to be invalid or fraudulent. The offence under Section. 493, Penal Code, consists in giving a false assurance of the marriage to a woman and thereby procuring sexual intercourse with her. It is essential that the deciet and fraudulent intention contemplated should be found to have existed at the time the ceremony of marriage was gone through (Kompella Ammanna Narasimha Subramanyam v. Josyula Ramalakshmi, (1971) 2 Andh. W. R. 278 (280, 281).

Offence under section493 of the Penal Code by any man is only possible when a woman is aged at least 14 years. If she is aged below 14 years her consent is immaterial and the accused is guilty of rape (Abed Alid Vs. State 34 DLR (1982) 367 = 1983 BLD 201). The victim of alleged cohabitation knew that there was no marriage between her and the accused and that the latter only compromised to marry her on some, future date-such allegaions made in the FIR did not come within the mischief of the section 493 Penal Code (Lukus Miah Vs. State 43 DLR (1991) 230).

If all forms of a valid and lawful marriage have been gone through, the subsequent disclaimer of a marriage validly performed does not make it invalid or fraudulent and the act of the accused cohabiting with woman after such valid and lawful marriage would not bring his act within the mischief of saction 493 of the Penal Code. Further, if a man married a woman believing bonafide that the marriage is valid, lawful and effective and afterwards some defects or flaws were discovered making the marriage invalid or inoperative, after which the man continues to live with her as husband and wife and to cohabit with her, he could not be said to have had sexual intercourse with her after causing belief in her marriage with him by deceit (Abed Ali Vs. State 34 DLR (1982) 366 = 1983 BLD 201).

2. Cohabitation caused by a man decitfully inducing a belief of lawful marriage.— A mere promise of marriage to her or to her guardian intending never to fulfil his promise does not warrant a conclusion that a false belief of marriage was caused in her mind. The prosecution has to prove that some form of marriage which is not valid and legal was gone through with a fraudulent intention (Abed Ali Vs. The State 1983 BLD 201).

Where the accused, aged about 58 years, had been giving some finacial help to the complainant, aged about 24 years and had promised that he would maintain her throughout her life, and this relationship had developed into a sort of relationship

between a married man and woman, and it was under that belief that the accused induced her to conabit with him, it was held under that the conclusion that the accused had deceifully induced the complainant to believe that a lawful marriage had been performed and it was under such a belief that the woman was induced to cohabit with him could not be reached with certainty, and in any case, two views were possible and the accused was entitled to benefit of doubt and it was not proper to interfere in the acquittal appeal, which thus failed and was liable to be dismissed (State v. Batuk Hiralal Mehta 1974 LR 391).

3. Evidence and proof.— Section 493 of the Penal Code presupposes proof of at least the four following ingredients (1) the accused cohabited or had sexual intercourse with the prosecutrix: (2) knowledge on the part of the accused that the marriage if any contracted, is not lawful and binding on the parties; (3) a belief caused in her that it was a valid and binding marriage; and (4) such belief was induced by deceit practised on her by the accused (Abed Ali Vs. State (1982) 34 DLR 366 = 1983 BLD 201).

From the evidence on record it can be safely held that both the petitioner and the complainant thought that they have been lawfully married and in fact a volid dmarriage tookd place. The element of deception which is an essential ingredient of the offence is wanting in the case and as such the sentence against the petitioner is set aside (Musa Miah @ Murshed Miah Vs. The State 1988 BLD 111).

The facts in the case of Raghunath Vs. The State, AIR 1957, Orissa 198 were that the accused Raghunath, a Brahmin with his wife living, was asked by complainant Radharani, a Brahman widow, to marry her by writing a bond. The accused Raghunath accordingly wrote a bond and gave a copy of it to her. The complainant Radharani put on bagles, new clothes and exchanged garlands. From the fact of writing a bond by the accused and handing over the same to the compladinant and participating in some sort of ceremony it was held that the accused acted in good faith and his subsequent act of desertion of a pregnant woman, however censurable it may be, would not suffice to make a criminal liability under Section 493 of the Penal Coded (Amulya Chandra Modak Vs. State 35 DLR 160).

Procedure.— Not cognizable-Warrant-Not bailable. Not compoundable. Triable by Magistrate of the first calss.

The offence under s. 493 is non-cognizable though not compoundable. The trial court, on the absence of the complaainant, has the discretion to discharge the accused in exercise of his powers undrer s. 249. Code of Criminal Proceudre (Kanhei Pradhan v. Bdasanti Khati 1981 Cri LJ 266 (Ori).

Complaint by person aggrieved necessary.— No Court's shall take cognizance of this offence except upon a complaint made by some person aggrieved by it (Criminal Procedure Code, s 198).

Thed complainant filed a complaint under s. 198 of the Criminal Procedure Code, 1898, against the accused charging him with offences under this section and ss. 496 and 417. The complainant died there after and her mother applied for substitution as a fit and proper complainant in the case. The accused contended that the trial of offences under this section and s. 496 was governed by s. 198 of the Criminal Procedure code and only the aggrived person could be the complainant and on her death the complaint must be treated as abated. The Supreme Court held that the bar created by s. 198 of the Criminal Procedure Code was removed with the filing of the complaint by the complainant and the mother could be allowed to carry on the prosecution, which she could, under s. 495 of the Criminal Procedure Code, 1898 (S. 302 of the 1973 Code) either hereself or though a pleader (Ashwin Nanubhai (1966) 69 Bom 308 (SC).

Charge.— The charge should run as follows :

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

That you, on or about the........day of.......,at.........., by deciet caused a certain woman, to wit AB, who was not lawfully married to you, to believe that she was lawfully married to you, and in that belief, cohabit or have sexual intercourse with you and dthat you there by committed an offence punishable under s. 493 of the Penal Code, and within my cognizance.

And I here by direct that you be tried on the said charge.

494. **Marrying again during lifetime of husband or wife.**— Whoever, having a husband or wife living, marrries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.— This section does not extend to any person whose marriage with such husband or wife has been declared void by Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent form such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

Synopsis

1. Absence of husband for seven years.
2. Marriage after dissolution of previous marriage.
3. Polygamy permitted by law or custom.
4. Apostacy of husband or wife.
5. Mohammedan law allows minor to repudiate marriage on attaining puberty.
6. Marriage during life time of such husband or wife.
7. Exception.
8. Bonafide belief as to earlier marriage being void.
9. Evidence and proof.
10. Jurisdiction.

1. Absence of husband for seven years.— Exception to the section gives the right of remarriage to a woman, if her husband is not heard of for seven years. The period so prescribed cannot be cut down by other period prescribed by personal law (1878 Pun. Re No 27 (p 67).

2. Marriage after dissolution of previous marriage.— A party to a marriage does not commit an offence, if she remarries after the dissolution of his first marriage (NLR 1980 Cr. 195).

Under Muslim law, when there is a contract between a husband and wife at the time of marriage, empowering the latter to divorce herself in specific contingencies and she exercises it at the happening of any of them, the divorce will take effect to the same extent, as if it had been pronounced by the husband. It does not require any declaration from a court of law. The power given to her by the husband is in itself quite sufficient, and the marriage with the girl after such a divorce does not bring home an offence under section 494 (AIR 1953 Tri 6). Similarly where a Muslim girl was given in marriage during her minority by her mother. Where the marriage was not consumated after attaining majority and the girl married another person. Her

second marriage would annul her first marriage. Therefore she was not guilty of an offence under section 494 of the Penal Code (1984 PCrLJ 2826). But a second marriage during the lifetime of the first husband and without the first marriage being annulled by divorce or in some other formal manner recognised by caste usage as equivalent to divorce (the mere wish of the soman against that of her husband being insufficient) is an offence under section 494 (AIR 1932 Mad 561). It must further be remembered that the dissolution must be final and irrevocable. A decree absolute, of nullity of marriage, though it has retrospective effect for certain purposes, has no effect of making a ceremony of marriage gone through by the wife, after obtaining a decree nisi against the former husband, but before the decree is made absolute, a valid marriage; such a second marriage would be a bigamous one (1958-1 WLR 1013).

Change of religion-Whether affects second marrigage.— A Hindu after haptism married a Christian lady, when the marrage fell through, he reverted back to Hinduism and was accepted as a Hindu by his community and as a Hindu married a Hindu girl. His second marriage was held to be a valid marriage but for the existence of the first marriage he was accordingly found guilty of committing an offence under Section 494, Penal Code. For proving an offence punishable under section 494,Penal Code, read with section. 109, Penal Code, it has to be established first that the family members or reletives of the principal accused had either attended the first marriage or knew the couple as husband and wife and had no reason to belivee that the marriage has been disolved secondly, they should do some act in act in the actulal celebration of the second marriage, which may be considered as an act of abetment such as putting knot token of the due performance of the marriage (Kalanjiam Ammal V. Shanbagam, 1989 Cr. L.J. 405 (Mad).

3. Polygamy permitted by law cr custom .— Where there is evidence that the second marriages are not uncommon amongst persons of the caste to which the accused belongs and actual instances are given of such marriage having occurred a conviction under section 494 is not justified (7 Cal LR 354). Thus where the Hindu law permits more than one wife and a Hindu male has contracted his first marriage with a Christian woman in England in Christian form and be subsequently marriage a second time while his first Christian wife is living, a Hindu female in a Hindu form, it cannot be said that he has committed bigamy under the Penal Code (AIR 1932 Lah 116).

4. Apostacy of husband or wife.— A Christian marriage is not dissolved by the apostacy of one of the parties and a subsequent marriage of a christian wife after her conversion to Islam is bigamy (AIR 1919 Lah 389). But if the husband is converted to Islam, and he marries a second wife, he cannot be held guilty of bigamy because according to Islam such second marriage is a valid marriage (PLD 1967 SC 334). When a Hindu becomes a Christian to marry a Christian lady there is nothing to prevent him on reconversion to Hinduism from marrying a Hindu lady and he will not be guilty of an offence under section 494, Penal Code. (AIR 1951 Mad 888).

Hindu law does not consider that a marriage is dissolved by apostacy Therefore, a Hindu wife embracing islam and marrying a Muslim during the lifetime of her first husband is guilty under section 494 (AIR 1920 Lah 379).

5. Mohamedan law allows minor to repudiate marriage on attaining puberty.— Where the first marriage of a minor girl had never been cosummated and she repudiated that marriage on attaining puberty within the period allowed by law, to the knowledge of her husband, it was held that the opinion of puberty was validly exercised and the first marriage could not be deemed to subsist at the time of her second marriage for the purposes of this Section. Moreover, under the Muslim law the Second marriahge could not be "void" by reason of its taking place during the life

of the previous husband but would be of the nature of shubat-ul-akd under Muslim law (Muhammad Baksh (1950) 51 Cr LJ 1169).

Where a woman is empowered to divorce herself in specifice contingencies and she exercises such power, a valid divorce takes place adn if she marries subsequently no offence under this Section is committed (Suroj Mia V. Abdul Majid (1953 Cr LJ 1504).

6. 'Marriage during life time of such husband or wife.— Where the first accused, a Christain, had entered into a second marriage according to Hindu rites, the second marriage was not a valid marriage in the eyes of law, and he was liable to be acquitted of the offence under Section 494 (Gopal Lal v. state 1979 Cri LJ 652 (SC): AIR 1979 SC 713 = 1979 SCC (Cri) 401).

The word 'solemnize' means "to celebrate the marriage with proper ceremonies and in due form", according to the Shorter Oxfored Dictionary. Unless the marriage is 'Celebrated or performed with poper ceremonies and due form' it cannot be said to be "solemnized ". It is essential for the purpose of Section 17 of the Hindu Marriage Act that the marriage to which Section. 494, Penal Code applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom. Where both sides agreed that according to the law prevalent amongst them homa and saptapadi were essential rites to be performed for solemnisation of the marriage and there was no specifice evidence regarding the performance of these essential rites in regard to the second marriage, it was held that the charge under Section 494 could not be made out (Priya Bala Ghosh v. Suresh Chandra Ghosh 1771 Cri LJ 939 (SC)= AIR 1971 SC 1153 = 1971 SCC (Cri) 362).

The Indian Supreme Court in another case has held that in a bigamy case, the second marrigage as a fact, that is to say the essential ceremonies constituting it, must be proved. Amission of marriage by the accused is not evidence of it for the purpose of proving marriage in a adultery or bigamy case (Kanwal Ram, AIR 1966 SC 614).

The true import of the provis to Section 50 Evisence Act, is that opinion evidence in a proscution under Section 494 Shall not be sufficient by itself to prove a marriage, This proviso does not rule out other forms of admissible evidence may take the shape, or be of the nature, apart from direct evidence, of cricumstantial evidence or even presumptive evidence. These two varieties of evidence for proving marriage are not shut out by the two authorities of the Supreme Court, namely, Bhaurao Sgankar and Kanwal Ram either expressly or by implication. Therefore, it is open to the Court to reach a finding about the factum of marriage on the basis of combined reading of all varieties of admissible evidence including the opinion evidnce of the nature mentioned in the main body of section 50, Evidence Act, where all though the lower courts, the accused defended his conviction under Section 494, on the ground that he bonafide believed his first wife to be dead before marrying the second time, which was negatived, and there was circumstanctial and opinione vidence coupled with the direct and unchallenged testimony of P.W.3, A colleague of the accused, who deposed that the second marriage "was performed in accordance with the Hindu "sastras" and the unequivocal adimission of the second marriage made by the accoused in a letter to the Chief Commissioner, Tripura, it was held, that they constituted sufficient evidence justifying the Court to presume that all ceremonies that were essential to bring about valid second marriage had been performed, and accordingly, the revision petition was dismissed (Rabinramy it is a gooda Kumar Bhattacharjee V. Prativa Bhattacharjee 1970 Cri LJ 838 (Tripura).

7. Execption.— In the absence of words in the statute dispensing with proof of *mens rea* it should be held that the offence under this section can be committed only intentionally or reckessly (Kunju Ismil V. Md. kedeja Umma (1959) Cr LJ 59 : (1959) Ker 18).

8. Bonafide belief asto earlier marriage being void.— In a case in England it was held that on a charge of bigamy it is a good defence if the accused perosn can prove that at time of the second marriage he had reasonable cause to believe, and honestly believed, that his first marriage was void on the ground that the woman he then married was already married to another man (Dolman (1949) 1 All ER 814).

Mens rea is a necessary ingredient of the offence under section 494. Where the accused, when he contracted the second marriage, acted on the bonafide belief that his marriage with the first spouse had been severed by virtue of a deed of divorce entered into between the parties, he was entitled to acquittal of the charge under Section 494. The deed of divorce entered into between the parties were residing separately on account of differences between them and they were convinced that each of them would be at liberty to marry again. It was held, though the deed of divorce was not sufficient in the eyes of law to put an end to the martial tie, the parties honestly believed that they were no longer husband and wife and that they were at liberty to marry again and in the circumstances the accused acted on the bonafide bleief that in entering into a second marriage he was not doing a wrong act, the benefit of doubt must certainly go to him (Sankaran Sukumaran V. Krishnan Sarwathy 1984 Cri LJ 317 (Ker) = 1983 KLN 728 (Ker).

9. Evidence and proof.— In order to prove the charge of bigamy under Section 494 of the Code, the essential ceremony constituting both the marriages have to be proved. Even an adimission of the marriage by the accused is not evidence for the purpose of proving adultery or bigamy (1978)Punj LR 12).It must be established that the second marriage was duly performed in accrdance with essential religious rites (AIR 1971 SC 1153= 1971 SC Cr R 513= (1973) 2 SCJ 611; 1982 Cr LJ 1567 (Orissa).

Where the second marriage of a Hindu is performed according to religious rites but homa and saptapadi are not performed, there is no marriage at all in the eyes of law and there can be no offence of bigamy under Section 484 (1975 Cr LJ 208: 1966 Cr LJ 472 (SC).

Where there was absolutely no evidence to prove that any of the two essential ceremonies i.e. Dalta Home and Saptapadi had been performed at the time of second marriage and the extreme of the custom in the community to put the yard thread instead of Mangal Sutra was neithermentioned in the complaint nor proved in the evidence, the conviction under Section 494, Penal Code, could not be susteined (AIR 1979 SC 484).

The mere fact that some cermonies were perfomed at a temple will not make a marriage a valid marriage recognised by the community unless the vitlal features of the function are proved by evidence (1971 Ker LT 614). In bigamy case, the second marriage as a fact, has to be established, and the admission of the marriage by the accused is not evidence of it for the purpose of proving marriage (PrasanaKumar V. habalaxmi, 1989 Cr.L.J. 1829 (1832) (Mad.) ; KumAr V. Himachal Pradesh Administration, AIR 1966 S.C. 614 = 1966 Cr .L.J. 472) Relied on).

Proof of actul the marriage is always necessary (Morris v. Miller (1967) 4 Burr 2057, 2059; Shantimani Dei v. Lingargj Moharana 1982 Cri LJ 1567 (Ori); Priya Bala Ghosh v. Suresh Chandra Ghosh 19671 Cri LJ 393 (SC).

If for the proof of the second marriage, it is nceessary for the complaint to prove all the essential requirements of a legal and valid marriage, then by the same

standard and by the same reasoning it is necessary for him to prove as a fact all the essential requirements to show that the first marriage was also performed validly. Where the complainant filed a complaint for the offence of bigamy against the accused but failed to prove that the first marriage was legal and valid, it was held that the question whether the second marriage was validly performed or nor really did not survive for consideration and the accused cannot be held guilty of the offence under Section 494 (Godawari 1985 Cri LJ 1985 Cri LJ 1472 (Bom)

In an adultery or bigamy case, the second marriage as a fact, that is to say, the essential ceremonies contstituting it, must be proved Kanwal Ram (1966) Cr LJ 472).

Where the complainant did not state in the complaint that after receipt of information about the alleged second marriage of her husband she herself made inquiries by going over to the place where the marriage was allegedly performed, the granthi who performed the alleged second marriage was neither produced nor his name was disclosed, and the evidence of the witnesses present at the alleged second marrigae was unreliable, the second marriage could not be held to have been proved (Surjit kaur V. Malkhan Singh 1982 MLR 170 (P&H).

When the due performance of the cermonies are not made out and when the Supreme Court has laid down further that the second marriage has to be proved strictly in accordance with the Hindu rites and customs, the complainant is not entiled to seek the relief of Section 494 to punish the husband for the offence under section 494 (Ventip Alli Neel avent, Smmt. V. Ventipalli Venkateshwar Rao, 1989 (1) Crimes 19(22) (A.P.).

The fact of the alleged second wife giving birth to two children and her conduct in not having a medical check up in compliance with the directions of the Court would not be sufficient to prove the second mariage. At best, it could give rise to a presumption that by residing with the husband of the complainant, she gave birth to two children (Surjit Kaur v. Malkhan Singh 1982 MLR 170 (P &H) ; Chhedi 1982 Up (Cr) Cas 137).

Where there was satisfactory evidence, in regard to the second marriage, to prove that 'Dola' was borough, marriage was performed by purohit, 'Bhanwaren' (Saptapadi) had taken place, Kanyadan was done and the full vivah was read and it had taken a few hours, the second marriage was held to have been duly solemnished and the accused found guilty for the offence under Section 494 (Sindhiya DEvi 1974 Cri LJ 1403 (All): 1974 All Cr C 341).

A voters list is a public record under Section 35 of the Representation of the people Act and a Public document withing Section 74 (1) (iii), Evidence Act, and is admissible in evidence. Where the entries in a voters list revealed the relationship of husband and wife, and the entires were supported by the marnam of the village, the marriage was held to be proved (Chelammal v. Angamuthu 1978 Cri LJ 752 (Mad).

There is no Specifice provision in the Code of criminal procedure which provides for continuance of proceedings by any relation after the death of the complainant but the trial Court, in its discretion, can permit a relation of the deceased complainant, who is willing , to contnue proceedings, provided it is satisfied that such continuance is not meant only to harass the accused. Section 198 of the 1973 Code has widened the meaning of the words "aggrieved persons" and has enabled many relations mentioned therein to file a complaint. With the leave of the Court any other relation also can file a complaint. Where, during the pendency of the proceedings, the complainant died, who was the wife, the morther was permitted to continue the proceedings against the accused husband. The Supreme Court observed

The presidencey Magiatrate was right in proceeding with the inquiry by allowing the mother to carry on the prosecution herself or through a pleader. We see no reason why we should be astute to find a locuna in the procedural law by which the trial of such important case would be stultified by the death of a complainant when all that Section 198, Code of Criminal Procedure, 1898 reuires is the removal of the bar (Ashwin AIR 1967 SC 983 = 1967 Cr LJ 943 (SC) ; Kirshna Reddy v. Aripireddy Indravathi 1983 Cri LJ 1746 (AP).

In another case (Subamma V. Kannappachari AIR 1969 Mys 221= 1970 Cri LJ 59 (Mys), it was held that the death of the complainant in a case of non-cognizable offence does not abate the prosecution, and that it is within the discretion of the trying magistrate in a proper case to allow the prosecution to be continued by a relative if he is willing. But where the proceedings were permitted to be continued, after the death of the complainant, by a minor daughter who was aged only seven years, it cannot be said that she was willing and volunteered to continue the proceedings. A girl of seven years could not be said to be some mentally development as to understand the implications so that it could be said that she was willing to continue the proceedings (Krishna Reddy V. Aripireddy Indravathi 1983 Cri LJ 1746 (AP).

10. Jurisdiction.— The proper Court to try a charge under this Section is the Court which has terriotorial jurisdcition at the place where the offence was committed. The offence of bigamy is essentially comitted at the place where the second marriage, takes place, because it is that marriage which constitutes the offence, It was accordingly held that the offence could be taken place and not by the Court of the District B where the complainant resided and the coplaint was filed. The order of the lower Court summoning the accused being contrary to law was quashed without prejudice to the right of the complainant to file her complain in the appropriate court (Sukhader V. Singh v. Sukhvinder kaur 1974 Cri LJ 229 (P&H): 1973 CLR 625).

11. Complaint.— In the case of of bigamy, the person aggrived is either the first husband or the second husband, and not the father of the accused (7 ALJ 10= 11 Cr L 51), It is the first wife who can object to the bigamous conduct of her husband. The complaint filed by second wife is not comperson (1976 Cr LT 680 (P &H).

A complaint of bigamy can be preferred by the person with whom the second ceremony is gone through or by other persons aggrieved, e.g. the husband (by the first marriage) of the woman committing bigamy (AIR 1943 Pat 212). The father, mother or brother of the first husband or the second husband or the father of woman who contracts the bigamous marriage are not competent to prefer a complaint of bigamy under this section (32 All 78). If the husband does not complain of bigamy committed by this wife but complains of other of offences and the evidence discloses the offence of bigamy, the wife cannot be proceeded against under section 494 Penal Code because of the want of complaint by the husband for that offence (AIR 1938 Sind 141).

Charge.— Charge should run as follows:

I (name and bffice of Magistrate, etc,) hereby charge you (Name accused) as follows:-

That you, on or about the--day of--, at --, having a wife (or huband) to wit--, living married again AB, such marriage being void by reason of its taking place during the lifetime of the said wife (or husband), and that you thereby committed and offence punishable under Section 494 of the Penal Code, and within may congnizance.

And I hereby direct that you be tried on the said charge (1967) 8 WR (Cr L) 9).

495. **Same offence with concealment of former marriage from person with whom subsequent marriage is contracted.**— Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be lible to fine.

496. **Marriage ceremony fraudulently gone through without lawful marriage.**— Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not there by lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

497. **Adultery.**— Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery; and shall be punished with imprisonment of either descripton for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

Synopsis

1. Scope and applicability.
2. Wife of another.
3. Consent or connivance of husband.
4. Consent of the woman irrelevant.
5. Right of the woman to be heard in adultery proceedings.
6. Punishment.
7. Charge.

1. Scope and applicability.— In the Penal Code adultery is viewed primarily as an invasion on the right of the husband over his married wife. (Chanda Chhitar Lodha v. Mst. Nandu, AIR 1965 M. P. 268 (269).

Adultery by itself is an anti-social and an illegal act; naturally any peace loving citizen and any person of good morals would not like that adultery should be permitted to be indulged in before his very nose (Hatim Khan v. State, AIR 1963 J. & K. 56 (58).

What is essential for the offence of adultery is proof of "sexual intercourse". It is true that this can rarely be proved by direct evidence beceause precautions are taken to secreen it from the view of others. But in evaluating the husband's accusation agaisnt his wife of adultery, the entire background and the context in which such accusation is made is highly relevant. When the parties concerned are sophisticated, conclusions cannot be arrived at on the mere basis of opportunities for sexual intercorse, such an inference may be more readily possible when dealing with persons whose social moores are more rigid and less sophisticated. The fact of adultery has, therfore, to be inferred from the totality of cricumstances that lead to it by fair inference and as a necessary conclusion. What those circumstances are cannot be laid down universally. Nonetheless, the circumstances must be such as should lead the guarded sicretion of a reasonable and just mind to that conclusion ; it is not to be reached by rash and intemperate judgment, or upon assurances that are equally capable of two interpretations (A.S. Puri v. K. L. Ahuja, 1970 Cr. L.J. 1441 (1446) = AIR 1970 Delhi 214).

In Ram Narayan v. Emperor (A.I.R. 1937 Bom. 186), the accused was convicted under Section 498, Penal Code, for enticing a married woman who was discarded by her husband and was staying with her brother who filed the complaint under section

198, Cr. P. C. In setting aside the conviction on the ground that the complaint was nto validly made, the Lordships held that the complaint by brother was not competent under Section 198 as the brother was acting on his own behalf and not under the authority of the husband. Therefore the conviction was held to be invalid.

Every act of sexual intercourse with another's wife under circumstances which makes the intercourse an offence under section 497 is a distinct offence (AIR 1955 NUC 5753).

Remedy under Divorce Act. Section 61 : Divorce Act does not forbid an aggrieved husband from proceeding against the adulterer under setion 497. The fact that the husband is entitled to proceed under the Divorce act does not disentitle him from maintaining aprosecution under section 497 (AIR 1935 Oudh 506).

Adultery by husband : An act of sexual intercourse of a married man with an unmarried woman or a prostitute or a widow or with a married woman with the connivance or consent of her husband is not adultery within the meaning of section 497. But this narrow definition of adultery has no application to proceeding for divorce under section 10 of the Divorce Act. It is there used in a wider sense, and the sexual intercourse of the husband may be with any woman. It need not be proved to be with a married woman (AIR 1959 Cal 451).

2. **Wife of another.—** Where the woman with whom sexual intercourse is committed is not married, no offence is made out and cognizance for an offence under this section cannot be taken (PLD 1976 Quetta 90). In a prosecution under section 497 the question of marriage must be proved strictly (PLD 1961 Kar 150). It must be proved that the woman was married in one of the approved forms of marriage or a form of marriage recognized as valid by the law and custom governing the parties. Mere statement by witnesses that she was the wife of a certain person would not be enough (1951 All W.R. (HC) 312).

Mere production of a Nikahanama is not enough nor the mere identification of a photograph of the woman alleged to have been found living with the accused sufficient, unless the persons identifyng the photograph specially mention at the same time that the photograph was that of the wife of the complainant (PLD 1961 (WP) Kar 150). Similarly a tacit admission by the accused that a certain person is her husband's brother, does not avail the prosecution in showing that the accused had knowledge that the woman was the wife of another (AIR 1956 Madh B 69).

It must further be remembered that the marriage should be proved as an event which took place and not merely as the state in which the parties were living. If the marriage is sought to be proved by oral evidence, such evidence must be in accordance with section 60 of the Evidence Act namely that of eye witnesses. It is not necessary for the purpose of proving the marriage to let in a large number of witnesses. Evidence of husband and wife alone can be sufficient unless it is suggested that a particular part of the ceremony to make it valid is lacking (AIR 1937 Pat 219).

Where a system of registration prevails it is sufficient for the petitioner or the prosecutor to give evidence of his marraige with the woman concerned and produce a certified copy of the register. But if no system of registration exists, it is necessary to set out the facts and circumstances surrounding the marriage in order to enable the court to decide whether the marriage in fact took place and whether the relationship of husband and wife existed at the time of prosecution. A tacit admission on the part of the accused alone admitting such relationship will not help the prosecution (AIR 1928 Pat 481).

3. Consent or connivance of husband.— An offence under this section would be committed where the accused knew that the woman with whom he had sexual

intercourse was the wife of another man and that his offence was committed without the consent or connivance of that man whom he knows to be her husband. Where the alleged husband did not state before the trial court that it was without his consent or connivance that respondent kept the woman to have illicit intercourse with her. The accused was acquitted (NLR 1981 Lah 558).

Consent is positive permission to do a thing while connivance may be defined as implied consent because it is an act of purposely shutting one's eyes to highly suspicious matters which are obvious (PLD 1962 Lah 558). It means not merely refusing to see an act of adultery but also wifully abstaining from taking any step to prevent adulterours intercourse which from what passed before the husband's eyes, he must reasonably accept, will occur. Connivance is not limited to active conduct. It includes the case where a spouse is aware that a certain result will follow, if he does nothing, and desires the result to come about (PLD 1963 SC 51).

4. Consent of the women irrelevant.— Section 497 applies to cases where a person has sexual intercourse with a woman whom he knows or has reason to believe to be the wife of another man, without the consent or connivence of that man and such sexual intercourse does not amount to rape. The consent or willingness of the woman is no impediment to the application of this section, and as generally happens she is quite sware of the purpose for which she is quitting her husband and is an assenting party to it. Where the accused and the complainant did not protest when the accused subsequently carried her from her husband's house to his house but continued to live with the accused in illicit intimacy, offence only under Section 497 or Section 498 and not under Section 366 could be said to have been made out against the accused (Parappa Sidram Karlati v. Dundawwa 1980 Cri LJ (NOC) 85 (Kant).

Where the respondent and the complainant- appellants wife were not related to each other and the woman had left her husband's house and were found together in a room in the dead of night, there was only one cot in the room and the two had been found naked at that time, it clearly established that the respondent was having sexual intercourse with he and the trial court's conviction of the respondent under Section 497 was upheld (Chaman Lal Monah v. Haji Sabir Ali 1973 Cri LJ 1249 (Del).

No inference of adultery can be drawn from the mere fact of the residence of the woman with her children in the house of the man with whom she is alleged to have committed adulterly (Suni Kanto (1964) 1 Cr LJ 250).

If the expression marries under Section 494 should mean marrying legally and validly (Bhaurao Shankar Lokhande (1965) 11 Cr LJ 544 : AIR 1965 SC 1564), the expression "wife" validly married wife, and, therfore, in a prosecution under these section, the factum as well as the legally and the validity of the marriage must be strictly proved beyond any reasonable doubt. (Chandra Bahadur Subba 1978 Cri LJ 942 (Sikkim).

Where the complainant, a Bengali Hindu and his alleged wife, a Bhutia Christian, were married allegedly according to the rites or customs prevalent among the Nepalese, no valid marriage could have taken place, and, as such, the conviction of the accused-appeallant under Section 497 was set aside and he was acquitted (Chandra Bahadur Subbe 1978 Cri LJ 942 (Sikkim).

5. Right of the woman to be heard in adultery proceedings.— Right to life under Article 21 of the Constitution includes the right to reputation, and, therfore, if the outcome of a trial is likely to affect the reputation of a person adversely, he or she ought to be entitled to appear and be heard in that trial. Section 497 does not contain a provision that the married woman with whom the accused is alleged to

have commited adultey must be impleaded as a necessary party to the prosecution or that she would be entitled to be heard. But in a case, where the wife makes an application in the trial court that she should be heard before a finding is recorded on the question of adultery, the appelication would neceive due consideration from the Court. There is nothing, either in the substantive or the adjectival criminal law, which bars the Court nothing, the Court from affording a hearing to a party, which is likely to be adverse adversely affected, directly and immediately, by the decision of the Court. The right of hearing is a concomitant of the principles of natural justice, though not in all situtations. That right can be read into the law in appropriate cases. (Sowmithri Vishnu v. Union of India 1985 Cri LJ 1302 (SC) = 1985 SCC (Cri) 325).

6. Punishment.— The circumstance that the complainant-appellant had already obtained a divorce from his wife, she had an early history of leaving home to have illicit relations with others, besides the respondent, and the petition for divorce on grounds of adultery had been filed by him even before the appellant filed a complaint against the respmdent, the sentence of imprisonment till the rising of the Court and a fine of taka 1,00, ordered by the trial court, was held sufficient to meet the ends or justice (Chaman Lal Monha v. Haji Sabir Ali 1973 Cri LJ 1249 (Del).

7. Charge.— A charge of adultery, alleging commission of offences between two dates, is legal where it is impossible, in the circumstances of the case, to assign particular dates on which sexual intercourse took place (Bhola Nath Mitter (1924) 51 Cal. 488).

Charge should run thus-

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

That you, on or about the .... day of ...., at committed adultery, with AB, knowing or having reason to believe her to be the wife of CD; and that you thereby committed an offence punishable under Section 497 of the Penal Code, and within may cognizance.

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

498. **Enticing or taking away or detaining with criminal intent a married woman.—** Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Synopsis

1. Scope and applicability.
2. With the intent that she may have illicit intercourse with any person.
3. Abduction of married woman.
4. "Or conceals or detains wiht that intent any such woman."
5. Custody of husband or on his behalf.
6. Consent of woman.
7. Sections 366, 376 and 498.
8. Evidence and proof.
9. Punishment.
10. Complaint.

1. Scope and applicability.— This section is intended to protect the rights of the husband and not those of the wife. The essence of the offence is the deprivation of the husband, or his custody and proper control over his wife, with the object of the accused having illicit sexual intercourse with her. Consent of the wife is not relevant (Alamgir Vs. State, AIR 1959 SC 436). The word 'takes' imports th

personal or active assistance of the accused to the wife in getting her away from the protection of the husband or from the protection of any person who was taking care of the wife on behalf of her husband (1986 CrLJ 1352).

The fact that the woman willingly accompanied the accused will not diminish criminality if other ingredients of offence are proved (1984 CrLJ (NOC) 101 (Cal). It is not necessary that there should be any enticement. All that is necessary is that if any person takes away another man's wife with the intention that she may have illicit intercourse with him, then the offence is complete. Taking away implies that there must be soem influence operating on the woman or co-operating with her inclination at the time the final step was taken which caused a separation of the woman from her husband, for the purpose of causing such step to be taken (PLD 1963 Dhaka 798).

The influence operating on the woman may be physical or moral (PLD 1963 Dhaka 798). Where all the time there was obviously a strong influence emanating from the accused and operating on the woman's mind which may be also co-operating with her inclination, to leave her husband's house, the accused was held guilty (PLD 1963 SC 51). Even coaxing a woman by letter to get away from the house of her husband would amount to enticing her away (PLD 1962 Lah 558). An inducement given by a man to another's wife that if she wanted to maintain friendship between them, she should agree to desert her husband's roof and live with the former, in which case he undertook to keep her as his mistress, amoutned to enticement (AIR 1947 Mad 368). But where there was no influecne operating on the woman when she left the house of her husband and she did so of her own free will, the accused cannot be convicted under this section (PLD 1963 Dhaka 798). Therefore the mere fact that a married woman was recovered from the house of the accused, or was seen in the company of a man without anything more would not be sufficient for conviction under this section (1977 PCrLJ 151).

The woman going together in the company of the accused by itself does not esablish the "taking away" within the meaning of section 498, of the Penal Code. It is not very easy to say that "taking away" means that there must be some influence, physical or moral, brought to bear by the accused to induce to the woman to leave her husband in order that her leaving may amount to taking away by the accused (Abdul Malek Vs. The State, 17 DLR 694 ; 4 DLR 367 AIR 1942 Oudh. 434).

2. With the intent that she may have illicit intercourse with any person.— Where the complainant's wife had gone with her sisters husband and there was nothing on record to show that the brother-in-law had detained her with intent of having illicit relations with her and the allegation that she had illicit relations with him was only a suspicion, no offence under Section 498 could be made out. (Ram Singh (1982). A Cr R 392). The detention must be with the intent that she may have illicit entercourse with the acaused (1973 Cr LJ 1281).

Where the wife of the complainant, owing to illtreatment by her father in law, left the house and went to the appellant, her fist cousin, living in the adjacent house and when the complainent went to take his wife back, she refused to acompany him, it was held that the essential ingredients of an offence under this section could not be proved as there was absolutely no evidnece to show that the appellant had at any time resisted or obstructed the wife of the complainant from accompanying her husband or going to the hosue of her husband. There was also no evidence from which an inference could be drawn that the appellant had enticed away the wife of the complainant for the purpose of having illicit intercourse with her. Hence, the appeal was allowed and the conviction and sentence set aside (Adikanda Samal v. Madhabananda Nayak 1980 Cri LJ (NOC) 176 (SC) = AIR 1980 SC 1729 = 1980 SCC (Cri) 108 reversing 1973 Cri LJ 1735 (Ori).

When it could not be proved that the enticement was for the purpose of illicit intercourse, the oftence is not made out (1980 SCC (Cr.) 108). For a conviction under Section 498 Penal Code, it is necessary that there should be a proper complaint by the husband as required under Section 198, Cr. P. C., but it is not necessary that the complaint should specify also the sections under which it has been made. What is necessary under Section 2(d) Cr. P. C., is only this much that the complaint should mention the allegations which if proved would constitute an offence under Section 498, Penal Code. (Shyamlal v. State, AIR 1958 All. 76 (7879 : 1958 Cr. L.J. 11).

Under Section 50 of the Evidence Act, where marriage is an ingredient of an offence, the marriage must be strictly proved, and no presumption arising from living as husband and wife or long cohabitation can sustain a conviction. (Pritam Singh, I.L.R. 5 Cal. 566 (F..B.).

Law does not postulate that direct evidence of enticement regarding time, place, date or proof of actual illicit intercourse has to be adduced. These are matters on which no evidence will be available and legitimate inference has to be drawn from the conduct of the parties evidence in the case and circumstances transpiring therefrom (Adikanda Samad v. Madhabananda Nik, 1973 Cr.L.J. 1735 (1737).

3. Abduction of married woman.— The wording of the section makes it clear that in order that a person should be made liable for an offence under it, it is not necessary that there should be any enticement. The fact that the word "takes" is put juxtaposition with "enticing away" shows that the Legisalature intended that the circumstances attending the two are quite different. The words "enticement" necessarily connote that some kind of persuasion or allurement was held out by the person who imposed either his will or power upon a woman (In re, Akkirayu Sanyasi : AIR 1950 Mad. 13 (14),= 51 Cr. L.J. 228 = (1949) 1 M.L.J. 207 = 1949 M. W. N. 278 : 62. N.L.W. 400).

Where there was a strong influence emanating from the accused and operating on the lady's mind to leave her husband's house all the time. Held that the accused was guilty of "enticing" and taking away a lady from her husband's house (Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf, P.L. D. 1963 SC 51 (78).

There was absolutely no evidence to show that the appellant had at any time resisted or obstructed Hemalata from accompanging her husband or going to the hosue of her husband. The evidence only showed that Hemalata just refused to go to the house of her husband. It was held that in these circumstances, it was not possible to hold that there was any legal evidence, either direct or circumstanctial, from which an inference could be drawn that the appellant had enticed way Hemalata for the purpose of having illicit intercourse with her (Adikanda Samal v. Madhapananda Nayak, (1979) 4. S. C. C. 488 (489) = 1979 Cr. L.J. 483 (SC).

Sections 497 and 498 protect only a husband and not any other man who may have a woman living with him even though that union may in fact be as permanent as a marriage contracted in accordance with the law (PLD 1962 Lah 558). Therefore in a prosecution under section 497 or section 498 by the husband, the question of marriage of the woman with the complainant is material (AIR 1957 HP 42). Where the marriage between the woman and her husband is recognized to be a valid marriage by local custom, an offence under this section woud be committed if the wife is enticed or taken away (AIR 1919 Lah 199 DB). But where hte relationship between a man and woman does not amount to marriage, the section woudl not apply. Thus cohabitation of a man and woman under the Aliyasantana system does not constitute marriage so as to render punishable a person who entices away a woman

with the intent specified in this section (6 Mad 374 DB). Where under the personal law, marriage between a man and woman is prohibited, they cannot claim to be married simply because they hav gone through a form of marriage, and therefore section 498 should not apply to them (1893 Pun Re No 17 P. 71 DB).

Voidable marriage : A woman is not the wife of a man within section 498 if their marriage is voidable. Consequently the enticement etc of such a woman is not indictable under section 498 (11 CrLJ 664). It must be noted that the marriage of a minor Muslim girl is not voidable merely because she has the option of puberty. The marriage is valid so long as the option is not exercised Therefore the mere fact that no consummation took palce after puberty and that she left her husband is not enough to hold that she exerised her opotion, and the person enticing her is guilty of an offence under section 498 (AIR 1928 Lah 898).

4. "Or conceals or detains with that intent any such woman".— The word "detains" in this section means, by deprivation and according to the ordinary use of language, "Keeps back". The keeping back need not necessarily be by physical force ; it may be by persuation or by allurements and blandishments. Where the wife of the complainant had left the house with the revisionist and the revisionist did not allow her to accompany the uncle of the complainant when he wanted to take her with him and there was evidence to show that the revisionist was concealing and detainging the complainant's wife at his house, his conviction under Section 498 would be proper (Ram Narain 1982 Cri LJ (NOC) 179 (All). 1982 UP Cr LR 313).

A man detains a woman within section 498, if she is kept under his protection in a house provided by him with knowledge and intention specified in the section (14 CrLJ 595). It is true that the word detains may denote detention of a person against his or her will; but in the context of the section it is impossible to give this meaning to that word. Detention in the context must mean keeping back a wife from her husband or any other person having the care of her on behalf of her husband with the requisite intention. Such keeping back may be by force; but it need not be by force. It can be the result of persuation, allurement or blandishments which may either have caused the willingness of the woman, or may have encouraged, or cooperated with her initial inclination, to leave her husband (AIR 1959 SC 436). It follows that for conviction under this section there must be evidence to show that the accused did something which had the effect of preventing the woman from returning to her husband. (AIR 1936 Cal 450).

The effect of keeping back the woman from her husband will be deemed to have been brought about by the offender when it is his act, however insignificant, that turns the balance in favour of the woman keeping back from her husband. That being so, however determined may a woman be not to go back to her husband whether due to ill treatment infidelity or any other cause, the offender will be deemed to have detained her if he offers her the facility, e. g. food and shelter, which enables her to keep away from her husband (AIR 1954 HP 39). It may be that the wife was dissatisfied with her husband and wanted voluntarily to leave him; but where evidence is that she must have been encouraged or induced not to go back to her husband because she knew that she would find ready shelter and protection with the accused and she must have looked forward to marrying him and the accused in fact claimed to have married her, there can be no doubt that he intended to have illicit sexual intercourse with her. If having thus left the house of her husband she came to stay with the accused and he allowed her to stay with him, it can be sad that he has detained her within the meaning of section 498. Where there is no evidence how the complainant's wife left the house but there is evidence that one of the accused married the complainant's wife, this could only have been because he had

offered to marry her and she had agreed to marry him. Thus there was persuation or inducement by reason of which she remained in the hosue of the accused That being so, she was detained within the meaning of that word in section 498 (AIR 1959 SC 436).

5. Custody of husband or on his behalf.— An offence under this section is committed only where a woman is taken away from custody of the husband or the custody of any other person who has her custody on behalf of the husband (PLD 1982 SC 4). Where there is no quarrel between the husband and wife and the wife is in charge of her mother, such charge is only on behalf of the husband and a person who takes away the woman from her mother is guilty under this section (1 Weir 573). Similarly where the wife has gone to visit her parents but she refuses to return, the parents have care of her on the husband's behalf. The fact that the relations between her father and the husband get strained during her stay at her father's house and the fact that the parents were opposing return of the wife to her husband could not change the character of their care (2 Sau LR 195 DB). But the custody of a woman by a person who took care of her because her husband neglected her is not a custody by such person on behalf of the husband (AIR 1937 Bom 186).

6. Consent of woman.— Consent of the wife to deprive her husband of his proper control over her is not material to the offence under section (498 AIR 1959 SC 436). But where the woman left the house of her husband of her own free will and there was inducement or enticing away by the accused, there can be no conviction under this section (AIR 1934 Oudh 258). Similarly where the woman is a discarded wife and she goes away with a man, the latter cannot be convicted under this section (AIR 1937 Bom 186).

The woman going together in the company of the accused by herself does not establish the ingredient of taking away within the meaning of section 498 (1962 14 DLR 694).

7. Sections 366, 376 and 498.— A person prosecuted for offences under Sections 366 and 376 cannot, if those offences are not etablished, be convicted of the offence under this section, in the absence of a complaint made by the husband or other person authorized by him in this behalf. (Empress of India v. Kullu, I.L.R. 5 All. 233).

It should be added that since this section contemplates criminality committed under diverse circumstances, the finding should specify only those proved; that is to say, whether the accused had- (i) taken away, or (ii) enticed away the married woman or whether the taking or enticing away was (iii) from the husband, or (iv) any other person having the care of her on his behalf, and whether the taking or enticing away was (v) with intent to have illicit intercourse with her or whether her concealment or (vi) detention was with that intention. As the same time where the facts do not warrant the finding on such exclusive particulars there appears to be nothing illegal in recording a finding in more general terms (Mothoora Nath Roy, 21 W. R. 71 (73).

It is clear that detention of a morried woman is a continuing offence. Where previous acquittals were in respect of previous detentions that husband is not beharred from prosecuting a new complaint of the detention of his wife which took place since last acquittal (Nadar v. Emperor, 24 Cr. L.J. 636 (637) : 73 I. C. 524).

8. Evidence and proof.— The expression wife under Sections 487 and 498 should also mean legally and validly married wife, and, therefore, in a prosection under these sections, the factum as well as the legality and the validity of the marriage must be strictly proved beyond any reasonable doubt (Chandra Bahadur Subba (1978) Cri LJ 942 (Sikkim).

The Court observed that the facts that a man and a woman lived together as husband and wife for a long time and that the woman bore children and that they were or are usually treated by others as husband and wife are not evidence of any valid marriage to sustain a prosecution under Section 498, particularly Section 498, in view of the provisions of Section 50, Evidence Act (Chandra Bahadur Subba (1978) Cri LJ 942 (Sikkim).

The fact that the woman accompanied the accused of her own free-will does not diminish the criminality of the act (Ram Narain 1982 Cri LJ (NoC) 179 (All) = 1982 UP Cr. LR 313 : Narayan Chandra Das v. Kamalakshya Das 1984 Cri LJ (NOC) 101 (Cal).

Detention may not be the result of force and may even be the result of persuasion, allurement and blandishment. It is true that in some cases it has been held that to keep any persons wife the promise of marriage or upon the understanding that she will be married, was such allurement and persuasion. Though, similar was the case here, the appellate Court was hesitant in reversing the finding of the trial Court as such promise, persuasion or flattery were all maters of presumption only there being no direct evidnece, and the appellate Court had to be slow in disturbing a finding of the lower court (Niyamat Khan v. Gaffar Khan (1976) Raj Cr C 320).

9. Punishment.— The determination of the right measure of punishment in a particular case, though guided by variety of considerations not excluding the prediliction of the presiding Judge, is a matter of discretion. But it is a judicial balanced discretion and, therefore, the Courts should always bear in mind the necessity of proportion between an offence and the penalty. A fine of taka 200 is grossly inadequent punishment awarded in a case under Section 498 Penal Code. (Adikanda Samad v. Madhabannand Nailk, 1973 Cr.L.J. 1735 (1738).

The consent of the wife in staying with and the fact that she left the complainent's house willingly would not exonerate the revisionist of his criminal liability but they could be taken into consideration for purposes of sentence. The High Court reduced the sentence of six months, rigorous imprsonement, to a fine of taka 200. (Ram Narain 1982 Cri LJ (NOC) 179 (All) : 1982 UP Cr LR 313).

A light sentence is sufficient to meet the ends of justice when the abducted woman is an active bettor (Lal khan (1914) 15 PLR 403 = 15 Cr LJ 524 = (1914) AIR (L) 101) = Chandgi (1926) 27 PLR 642 : 28 Cr LJ 52 : (1927) AIR (L) 91)., or where the husband did nto care much about his wife and did not take any action against the accused for a number of months after her abduction. (Gahra (1925) 26 PLR 429 : 27 Cr LJ 192 : (1926) AIR (L) 176 ; Rem Chand 12 Cr LJ 500).

10. Complaint.— The provisions of section 199 of the Criminal Procedure Code categorically declare that "no Court shall take cognizance of an offence under section 497 or section 498 of the Penal Code, except upon a complaint made by the husband of the woman". This shows that the bar against taking cognizance of such an offence otherwise than upon a complaint by the husband is total and cimplete. (The State Vs. Aynuzzaman 1987 BLD (AD) 100 Para 10).

It must be prved that sexual intercourse took place without the consent or connivance of the husband. Adultery cannot be committed with unmarried women, prostitutes or widows. There can be no cognizance of the offence except upon a complaint by the husband or by some person who had the casre of such woman (Nurul Haque Bahadur Vs. Bibi Sakina 1985 BLD 269).

CHAPTER XXI

OF DEFAMATION

499. **Defamation.**-Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, execpt in the case hereinafter excepted, to defame that person.

Explanation 1.-It may amount to defamation to impute any thing to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2-It may amount to defamation to make and imputation concerning a company or an association or collection of persons as such.

Explanation 3.-An imputation in the form of an alternative or expressed ironically, may ammount to defamation.

Explanation 4.-No imputation is said to harm a persons' reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person, in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

(a) A says-"Z is an honest man ; he never stole B,s watch" ; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(c) A draws a picture of Z running away with B,s watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

First Exception. **Imputation of truth which public good requires to be made or published.**-It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception. **Public conduct of public servants.**-It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception. **Conduct of any person touching any public question.**-It is not defamation to express in good faith any opinion whatever respecting

the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in peitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

***Fourth Exception.* Publication of reports of proceedings of Courts.**-It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation.-A Justice of the peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

***Fifth Exception.*- Merits of case decided in Court or conduct of witnesses and others concerned.**-It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

(a) A sayts-"I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as witness, and no further.

(b) But if A says-"I do not believe what Z asserted at that trial because I know him to be a man without veracity." A is not within this execption, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

***Sixth Exception*-Merits of public performance.**-It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation.-A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z-"Z's book is foolish : Z must be a weak man, Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.

(e) But if A says-"I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine," A is not within this exception, insamuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

***Seventh Exception.* Censure passed in good faith by person having lawful authority over another.**-It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his order; a parent censuring in good faith a child in the presence of other children; a school master, whose authority is derived from a parent a pupil in the presene of other pupils a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier-are within this exception.

***Eight Exception.* Accusation preferred in good faith to authorised person.**-It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with pespect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; If A in good faith complaints of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father-A is within this exception.

***Ninth Exception.* Imputation made in good faith by person for protection of his or other's interests.**-It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustrations

(a) A. a shopkeeper says to B. who manages his business-"Sell nothing to Z unless he pays you ready money for I have no opinion of his honesty,"A is within the exception if he has made this imputation on z to good faith for the protection of own interests.

(b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the public good, A is within the exception.

***Tenth Exception.*- Caution intended for good of person to whom coneveyed or for public good.** It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person is interested, or for the public good.

500. **Punishment for defamation.**-Whoever defames another shall be punished with simple imprisonment for a term whcih may extend to two years, or with fine, or with both.

Synopsis

1. Scope and applicability.
2. Publication by editor, printer and publisher.
3. News paper criticism.
4. Imputation concerning any person.
5. Imputation against wife.
6. Explanation 2.- Imputation against combination of persons.
7. Imputation to harm .... the reputation of such person.
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1. Scope and applicability.—The essence of the offence of defamation is the intention to harm reputation, and that necessarily requires publicity to be given to the imputation (Sohan Lal. V. State, (1962) 2 Cr. L. J. 520 (522) = I. L. R. (1962) All. 179). Intention on the part of the accused to harm the reputation or the knowledge or reasonable belief that an imputation will harm the reputation of the person concerned is an essential ingredient of offence under Section 499, Penal Code (Nihal Singh, v. Arjand Das, 1983 Cr. L. J. 77 (780) (Delhi).The essential ingredient of the offence is that the imputation should have been made or published with the intention of harming or with the knowledge or with reasons to believe that the imputation will harm the reputation of such person (AIR 1970 SC 1876).

It is well settled that where some passage in a petition are alleged to be defamatory, the document should be read as a whole, with a view to find out the main purport, and too much improtance should not be attached to a few isolated passages here and there (Chaitan Charan Das V. Raghunath Singh, AIR 1959 Orissa 141 (143) = 1959 Cr. L. J. 1006 = 25 Cut L. T. 16).

The offence of defamation consist of three essential ingredients viz. (i) making or publicing any imputation concernng any person, (ii) such imputation must have been made by words either spoken or intended to be read, or by sings, or by visible representation, and (iii) such imputation must have been made with the intent to harm or with knowledge, or belief that it will harm the reputation of the person concerned (AIR 1968 Cal 266).

The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed. (AIR 1935 All 743). Where a person is called by a name which is *per se* defamatory, this knowledge is presumed. It has been held that the expression black marketeer is *per se* defamatory within the meaning of section 499 and as such calling one a black marketeer is an offence under section 499 (AIR 1952 Mys 123).

Where the imputations scathed the parents of young girls for adopting western culture and allowing freedom to the girl thereby suggesting that they introduced their daughters to certain objectionable environments and encouraged them to indulge in sexual involvements. Apart from the severe attack against the girl who was engaged all the girls in the family had been criticised for immorality resulting from fondness of the western culture by their parents and the training received from them. Flirting whether before or after engagement is irreconcilable with our religion and culture and the sexual involvement is severely condemned. The girls adopting such a way of life are rarely welcomed or accepted in a respectable society.

Scandlising the parents and their unmarried daughters is the worst type of defamatory imputation (PLD 1971 Kar 266).

There is a difference between civil and criminal liability for defamation. The civil liability for defamation to pay damages, however, is not governed by any statute law but is determined with reference to the principles of justice, equity and goods conscience, which generally have been improted in this country from the English principles (PLD 1960 Dhaka 736). It follows that if a defamatory statement does not fall within the specified exception, it is not privileged and is not protected from the mischief of section 500 of the Penal Code (PLD 1960 Dhaka 736).

So far as liability for defamation is concerned there is distinction between civil liability and criminal liability. Civil (a part of law of tort) is determined by the principles of English Law, but criminal liability depends upon sections 499 and 500, of the Penal Code (AIR 1926 All 287= 27 CrLJ 253). Neither ill-will nor malice is an ingredient of the offence of defamation, and want of either, cannot serve as a defence. An unproved plea of justification, in judicious cross-examination of the person aggrieved, and obstinately persisting in the libellous charge without any sufficient reason, may be taken into consideration, as evidence of malice. Malice at law does not mean, that the accused was actuated with hatred or ill-will or even that he had an actual intent to vilify or defame such a person. It suffices that the statement was made wilfully or purposely or without any lawful excuse or justification (Harbhajan Singh v. State of Punjab, AIR 1961 Punjd. 215 (229,) reversed in Harbhajan Singh v. State of Punjab, AIR 1966 S. C. 97).

A bad general reputation can be proved but not rumours or suspicions. It is not open to give evidence of particular facts having bad character of disposition. Section 55 of the Evidence Act, allows as admissible the evidence of general reputation and of general disposition but not of particular facts or of traits (Harbhajand Singh v. State of Punjab, AIR 1961 Punj. 215 (226), reversed in Harbhanan Singh v. State of Punjab AIR 1966 SC 97).

2. Publication by editor, printer and publisher.- Publication is a necessary ingredient of the offence of defamation and once it is found missing the offence cannot be complete (KLR 1982 CrC 105). It is of the essence that in order to constitute an offence of defamation it must be communicated to a third person because what is intended by the imputation is to arouse the hostility of others. If a person merely writes defamatory words and keeps the writing with himself, the offence is not made out. Likewise, if the libeller merely communicates the libel to the person defamed it does not constitute an offence under the said section although it may amount to an insult and may be punishable as such (AIR 1962 MP 382).It is undisputed that it is the duty of an editor of a newspaper to check up the news of the information that is supplied to him, before publishing the same in his paper, especially when the news might be of a defamatory nature, because ultimately it is the editor who would be held responsible for publishing any defamatory material in his paper. If he does not do that he had to suffer the consequences for his neglect and remissness. Learned counsel for the petitioner could not cite any principle of law or a decided case in favour of the proposition that if a person gives wrong information to the representative of a newspaper and the same is published with the result that the editor of that paper is subsequently held for defamation, then the supplier of the information would be liable damages in a suit filed against him by the editor (Sodhi Gurbachan Singh v. Babu Ram AIR 1969 Punj 201 (204).

A newspaper is in no better position in regard to the law of defamation than a private individual. A printer is liable under the law for defamatory matter printed by him (AIR 1963 Punj 201). The freedom of the journalists is an ordinary part of the

freedom of the subject and to whatever lengths the subject in general may go, so also may the journalists, but, apart from statute law, their privilege is no other and no higher. (AIR 1965 All 439). The limitations, *inter alia*, are to the effect that the freedom of speech and expression is not to be exercised in such a way as to constitute an infraction of the law relating to defamation. Just as every individual possesses freedom of speech and expression, every person also possesses a right to his reputation which is regarded as property. Hence no body can so use his freedom of speech or expression as to injure anothers reputation or to indulge in what may be called character assassination (AIR 1963 Punj 201). It is therefore incumbent that the journalists should make due enquiry as to the truth of the matter they publish. If they do not they take the risk of prosecution for defamation. Thus where comment is made on allegations of fact which do not exist, the very foundation of the plea of fair comment disapears. A wilful misrepresentation of fact or any misstatement which an editor could have discovered to be a misstatement if he had made proper enquiries cannot support the plea of fair comments as an editor must make due enquiries as to its truth before disseminating the statement of those facts.(AIR 1929 Sind 90).

Where the accused accepted allegations made by certain prisoners affected by the alleged conduct of the Jail Superintendent as true upon hearing a very interested party only, without giving the other party concerned an opportunity to refute them in publishing defamatory statements about the conduct of the Superintendent towards the prisoners, he cannot be said to have acted with due care and attention and therefore, in good faith, so as to bring himself within the second and ninth exception to section 499 of the Penal Code (AIR 1943 Oudh 1).

The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not (Mc Leod (1880) 3 All. 342). Simply because the accused is an associate editor he cannot escape liability if he is really guilty of offence of publishing defamatory news when his name is specifically mentioned in the declaration published at the end of the newspaper (A. B. K. Prasad v. State of Andhra Pradesh; 1990 (1) Crimes 325 (A. P.).

The press has great prower in impressing the minds of the people and it is essential that persons responsible for publishing anything in newspapers should, take good care before publishing which tends to harm the reputation of a person (Sahib Singh (1956) AIR (SC) 1451 = (1965) II Cr LJ 434).

The owner of a journal in order to be liable under s. 409 has to have direct responsibility for the publication of the defamatory statement and he must also have the intention to harm or knowledge or reason to believe that the imputation will harm the reputation of the person concerned. The owner of a journal qua-owner has no responsibility under the section (Bhagat Singh v. Lachmand Singh (1968) Cr LJ 759 = (1968) AIR Cal. 296).

An editor should be most watchful not to publish defamatory attacks unless he first takes reasonable plans to ascertain that there are strong and cogent grounds for believing the information, which is sent to him, to be true. A plea justifying commission of an offence should be put forward only in a case where there is reasonable certanity that such plea will earn acquittal (M. Anwar Vs. Saddat Khyali, 15 DLR 76 (WP). The publication of a notice in a newspaper conveying an imputation that the complainant is dishonest in the management of the fixd affairs of a company and tries to conceal the dishonesty by methods that are themselves dishonest, is defamation (Madhorao Gangdhar Chitavis v. Narayan Bhaskar Khare (1926) 27 Cr LJ 1119 AIR 1927 Mad 17). It is duty of newspaper editor to check every item of news supplied and then to publish the same. If the editor is convicted for publishing a defamatory statement, he cannot recover damages from the supplier of news unless

there is an express contract to ndeminfy him (Sodhi Gurbeachan Singh Vs. Babu Ram, AIR 1969 Punj 201).

If the imputation is false that may be a circumstance to be taken into consideration for ascertaining the intent of the publisher but it is not by itself sufficient to base a conviction. Again, it should not be forgotten that in a criminal prosecution it is sufficient if the accused can show that the imputation was substantially true. The onus upon the accused of proving that his case comes within either as the Exceptions may also be discharged if he can show that he had reasonable grounds for believing it to be true and was not actuated in making such an imputation by any malicious motive. The mere fact, therefore, that the imputation contained in the publication is factually incorrect will not by itself be sufficient (PLD 1967 SC 32).

To prove the publication of libel through newspaper it is sufficient to prove that the newspaper was delivered with the postal area over which the Court had jurisdiction and it is not necessary to go further and show that the article was read by some particular person since a newspaper is a commodity printed for the purpose of being read and it must be assumed that it was so read (Jhabbar Mal (1927) 26 ALJ 196, 207 = 30 Cr LJ 530 AIR 1928 All (222). The accused, the editor, printer and publisher of a newspaper, publshed a statement of a political leader, to the effect that the Governor of Orissa was a mere toy in the hands of the Congress Party and that the Governor was favouring the Congress Party because a close relation of the Governor had got an appointment n the Assam Brithish Oil Company on a fat salary through the endeavours of the Congress Government. It was held that these words were prima facie defamatory of the Governor in respect of his conduct in the discharge of his public functions and that the accused were not justified in publishing and printing the imputations without verification and that the editor was guilty under s. 500 and the printer under s. 501 (Gour Chandra (1962) AIR Orissa 197).

3. Newspaper criticism.— A newspaper has a public duty to ventilate abuses and if an official fails in his duty, a newspaper is absolutely within its rights in publishing facts derogatory to such official and making fare comment on them, but it must get hold of provable facts (Jhabbar Mal (1927) 26 ALJ 196 = 30 Cr LJ 530; (1928) AIR (A) 222; Vishan Sarup v. Nardeo Shastri AIR 1965 ALL 439 = (1965) II Cr LJ 334).

The editor, however, should be most watchful not to publish defamatory attacks upon individuals unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believng the information which is sent to him to be true-that proof is readily available and that in the particular circumstances his duty to the public requires him to make the facts known (Mohannad Nazir (1928) 26 ALJR 509 = 30 Cr LJ 766 = AIR 1928 All 321).

Where imputations are made against a public officer for acts of oppression and bribery in a newspaper, it is for the Court, to see, whether they are made in 'good faith' or not. The opinion of the superior officer of the public servant is not decisive on the point. The fact that the writer did not wait before publishing the article till he received a reply to his petition to the superior officer, making the same allegations, does not negative good faith (Kelu Nair v. Thirumampu (1947) 2 MLJ 325 = 60 LW 621 = (1947) MWN 607).

Newspaper report regarding theft, incident based on true facts and supported by good faith without any element of malice hold report is not defamatory, the accused is protected (K.M. Cheriyan Vs. D. Johnson, 1969 Ker LT 59; 1969 Ker LR 826).

False statements published in newspapers are not fair criticism. If annoymous letters are sent to the press containing false statements the press is responsible for them if the name of the author is not given up (26 CLJ 401).

A fair comment must be based upon facts and a person cannot invent facts and express his opinions upon such invented facts. The conduct of a public man or of a main in his public character cannot be assailed as dishonest, simply because the writer fancies that such conduct is open to suspicion (19 CrLJ 129; 43 IC 417 Rang).

4. **Imputation concerning any person.**—An imputation ordinarily implies an accusation, or something more than an expression of a suspicion. It is, however, rather difficult to draw the line. An expression of a suspicion may have the same effect on the mind of the person to whom the suspicion is comunicated as an accusation would have (Thambu (1926) 27 PLR 171 = 27 Cr LJ 899 = (1926) AIR (L) 278).

Where the accused made a report at the police station that some property of his had been stolen from his threshing floor, and that he suspected the complainant and two others, and the complainant prosecuted the accused for defamation in respect of that report, it was held that an expression of suspicion might have the same effect on the mind of the person to whom the suspicion was communicated as an accusation would have, and as in this case the suspicion resulted in the police searching the complainant's house, the accused was guilty of defamation (Thambu (1926) 27 PLR 171 = 27 Cr lJ 899 = (1926) AIR (L) 278).

To give out that a woman had miscarriage without any knoweldge whether she was married or not would amount to defamation (Kashi Ram (1930) ALJ 1121 = 32 Cr lJ 435 = (1930) AIR (A) 493).

5. **Imputation against wife.**— A person may be defamed by making scurrilous attacks upon the character of his wife without alleging anything personally against him (Bishwanath Bubna (1949) 50 Cr LJ 972).

6. **Explanation 2.— Imputation against combination of person.**—If an indeterminate and indefinite body as the Marxist Communist Party or Marxists or leftists as a collection of persons are defamed, it could not be said that each and every member of that body could maintain an action under s. 500 unless the complainant was referred to as a person who had been defamed by the imputation (Krishnaswami v. Kanaran 1971 KLT 145; Narayana Pillai v. Chacko 1986 Cri LJ 2002 (Ker).

Advocates, as a class, are incapable of being defamed. The dialogues and visual representations of lawyers in the impugned film 'Nadaan' pointed out only to advocates who indulge in such practices. The impugned portions of the film cannot lead any reasonable person to form the conclusion that advocates are pests and a despicable bunch (Asha Parekh v. State 1977 Cri LJ 21 (Pat).

Reference to lawyers as 'Kajia-Dalals, 'i.e., dispute brokers, was in respect of the lawyer's class as a whole and the same was not referable to a person or a group of persons who could be identified and distinguished from the rest of the members of the legal profession. True, the term 'Kajia-Dalal' if used in respect of lawyers would certainly cause some resentment, but, simply because an adjective or description causes resentment, it would not become defamatory (Narottamdas L Shah v. Patel Maganbhai Revabhai 1984 Cri LJ 1790 (Guj).

7. **Imputation to harm .... the reputation of such person.**- Section 499, when it speaks of making or publishing any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the

reputation of a person, assumes that every person has some reputation, whether high or low (ILR 1955 MB 429). For a conviction under section 499, it is not necessary to prove that actual harm was caused to the reputation of the complainant. The proof that harm was intended to the complainant's reputation or that the accused knew or had reason to believe that harm will be caused by the imputation is sufficient. (AIR 1941 Pat (DB). Thus to give out that a woman had miscarriage without any knowledge whether she was married or not, would amount to defamation because the person who makes the statement would have reasonable belief that such imputation would harm the reputation of the woman in case she was no married (AIR 1930 All 493). Similarly making the effigy of a person, calling it by the persons' name and beating it with shoes in the midst of a mela or fair, amounts to defamation (2 NWPHCR 435 DB).

Where the only objection to the impugned writing was that while the complainant was'removed' from service, the news item reported that he had been 'dismissed', no offence under ss. 501 and 502 could be made out. 'Removal' and 'dismissal', in common parlance, have the same meaning, no distinction is made between the words in common speech. In the impugned writing itself, while the word dismissed was used at several places, in the end, it was reported as a case of removal. Obviously, the accused made free use of both the words to describe the event (Radhanath Rath v. Sub-Divisional Judicial Magistrate, Cuttack (1977) 43 Cut LT 469 = 1977 Cut (Cr 82).

The accused must have intended to publish the words alleged to be libelous. It is not sufficient that he intentionally published something which contained the words. Munslow, (1985) 1 QB 758. Intention on the part of the accused to harm the reputation of the complainant, or knowledge or belief that the imputation will harm the reputation is an essential element (1983 CrLJ 772).

8. Explanation 4,- Harm the reputation.— To impute dishonesty to a company doing business would amount to defamation (Narayanan Chettyar (1935) 37 Cr LJ 328 = (1935) AIR (R) 509). Statement that a woman is having a paramour is scandalous and affects reputation. It is per se defamatory as per Explanation 4 of section 499 of the Penal Code (J. Chelliah Vs. Rajeswari, 1969 CrLJ 571=(1968) Mad LJ 441).

Mere vulgar abuse, which does not intend to lower a person addressed in the estimation of others or to bring him into oblique, contempt or ridicule does not amount to defamation. If a woman had merely uttered the word 'chhinal', i. e., a woman of easy virtue, it could be held that the word did not convey its literal meaning but was only a vulgar abuse, which is not uncommon in villages when women quarrel among themselves. But, where the imputation against a 45 years old widow was that she was the kept of the maternal uncle of the plaintiffs daughter-in-law, was a definite imputation upon her chastity and was undoubtedly defamatory. A Language is defamatory on the face of it when defamatory meaning is the only possible or the only natural and obvious meaning (Ramdhara v. Phulwatibai 1970 Cri LJ 286 (MP).

The background and the circumstances under which the imputations were made are relevant to arrive at a conclusion whether the imputations were intended to be literally conveyed or they were only hurled as abuses. There must be something more than mere abuses from which it could be possible to infer that the imputations were made with such intention of defaming directly or indirectly the complainant. In the absence of any such proof or material, howsoever vituperative the abuses may be, the abuses by themselves may not be sufficient to consitute the offence of defamation. Where the accused used words suggesting that the complainant was illegitimate and

his mother was a kept mistress of his father, it could not be said that the words *per se* constituted defamation unless it was proved that the accused intended by so publishing or publicly abusing to make all others to believe literally that the complainant and his mother were so. The way in which the accused were questioning the complainant, abusing him at the same time about his conduct in taking warrants for their arrest showed that they were mrely giving vent to their displeasure and anger by so abusing. Therefore, the accused could not be held guilty of the offence of defamation under s. 499 (Jayappal Ls v. Shamegowda NS 1985 Cri LJ 1283 (Kant).

An imputation that a person would be excommunicated if he carries on the business of leather and if he participates in social functions and takes meals is certainly one which lowers the moral character of that person not only by itself but also in respect of his possession (Pokhai v. Dina 1984 Cri LJ (NOC) 157 (All).

Where a group photograph with a false caption depicting the person depicted therein a soldiers of a goonda war' was published in a newspaper, on a complaint by one of the persons photographed, it was held that to characterise a person as 'goonda' which is a well understood term, is *per se* defamatory and that each and every person thus photographed could file a complaint (Chellapan Pillai v. Karanjia (1962) II Cr LJ 142).

9. Exception 1.- In order to attract the first execption to Section 499 of the Penal Code, it must be proved that the allegations made p*er se* defamatory are true (Damondara Shenoi v. Public Prosecutor; 1990 (1) Crimes 451 (Ker). In order that exception. I my apply, it must be for the public good and that such imputation should be made or published. It however a question of fact whether such imputation made or published is for public good (AIR 1970 SC 1372).

The first exception s available to an accused if he can show that the impugned statement was true and had been made public for the public good (AIR 1966 SC 97).

10. Execption.— The imputation concerning a public servant do not amount to defamation if they express opinion respecting the conduct of the public servant touching public question. However such an opinion has to be expressed in good faith. Healthy and wholesome criticsm of public functions by public servants while acting in the discharge of their official duties is necessary to keep the public servants within the grooves of responsibility. Bona fide criticism concerning questions of public interest involving the conduct of public servants and expression of opinion for public good provide a good check and corrective against the transgression of bounds of official authourity and help to maintain standard of conduct, which is expected of them to attain the end of service to the public (Master Girdhari Lal. V. State, (1969) 71 Punj. 1 R. 322 (328).

11. Execption 3.— In order that exception 3 may apply it must be established that the opinion published in good faith (AIR 1965 SC 1451). For the purpose of this exception it is not necessary to prove that the facts forming the basis of the articles conclusively show that the imputations published were true (Girdhari Lal (1969) Cr lJ 1318).

12. Execption 4.— In Jatish Chandra v. Hari Sadhan (1961) AIR SC 613), it was observed that this exception does not make any concession in respect of proceedings of a House of Legislature or Parliament. As to the definition of 'Court of Justice'. it is not necessary in law that the proceedings is to be published contemporaneously. All that is necessary is that the publication should be a substantially true report. But, if the publisher gives his comments, perhaps they are not covered by the fourth exception. In the present case, the report contained only a

fair account to what took place, in the Court and as such, the accused had only to prove that fact under the general issue and he would be entitled to claim complete immunity (Narendra v. Amrit Kumar 1973 Cri LJ 1637 (Raj).

Imputation against the High Court judges in discharge of their duties, amounts to contempt of court. Presumption under criminal law in case of a person charged with a criminal offence is different from libel or slander. Fair and legitimate comment on Judgments of a Court, would not be actionable, provided the limits of bonafide criticism are not exceeded. Justice is not a cloistered virtue, she must be allowed to suffer the secrutiny and respected even though outspoken comments of ordinary men. The power to commit should be sparingly used and any technical or formal contempt should be ignored, as hyper sensitiveness on the part of Judges would stifle that spirit of free discussion on matters of public interest which is hall-mark or democratic societies. Judges are to share the common fillings of huminity and a claim of in-fallibility has never been set up on their behalf. To impute to the Judges any unfitness, whether on account of incompetence, lack of integrity or otherwise amounts to scandlising court. (Sir Edward Snelson Vs. The judge of High Court of West Pakistan 16 DLR 535 SC).

Good faith has not been made an ingredient in the exception. It need not be true absolutely, true word, and minor errors are immaterial. (Annanda Prosad v. Monotosan Roy (1952) 56 CWN 750 = (1953) Cr LJ 1168).

The absolute privilege which the accused are entitled to claim under Section 499, Exception 4, is not confined only to judgments and orders of Courts, but it stretches to complaints pleadings made by parties concerned (Narendra v. Amrit Kumar 1973 Cri LJ 16737 (Raj.).

13. Exception 9 : Protection of interest or public good.— To establish good faith it has to be seen first, the circumstances under which the letter was written or words uttered; secondly whether there was malice ; thirdly whether the accused made any enquiry before he made the allegation; fourthly there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the accused acted in good faith (1970 SC 1372 = (1970) 3 SCR 913 = (1971) 1 SCJ 112.

Subsequent correction of defamatory article is not enough to prove good faith. (AIR 1966 Cal 473 ; (1966) 2 Cr LJ 986).The ingredients of the ninth exception are firstly that the imputation must be made in good faith, secondly the imputation must be for protection of the interest of the person making it or of any other person or for the public good (AIR 1971 SC 1567).

14. Imputation made by lawyer when protected.— Imputation made by a lawyer in discharge of professional duty on the character of any person in good faith and for the protection of the interest of the person making it or of any other person or for the public good will not constitute offence of defamation. In the instant case, the imputation allegedly made by the petitioner as an advocate under instruction of her client for protection of her interest cannot constitute the offence in view of exception 9 to section 499 Penal Code (Sigma Huda Vs. Ishfaque Samad & ors. 45 DLR 129 = 1993 BLD 152).

On ground of public policy, an advocate is entitled to special protection, and that if an advocate is called in question in respect of defamatory statements made by him in the course of his duties as an advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice (Tulsidas Amanmal karani v. S. F. Billimorai A. I. R. 1932 Bom. 490 (491) = I L R 39 Cal. 275 = 23 Cr LJ 740). Bad faith cannot be presumed merely

because a advocate's statement is prima facie defamatory, but there must be some independent allegation and proof of private malice. Even the presence of malice does not rebut the presumption of good faith when the statement was obviously necessary in the interest of his cilent (AIR 1955 Mad 741=1954 CrLJ 1239). It is now possible to assume that defamatory questions were put by a counsel during cross-examination upon definite instructions. It would have to be proved and having regard to section 126 of the Evidence Act, it could not possibily be proved, unless with the client's express consent which in the circumstances he would hardly be likely to accord. It follows from this that no one could ever be prosecuted for defamation in regard to any instruction which he might have given to his lawyer. It is the lawyer's business to decide whether he could properly act upon the instructions and whatever responsibility might ensue from acting upon those instructions would be his and no one else (AIR1984 Pat 56).

As an advocate acts on the instructions of his client, his case is covered under 8th & 9th Exception to Section 499 Penal Code, in a complaint for defamation in any pleading filed in the Court (Mahanand Ranghdale v. Ku. Kiran & Anr 1993 (2) Crimes 532 (M. P.). (1993) 45 DLR 129).

The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of section 499 of the Penal Code, and the court will presume good faith, unless there is cogent proof to the contrary. The privilege is not absolute but qualified. The common law of England under which an advocate can claim absolute privilege for words uttered in the course of his professional duty is not applicable to out country (AIR 1948 Pat 56; 48 CrLJ 997).

The immnuity which an advocate or pleader enjoys in proceedings before law courts for the words uttered or written in the performance of his functions as an advocate is not in the nature of an absolute but of a qualified privilege and it is for the prosecution to prove absence of a good faith. It is highly improper for counsel to misuse the provilege of free speech which they enjoy when examining witnesses or presenting argument for consideration of the court. They owe it to the court and the profession of which they are members not to indulge in their arguments in defamatory remarks of a gratutious nature about the complainant, accused or witnesses in the cases, entirely irrelevant for the purpose of protection of the interest of their clients. Such gratuitous remarks reflecting on the conduct of a party, if made with a malicious intent to lower him inthe estimation of his fellowmen in a case where the party's character is not in issue or relevant for the purposes of a right determination of the case, would not protect consel from a criminal defamation. Exeption 9 to section 499 would be available of him only if he uses the occasion with due regard for the responsibility that is imposed on him. It is the duty of counsel to exercise commonsense and caution in asking a defamatory question or addressing an argument which is defamatory to the opposite party (AIR 1984 All 409).

It is well established law that a lawyer conducting a case on behalf of his client enjoys certain privileges and latitudes and the presumption will be that he has acted in good faith unless the contrary is alleged or established. A lawyer will come within the ninth exception to Section 499 of the Penal Code and it will be presumed that be acted in good faith in the interest of the protection of his client unless the contrary is alleged or established. (Jiban Krishna Das v Monoranjan Bhattacharjee, 87 C. W. N. 224 (226). The imputation made by a lawyer in discharge of professional duty in good faith does not canstitute an offence of defamation. (1993) 45 DLR 129).

Advocate's privilege is limited where person against whom the imputation is made neither a party not a witnessess. If an advocate makes imputation about another on the strength of instructions from his client and the in structions from his client and the instructions later turm out to be unture, the advocate is bound to withdraw imputation (AIR 1932 Bom 490; 33 CrLJ 743).

15. Witness.— A witness cannot be prosecuted for defamation in respect of statements made by him when giving evidence in a judicial proceeding. This is because if a man is not allowed to speak out the truth in a court of law under a penalty of being exposed to a prosecution under Section 500 the administration of justice would indeed become impossible and it would be hampered to such great extent that nobody would be prepared to come forward to depose to facts of which he has knowledge. But this protection is not available to a complainant who deliberately makes a defamatory statement with out the slightest justification. (Rajindar Singh v. State, AIR 1955 Punj. 142 (143).

When a witness makes a voluntary statement which is defamatory he cannot claim any immunity, whereas if he is forced or insisted upon to answer a question he can claim immunity under proviso to section 132 of the Evidence Act (Rajindra Vs. Duraga, 1967 All LJ 158; 1967 All Wr (HC) 163).

The Delhi High Court has held that a statement made by a witness in answer to question which he is compelled to answer will not subject him to prosecution under Section 500 even if the answer is defamatory of some person. However, in the absence of such compulsion, the proviso to Section 132 Evidence Act, will not apply, though he can still escape liability if he can come under any of the Exceptions of Section 499. Before protection can be claimed by a witness he must show that he was compelled by the Court to answer in spite of his protest or unwillingness. (Shamsher Sigh v. Malik HKS 1982 Cri LJ (NOC) 167 (Del.

16. Statement made to protect interest of maker.— The protection of interest contemplated in the Ninth Exception is that communication must be made bonafide upon a subject in which the person make the communication has an interest or duty and the person to whom the communication is made has a corresponding interest or duty. Where there was a proceeding under. Section 144, Code of Criminal procedure, 1898 (same section of the 1973 Code), between the respondents and appellant regarding possession of land and the appellant in showing cause described the respondents as illegitimate sons having been born of a concubine, on a complaint, it was held that just because a proceeding was pending under Section 144, Code of Criminal Procedure, 1898 it was not open to a person to impute humiliatory and defamatory statements, as in the present case. There was no question of title involved. Protection of interest of the person making the imputation will have to be established by showing that the imputation was itself the protection of interest of the person making it. In the present case, the question was who was in possession of the land. It was not open to the accused-appellant to deny or resist possession in a proceeding under Section 144, Code of Criminal Procedure, 1898 by hurling defamatory invective and then claim there benefit of protection of interest (Sukra Mahto v. Basudco Kumar Mahto 1971 Cri. LJ 1168 (SC) = AIR 1971 SC 1567 =1971 SCC (Cr) 371).

Where there was a dispute regarding the paternity of the complainant-appellant and his brothers and he had got marriage invitation cards issued for his brother under the name of the first respondent as his father, on seeing this the name of the first respondent as his father, on seeing this invitation, the accused-respondent and his two sons-in-law advertised in a newspaper and printed leaflets disputing the paternity of the complainant and his brother and he denied that was born to him and

had not caused the marriage invitation to be issued under his name, no offence of defamation could be made out (Palaniswamy v. Rasu Chettiar 1974 Cri LJ 1209 (Mad).

17. Evidence and proof.— The mere fact that the imputation contained in the publication is factually incorrect will not by itself be sufficient to warrant a conviction. In an offence under section 499 of the Penal Code if the accused can show that the publication can reasonably be believed to be true or which can be inferred from circumstances, does not amount to any offence. The onus is upon the accused to prove that his case comes in either of the exceptions or that he had reasonable grounds for believing it to be true and was not actuated in making such an imputation by any malicious motive (19 DLR 195 (SC). It is for him to show that the statement he made falls within one or other of the exceptions or that he is protected by the proviso to Section 132, Evidence Act. (Ganga Prasad ILR, 29 (All). 684 (F.B.).Onus of proving exceptions is on the accused (Druba Charan v. dinabandhu (1966) Cr LJ 42 : (1966) AIR Ori 15).

The law treats the onus as is charged if the succeeds in proving a preponderance of probability (Kishan Kants v. Geeta Roy 1082 Cri lJ (NOC) 3 (Del).In a criminal prosecution, for defamation under section 499, it is sufficient, if the accused can show that the imputation was substantially true. The onus upon the accused of proving that his case comes within either of the exceptions may also be discharged, if he can show that he had reasonable grounds for believing it to be true and was not actuated in making such an imputation by any malicious motive. The mere fact, therefore, that the imputation contained in the publication is factually incorrect, will not by itself be sufficient to warrant a conviction (Khondakar Abu Taleb Vs. The State, 19 DLR 198 SC; AIR 1943 Oudh).

Where the prosecution produced a copy of the impugned newspaper and proved that the said copy was available for sale, Section 81, Evidence Act was attracted and the said newspaper could be admitted into evidence. Once the newspaper was admitted into evidence it was for the accused to prove that the said newspaper was not the correct copy of the issue published on the relelevant date (Dilip Chakraborty v. Public Prosecutor 1976 Cr LJ 1300 (Cal).

To support a conviction for oral defamation it is not necessary to prove the exact words used by the accused. It is not necessary that the witnesses should remember and reproduce the identical or the very same words in the order they were uttered. It is sufficient for the purposes of the Section, if witnesses are agreed in a substantial measure to the words of imputation uttered as it is hardly possible or necessary to reproduce every word or expression used (K.S. Namjundaiah v. Setti Chikka Thippanna, AIR 1952 Mys. 123 (124); Bhola Nath v. Emperor, AIR 1929 All 1).

False statement (not in the course of Investigation under Section 161 Cr. P.C) made to the police leading to the arrest of the man defamed. The accused made certain statement to the police and got the complainant arrested. The statement was to the effect that the complainant had committed theft in house of the accused and the complainant and his relations had been described as thieves. The Police found that the accusation against the complainant was false. Held, from the findings arrived at by both the Court, below, there can be no manner of doubt that the said statements were false and that they were not made in good faith (Mohi Bsasar Vs. Hydar Ali Halder, 12 DLR 318; PLD 1966 Karachi 337).

The actual words used or the statements made may be reproduced verbatim by the complainant if the words are few and the statement is very brief. But in cases where the words spoken are too many or the height of technicality to insist that the actual words and the entire statements should be reproduced verbatim. If the case of

the complainant is that each of the appellants but when the case of the complainant is that all the appellants but when the case of the complainant is that all the appellants made the statements and he is prepared to go on trial on that footing, the question of the complainant being made to state the statements alleged to have been made by the individual accused does not at all arise. Such a situation will arise only when the case of the complainant is that different statements were made by different accused, who are before the Court (Balraj Khanna V. Moti Ram 1971 Cri LJ 1110 (SC)= AIR 1971 SC 1389= 1971 SCC (Cri) 647).

Where a complaint was lodged against the Chairman of a company publishing dailies but the Chairman was neither the printer nor publisher nor editor, he could not be imputed with knowledge of contents of impugned articles under Section 7 of the Press Act. and accordingly, the proceedings launched against the petitioner were quashed (Nihar Singh v. Arjan Das 1983 Cri LJ 777 (Del): (1983) 1 Crimes 438; Ashok Kumar Jain 1986 Cri LJ 1987 (Bom).

The mere fact that the petitioner was described as "Saradhy' of the daily, and his name was so printed in the daily, could only mean that the petitioner was either the founder of the chief promoter or the company and no more (Dasari Narayana Rao v. Bhagvandas RD 1986 Cri LJ 88 (AP) relying on Nithar Singh V. Arjan Das, Supra).Where the husband has defamed his father-in-law in a letter written by him and the letter comes into the hands of the father-in-law, the latter cannot get his daughter, the wife of the accused husband, to speak to the letter from the witness box, there is nothing to prevent him (father-in-law) from proving the contents of the letter by any other means which may be open to him (AIR 1970 SC 1876).

Where summons to face trial under Section 500/501 were issued to the printer, publisher, editor-in-chief, resident editor and executive editor of a newspaper for printing and publishing as defamatory news agency, but in the declaration printed in the newspapers, the names of the executive-editor and the editor of a news agency did not find mention and more so, when there was no iota of evidence to show that they were in any manner concerned with the collection control or selection of the matter printed in the newspaper, the issuance of summons against the executive editor and the editor of a news agency was unsustainable (Nihar Singh v. Arjan Das, Supra, relying on State v. Chaudhari R .B 1968 Cri 95 (SC)= AIR 1968 SC 11o).

In order to establish good faith and bona-fide it has to be seen first the circumstances under which the letter was written or words were uttered; secondly whether there was any malice , thirdly, whether the appellant made any enquiry before he made the allegations; fourthly whether there are reasons to accept the version that he acted with care and caution and finally whether there is preponderance of probability that the appellant acted in good faith (Chaman Lal. v. State of Punjab 1970 Cr. L.J. 1266 (1268)= AIR 1970 S.C. 1372: Samanta Biswanath Ray v. Jhari Bawa, (1977) 64 Cut. L.T. 258 (261).

18.Punishment.— When the defamatory words are uttered in the heat of passion it cannot be said that a serious case of defamation has arisen which calls for a server penalty (AIR 1923 Rang 148= 2 Bur LJ 10).

Where there is no substantial defence, an immediate applogy in the widest and most unreserved terms may fairly be presumed to lessen the punishment (AIR 1928 All 321= 30 Cr LJ 766= 26 ALJ 509).

A journalist is required to attach more care and caution in publishing items which are likely to harm the reputation and good name of others. Papers publishing scandalous articles sometimes get wide publicity and the circulation in such cases

and consequently the income of the journalist also increases. This, therefore, calls for a deterent punishment and a mere sentence of fine in such cases will not at all be adquate (1974) Cr LJ 1358).

In considering the quantum of sentence in a case of defamation a number of factor, such as the type of defamation, the manner in which defamation was made, etc, will have to be taken into consideration. A journalist wields a very easily. He is, therefore required, to attach more care and caution in publishing items which are likely to harm the reputation and good name of others. It is common knowledge that papers publishing scandalous articles sometimes get wide publicity and the circulation increases and consequently the income of the journalists also increases. This, therefore, calls for a deterrent punishment and a mere sentence of fine in such cases will not at all be adequate. For such person to pay the fine is very easy and it would not deter him from publishing again one equally libelous article. Where the accused had acted in a reckless way and without due care and caution and without making any attempt to find the veracity of facts before publishing the impugned article, a sentence of three months, simple imprisonment and Rs 1,500 of fine was held sufficient to meet the ends of justice (Jagadish B Rao 1974 Cri LJ 1358 (Goa).

Where an experienced journalist without any basis or foundation published and article saying that the complainant had dishonestly converted election funds to his own use, to which allegation he adhered to till the end and thus besmirched complainant's moral and public character, sentence of fine alone would not be sufficient (1970 Mad LW (Cr) 245 (Mad).

The applicant 'S' the editor and publisher of a newspapers, published an open letter addressed to a Minister against A, which contained defamatory allegations. The letter was written by B and S only gave the editor's comment, which could not be characterisd as malicious. S was convicted under Section 500 and sentenced to eight months rigorous imprisonment. On appeal by S the Court while finding him guilty under Section 500, held that keeping in view that section 500 of the Penal Code, makes defamation punishable only with simple imprisonment he had already served 13 days, rigorous imprisonment, merely published the grievance of some one else in his newspaper, had nothing personal against the complainant, was a 68 years old man, and the defamatory article was published 10 years back, the sentence already undergone by the applicant would meet the ends of justice (Shyam Nasrain 1974 Cri LJ 1006 (Raj).

19. **Complaint**.- Where the facts alleged *prima facie* constitute an offence under section 500, there is no reason why that offence should not be taken cognizance of on a complaint by the aggrieved person (AIR 1934 Rang 400). But where the complainant does not bring a charge of defamation and the charge under section 500 was added by the Magistrate on the complainant's statement made in evidence either of his own accord or with reference to suggstions by the Magistrate. It was held, that there was no legal complaint by the aggrieved party of which a court should take cognizance under section 198, Criminal P.C.

Acomplaint filed by two persons is not maintainable (R. Krishnamurthy Vs. MP. Raja, 1989 LW (Cr) 186 (187) Mad).

Where the complaint is made against serveral persons, if the case of the complaint is that each of the accused made different statements or spoke different words, which are defamatory, then it is absolutely necessary that the complaint must specify the words spoken or the statement made by each of the accused (1971) Cr LJ 1110 =AIR 1971 SC 1389= (1971) 1 SCWR 850= 1971 SCD 822).No Court shall take cognizance of the offence of defamation except upon a complaint made by the person aggrieved (Criminal Procedure Codes. 198).

Complaint by Court.— A complaint for defamation in respect of a statement made during judicial proceedings can be made by a private person without the sanction of the Magistrate before whom the alleged defamatory statement was made. The Magistrate on his own authority can not take any initiative under Section 198 Cr. P.C (Muhamed Is a v. Nazim Hossain 1940 All 314; Chotelal v Phulechand AIR 1937 Nag 425).

A member of an unidentified, undefined, indeterminate and an amorphous body is not an aggrieved person (Narasimhan v. Chokkappa 1973 Cri LJ 52 (SC) : AIR 1972 SC 2609" 1972 SCC (CRi) 777. The Criminal Procedure Code neither in section 195 nor elsewhere had provided anything which would prevent an individual from making a complaint in respect of an alleged defamatory statement made in a judicial proceeding, civil or criminal, against him either as a party or as a third person, rather the provision of section 198 of the criminal Procedure Code provides that no court shall take cognizance of an offence falling under Chapter XIV or XXI of the Penal Code or under sections 493 and 496 both inclusive except upon a complaint made by some person aggrieved by such offence (A.Y. Masihuzzaman Vs. Shah Alam (1989), 41 DLR 180 (para 11).

Aggrieved person.—The words 'aggrieved' has not been defined. It must be taken in its ordinary sense. The parents can be treated to be the persons arrived if unmarried daughters who are living with them are defamed (Hasan Razaki Vs. Mst. Meherun Nisa Meher, 23 DLR 14 (WP).

Though generally the person defamed is the person aggrieved, but in the case of defamation of a deceased an exception is made in favour of living persons limited only to members of the family or near relatives whose feeling is hurt by the defamatory statement, and none else (Bhagwan Shree Rajneesh v. State of Bihar & another 1988 (2) Crimes 657(Pat).

The husband was held to be a "person aggrieved" where the imputation was that his wife was which and practiced witch craft and destroyed there crops of the accused (1958 Cr lJ 1191).

Where defamation is against an unidentifiable body of persons complaint by one state to belong to that group was not maintainable (1984 Cr LJ 1121 (Gau).

20. Procedure.— Where the defamatory statement is published in a newspaper, it is sufficient to prove that the paper was delivered within the jurisdiction of there 'Court (Chelappan Pillai v. Karanjia (1962) 11 Cr LJ 142: Narayana Pillai v. Chacko 1986 Cri LJ 2002(Ker).

Civil suit pending -Whether cognizace could be taken.— Both the matters, namely, the civil suit as pending in the Civil Court and the complaint as filed by the respondent before the learned Magistrate are separate and independent proceedings and they can go on side by side. There is no bar to the Magistrate taking cognizance of the offence which he may be of opinion to have been committed by a person whose matter is still pending in a civil Court (K.L. Dhall v. B.P. Dutta, 1985 (1) Crimes 484 (850) (Delhi).Pendency of criminal case for defamation does not bar a civil suit (Ashoke Kumar Vs. Radhakanta, AIR 1967 Cal 179; 1967 CrLJ 455).

Limitation for filing suit for defamation.— A special period of limitation is provided under Section 199(5), Cr.P. C., 1973 for filing a complaint, namely six mounts from the date on which the offence is alleged to have been committed, For a complaint under Section 500, Penal Code, Limitation Commences from the date of filing complaint under Section 406/420, Penal Code, and not from the date of acquittal (1978) Cr LJ 764 -AIR 1978 SC 986= 1978 Cr LR (SC) 158).

Charge.- The charge should run as follows :

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

That you, on or about the .... day of ...., at ...., defamed X by making or publishing to Y a certain imputation concerning said X, Wit (State the defamatory matter), by means of spoken words(or writing or signs or visible representations), intending to harm, or knowing or having or having reason to belived that such imputation would harm the imputation of the said X; and you thereby committed an offence punishable under Section 500 of the Penal Cede and within cognizance.

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

501. **Printing or engraving matter known to be defamatory.—** Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

502. **Sale of printed or engraved substance containing defamatory matter.—** Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished wih simple imprisonment for a term which may extend to two years, or with fine, or with both.

CHAPTER XXII

OF CRIMINAL INTIMIDATION, INSULT [1][,PREJUDICIAL ACT AND ANNOYANCE]

503. **Criminal intimidation.—** Whoever threatens another with any injury to his person, reputation or property, or to person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation.— A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B,s house. A is guilty of criminal intimidation.

504. **Intentional insult with intent to provoke breach of the peace.—** Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

1. Substituted by Act XV of 1991, for "AND ANNOYANCE" (w. e. f. 26-2-91).

[1][505. **Statements conducing to public mischief.**— Whoever makes, publishes or circulates any statement, rumour or report,-

(a) with intent to cause, or which is likely to cause, any officer, soldier, [2][sailor or airman] in the Army, [3][Navy or Air Force] of [4][Banghladesh] to mutiny or otherwise disregard or fail in his duty as such ; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the public tranquility ; or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community [5][;or]

[5][(d) with intent to create or promote, or which is likely to create or promote, feelings of enmity, hatred or illwill between different communities, classes or sections of people,]

shall be punished with imprisonment which may extend to [6][seven years], or with fine, or with both.

Exception.— It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report in true and makes, publshes or circulates it wihout any such intent as aforesaid.]

[7][505A. **Prejudicial act by words, etc.** Whoever-

(a) by words, either spoken or written, or by signs or by visible representation or otherwise does anything, or

(b) makes, publishes or circulates any statement, rumour or report.

which is, or which is likely to be prejudicial to the interests of the security of Bangladesh or public order, or to the maintenance of friendly relations of Bangladesh with foreign states or to the maintenance of supplies and services essential to the community, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.]

506. **Punishment for criminal intimidation.**— Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a ferm which may extend to two years, or with fine, or with both;

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1. Subs. by the Indian Penal Code Amendment Ac, 1898 (V of 1898), s. 6, for the original section.
2. Subs. by the Repealing and Amending Act, 1927 (X of 1927), s. 2 and Sch. I, for "or sailor".
3. Subs. ibid., for "or Navy".
4. Subs. by Act VIII of 1973, s. 3 and 2nd Sch. (with effect from 27-3-71), for "Pakistan".
5. The semi-colon and the word "; or" were substituted for the comma at the end of clause (c) and thereafter new clause (d) was inserted by Act XV of 1991, s. 7(a) (w. e. f. 26-2-91).
6. Subs. ibid., s. 7(b), for "two years" (w. e. f. 26-2-91).
7. Section 505A was inserted, ibid., s. 8 (w. e. f. 26-2-91).

If threat be to cause death or grievous hurt, etc.— and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cuase an offence punishable with death or [1][imprisonement for life], or with imprisonment for a term which may extend to seven years, or to impute unchastiy to a woman, shall be pubnished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

507. **Criminal intimidation by an anonymus communication.—** Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

508. **Act caused by inducing person to believe that he will be rendered an object of the Divine displeasure.—** Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonent of either description for a term which may extend to one year, or with fine, or with both.

Illustrations

(a) A sits dhurna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of Divine displeasure. A has committed the offence defined in this section.

(b) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

[2][509. **Word, gesture or act intended to insult the modesty of a woman.—** Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

1. Substituted by Ordinance No. XLI of 1985, for "transportation".
2. See also the Criminal Law (Amendment) Ordinance, 1958 (VIII of 1958), section 4.

Comments

This section makes intention to insult the modesty of a woman the essential ingredient of the offence (5 Bom LR 502). Where the court on a consideration of the evidene on record and the overall facts and circumstances of the case disclosed therefrom comes to the conclusion that the accused had the necessary intention to insult the modesty of a woman and for that he had said something or uttered some word's the accused would be held guilty under section 509, no matter the exact words uttered by the accused were not placed on record (Sabanlal Bayak Vs. State 1973 Cut LT 1037).

Where accused by winking his eye at a woman in public and by beckoning her to the notice of others had insulted her modesty and is thus guilty under section 509 Penal Code, And further be caught hold of her arm which is an obvious act of assault to outrage her modesty and is thus also guilty u/s. 334 Penal Code (State of Kerals v. Hamsa 1988 (3) Crimes 162 (Ker).

A group of youngman following a group of young girls made indecent questions and words, they commit offence under this section (1957) 9 DLR (SC) 127). The accused followed in his carriage the complainant's unmarried daughter at various places, and taughed at and grinned and stared at her while passing and repassess of in his carriage, and stoodup in it and shouted her name and so on. He was convicted under this section (Muhammad Kassam Chisty Vs. State, Cr. Appeal No. 454 of 1910 (Unrep. Bom),

Where the accused taking the opportunity of the absence of the adult male members of the family of a woman, entered her house at about 10 p.m. caught hold of the woman who was sleeping alone in a room of the house and forcibly wanted to remove her clothes and to have sexual intercourse with her, and when the woman resisted and she and her mother-in-law raised alarm and on the arrival of other persons, the accused ran away, it was held that the accused was guilty of an offence under this section and not under section 376 read with section 511. (Bankey Vs. State (196) 1 CrLJ 330).

The accused had uttered objectionable words only in the heat of the moment and had no intention to cause any harm to the reputation of the complainant in her evidence that her relations with the accused had been cordial and she treated him as her child. In the circumstances, even assuming that any harm was caused to the complainant by the words used by the accused, the same was so slight that no ordinary sense and temper would complain of such harm. Section 95 of the Penal Code was attracted to the case and the conviction of the accused under Section 509 was not warranted (Nisar Khan v. State of madhya Pradesh, 1984 (2) Crimes 691 (692) (M. P.).

There must be some individual woman whose modesty has been outraged and there must be an allegation in the complaint that the action complained of has insulted the modesty of a particular woman or women and not merely of any class or order or section of women. It is however not necessary that the individual woman or women should herself or themselves make a complaint (Khair Mohammad Vs. State, 26 CrLJ 904=AIR 1925 Sind 271).

Where there is an inordinate delay in lodging the complaint and neither the report which alleged to have been sent to the police station nor the complaint to the authorities nor her statement said to have been recorded by the school committee have been produced, and there was no medical examination of complainant to

corroborate her version that she was assaulted and there was no corroboration of the evidence of the complainant and the witnesses were interested, it was held that no interference could be called in the order of acquittal (Ku. Gavarti Baiv. Banshilal. 1985 Cr. L. R. 176 (177) (M. P.).

510. **Misconduct in public by a drunken person.**— Whoever, in a state of intoxication appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be sunished with simple imprisonment for a term which may extend to twenty-four hous, or with fine which may extend to ten [1][taka], or with both.

CHAPTER XXIII

OF ATTEMPTS TO COMMIT OFFENCES

511. **Punishment for attempting to commit offences punishable with [2][imprisonment for life] or imprisonment.**— Whoever attempts to commit an offence punishable by this Code with [2][imprisonment for life] or imprisoment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with 3[imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of imprisonment provided for that offence] or with such fine as is provided for the offence, or with both.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

Synopsis

1. Scope and aplicability.
2. What is an attempt.
3. Attempt need not be the penultimate act.
4. Distinction between preparation and attempt.
5. Cases of attempted offences.
6. Evidence and proof.
7. Sentence.

1. Scope and applicability.— Section 511 applies to offences punishable under the Penal Code itself and does not apply to an attempt to commit an offence under any other Act (AIR 1962 Cal 370 = (1962) 2 Cr LJ 43). Section 511 is a general section that make punishable all attempts to commit offences punishable with transportation or imprisonment and not those punishable with death, which is a specific offence under the Code. (AIR 1945 Lah. 334 = ILR 1945 Lah. 403 = 47 Cr. L. Jour 1036).

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1. Sbus. by Act VIII of 1973, s. 3 and 2nd Sch. (With effect from 26-3-71), for "rupees".
2. Substituted by Ordinance No. XLI of 1985, for "transportation".
3. Substituted ibid., for certain words and comma.

The section does not apply to cases of attempts, made punishable by express provisions of the Code, some court have, however, held that this section, is supplementary to the other sections punishing attempts, since it deals with such attempts as are not punishable under other provisions of the Code, whether, those provisions relate to substantive offences or to mere attempts (4 BHC 17 followed in 14 Bom. LR 991 and dissented from in 14 ALJ 368).

Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention he commences his attempt to commit the offence. (1962) 1 SCJ 183 = 1961 Cr LJ 822 = AIR 1961 SC 1698).

To constitute an attempt to commit an offence it must be connected with the actual commission of the offence. To constitute an attempt there must be evidence of some overt act. The attempt to commit an offence is complete if the person with a view to committing an offence does something which is a step towards commission of the specific crime which is immediately and not remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime. Actual penetration is not necessary to constitute the offence of attempt to commit an offense of sodomy (Ali Mohammed Vs. The State, 22 DLR 155 (WP) ; 7 DLR 87 and 110 (WP).

A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is exactly what the provisions of this section require (Abhayanand Mishra 1961 Cr LJ 822 ; (1962) 1 SCJ 183).

Attempt to commit an offence, therefore, can be said to begin where the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. If the accused had made the name board with the questioned degrees, or if the accused got the prescribed slips printed describing himself as holder of such degrees, perhaps, such acts would only have reached the state of preparation. But when he released such prescription slips to others or when he exhibited such name board for others to read, he cross the stage of preparation and transgresses into the realm of attempt. The upshot of the above discussion is the finding that the accused had committed the offence under Section. 511 read with Section 417 of the Penal Code (State of Kerala V. Dr. C. K. Bharathan, 1989 Cr.L.J. 2025 (2028) (Ker).

2. What is an attempt.— Attempt is an intentional act which a person does towards the commission of an offence but which fails in its object through circumstances independent of the violition of that person. According to English Law an "attempt" is a definite act requiring consideration of criminal nature, whereas according to the Indian Penal Code an "attempt" is a continuous proceedings which at one stage assumes criminal character. When the accused has done something definite in pursuance of his design not for what he has done, but with regard to what he would have done if he had succeeded, he has done act towards the commission. It will

always remain a question of fact when the point would be reached under Section 511, at which an act is done towards the commission of the offence. While it is not possible to give a precise or exhaustive definition of "attempt" it may be broadly stated that an intentional act which a person does towards the commission of an offence but which fails in its object through circumstances independent of the violation of that persona is "attempt". (AIR 1962 All 359 = (1962) 2 Cr LJ 161).

An attempt in order to be criminal need not be the penultimate act. It is sufficient in law if there is present an intent coupled with some overt act in execution thereof. For purposes of criminal liability it is sufficient if the attempt had gone so far that the crime would have been completed but for extraneous intervention which frustrated its consummation (1971 MPLJ 960 ; AIR 1959 Punj 134 ; ILR (1958) Punj 2319 ; 195 Cr LJ 368 ; (1961) 2 Cr LJ 848 ; (1962) 1 SCJ 189).

A person makes an attempt to commit a particular offence, when (i) he intends to commit that particular offence; and (ii) he, having made preparation and with the intention to commit the offence, does an act towards its commissions, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. (AIR 1961 SC 1698).

In other wards attempt is an act down in part execution of a criminal design, amounting to more than mere preparation but falling short of actual consummation, and possessing, except for failure to consummate, all the elements of the substantive crime ; in other words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to but falling short of its actual commission ; it may consequently be defined as that which, if not prevented, would have resulted in the full consummation of the act attempted (1982 PSC 933 = PLJ 1982 FSEC 123 ; AIR 1927 Lah. 580).

What constitutes an "attempt" is a mixed question of law and fact, depending largely on the circumstances of the particular case. "Attempt" defines a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea or intention to commit an offence. In the second stage, he makes preparations to commit it. The third stage is reached when the culprit takes deliberate over steps to commit the offence. Such over act or step in order to be "criminal" need not be the penultimate act towards the commission of the offence. It is sufficient if such act or acts were deliberately done, and manifest a clear intention to commit the offence aimed, being reasonably proximate to the consummation of the offence (State of Maharashtra v. Mohd. Yakub, 1980 Cr. L.J. 793 (796-797).

3. Attempt need not be the penultimate act.— In this section the word "attempt" is used in a very wide sense and not in a restricted sense as in English Statutes. In some cases, a solitary over act or omission may constitute attempt while in others a series of acts and omissions. All such acts are punishable (1982 PSC 933 = PLJ 1982 FSC 123).

Where the accused deliberately starved his wife and denied food to her for days together and did not allow her to leave his house. Owing to the maltreatment and under-nourishment her health deteriorated to a great extent. ultimately she managed to escape from the house. It was held that the course of conduct adopted by the accused in regularly starving the wife in order to accelebrate her and came within the purview of Section 307, through it was not the last act which if effective would cause death (AIR 1961 SC 1782).

Where the accused represented that he could double the currency-notes and thus got some notes from the complainant, it was held that two of the ingredients of the offence of cheating, false representation and delivery of property, had taken place and they were acts done towards the commission of the offence within the meaning of Section 511 (AIR 1960 SC 979 = (1960) 3SCR 554 = 1960 Cr L. J. Jour 1383).

Even if the complainant did not believe the representation but he gave currency-notes to the accused with a view to entrap the accused; it was held that as the complainant knew the falsehood of the pretence, the accused could not be convicted of the offence of cheating. But making a false pretence and asking for currency notes wore in themself sufficient for holding the accused guilty of the offence of attempt to cheat (AIR 1960 Sc 979 ; AIR 1951 Madh. B. 100 ; 52 Cr. L. Jour 644).

4. Distinction between preparation and attempt.— There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempt to commit the offence. If the attempt aucceeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is clear from the general expression "attempt to commit an offence" and is exactly what the provisions of Section 511, Penal Code requires (Abhayannand Mishra v. State, of Bihar, AIR 1961 SC 1698 (1700).

The test for determining whether the act of an accused constitute an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress the acts already done would be completely harmless (Malkiat Singh v. State of Punjab (1969) 2 SCR 663 (666, 667) = AIR 1970 SC 713).

A person "commits the offence" or "attempts to commit a particular offence" when (1) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission ; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence. (1973) SCC (Cr) 1007 = 1973 Cr AR 401= 1973 Cr LJ 1798 = AIR 1973 SC 1798).

There is a distinction between "preparation" and "attempt". Attempt begins where preparation ends. If such person commits the offence of "attempt to commit a particular offence when (i) he intends to commits that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission ; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence (State of Maharashtra v. Mohd. Yakub, AIR 1980 SC 1111 (1114, 1115) = 1980 L. W. Cr. 96 (99) ; Harishchandra Narayen Khandape v. State of Maharashtra, 1983 (2) Crimes 88).

Preparation consists in devising or arranging means necessary for the commission of an offence while an attempt is the direct movement towards the commission after the preparations are made (23 Cr LJ 108 = AIR 1923 Pat. 307). The test for determining whether the acts constitute attempt or preparation is whether the covert acts already done would be completely harmless. But where the

thing one is such, as, if not prevented by an extraneous cause, would fructify into commission of the offence, it would amount to an attempt to commit an offence. (ILR (1950) Cut 75).

The distinction between the two may be clear in some case, but in most of the cases, the dividing line is very thin. Nonetheless it is a real distinction. The crucial test is whether the last act, if interrupted and successful would constitute a crime. The question is really one of fact depending upon the circumstances of each case (1955 Cr LJ 917 = AIR 1955 AP 48 = 1955 Andh WR 53).

An attempt to commit an offence is an act, or series of acts, which leads inevitably to the commission of the offence unless something, which the doer of the act or acts neither foresaw nor intended, happens to prevent it (1971) MPLJ 960 = 50 Cr LJ 682).

5. Cases of attempted offences.—

(i) Cheating.— The accused wrote a letter to the currency office at Calcutta enclosing the halves of two Government Currency Notes, stating that the other halves had been lost, and enquring what steps should be taken for recovery of their value. The Currency Office having, upon enquiry, ascertained that the second halves of the notices had been already paid for and the notices withdrawn from circulation and cancelled, nevertheless sent the accused the usual form of claim to be filled up and returned to it which the accused did. The form was sent on purpose to enable the accused to commit himself, in short, to entrap him. It was held that the accused was none the less guilty of attempt to cheat (16 Cal. 310; 1060 Cr LJ 1383 = (1660) 3 SCR 554 = 62 Bom.LR 908).

The accused told the complainant that he was proficient in duplicating currency notes. The complainant never believed that the accused could actually duplicate currency notes. He feigned belief in false representation and gave the currency notes only in order to trap the accused. It was held that the accused was guilty of the offence of attempt to cheat (AIR 1960 SC 979 ; 1957 BLJR 66 ; (1940) 16 Luck 194).

The accused despatched to his creditor an insured postal cover advising him of the remittance of his debt in currency notes which on opening was found to contain only worthless paper. It was held that there was no attempt to cheat though it might amount to an attempt to farbicae false evidence (21 ALJ 865 = 26 Cr LJ 203 ; 1 Pat LJ 391 ; AIR 1927 Mad 199 = 28 Cr LJ 70 = 51 MLJ 800 contrary view was taken in 14 Cr LJ 436 = (1912) PR NO. 10 of 1913).

The accused had insured his stock of paddy which was burnt by fire; he made a claim on the basis that 75,040 baskets of paddy were astored. It was found that the mill godowns could not acomodate more than 15,000 baskets. It was held that the claim was not a mere exaggeration but was a fales abatement as to the quantity stored ; that the first accused having sent the notice of the fire and also the claim papers, must be regarded as having gone beyond the mere stage of preparation to the stage of attempt (AIR 1924 Rang. 241 = 25 Cr LJ 1175).

(ii) House trespass.— While an entry on a verandah may not amount to house-trespass, such entry coupled with an attempt to push open the door would amount to an attempt to commit that offence. (26 IC 306 = 16 Cr LJ 2 = AIR 1915 LB 102).

Where the accused went on the roof of a house and had started to go down the ladder into the courtyard when he retraced his footsteps and jumped down from the back of the roof, if was held that he was guilty of an attempt to commit house breaking. (AIR 1933 Lah. 433 = 34 Cr LJ 1181).

Where the accused opened the door but before he actually effected entry into the shop, he was disturbed and captured, it was held that he was guilty of an attempt to commit house-breaking. (29 Cr.LJ. 4).

(ii) Rape.— In case of sexual intercourse the hymen may not remain intact if the vaginal orifiee is big enough to admit two fingers easily. In case of girls of less than 14 years the distensibility of the vaginal orifice has to be taken in view. If penetration takes place in the case of girls of such age then there can be expected to be widespread damage of the fourchette, hymen, labia majora, labia minora, vuba, and the vaginal canal. In the case the doctor did not notice any injury on the labia majora and labia minora. In the case penetration these organs could not escape injuries or at least the signs of violence. From these circumstances it can be deduced that penetration had not taken place when an attempt was made by the accused to ravish. In that case an offence under Section 376, Penal Code, is not made out. The act of the accused amounted only to an attempt to commit rape. The accused had taken off his underwear, to thrust his male organ in the private parts of the prosecutrix. In that process an injury to the foruchettee was caused which indicates the making of such an attempt (Suresh Chandra v. State of Haryans. 1976 Cr. L. J. 452 (454) : (P &H) : 1974 Punj. L.J. (Cr) 477 = (1975) 2 Cr L.T. 305).

Accused throwing down girl, putting sand in her mouth, sitting on her chest and attempting to have sexual intercourse and running away on the girl shouting out, was held guilty of an offence of attempting to commit rape (35 Cr LJ 432 = AIR 1933 Lah. 1002).

The accused crossed over the roof of his neighbour, caught hold of his daughter and pushing her down on the charpay undid her pyjama strings and was struggling with her. He ran way when the girl's mother appeared in answer to her cries. It was held that he had been convicted rightly of an offence under Sections 376-511 (AIR 1927 Lah 580= 27 Cr LJ 663).

The accused took off the girl's clothes threw her on the ground and then sat down beside her. He said nothing to her nor did he do anything more to her. It was held that the accused committed an offence under section 354 and was not guilty of an attempt to commit rape (116 PLR 1912= 15 EC 309= 13 Cr LJ 649). Forcibly making a girl naked and repeatedly trying to force the male organ into her private parts despite strong resistance from her amounts to attempt to commit rape and not merely indecent assault (1967 Cr LJ 920 =AIR 1967 Raj 149).

(iv) Theft.— The accused was caught while attempting to steel the purse of A from pocket. A, however, seized the purse from the outside of his pocket and also the accused's hand. It was held that although the accused did not commit the offence, of theft because he was unable move the purse from the possession of A. The offence was, herefore, held punishable under Section 511, and not under Section 379 (AIR 1242 Mad 521 (1942) 1 MLJ 591; 1942 MWN 376= 44 Cr LJ 501).

Accused made his way into an open thorned enclosure in which goats and sheep were kept. He was disturbed and ran away. It was held that he was guilty of attempt to commit theft (AIR 1919 Lah 163= 20 Cr LJ 492; AIR 1926 Lah 147= 16 Cr LJ 1424).

6. Evidence and Proof.— The points requiring proof are :

(1) That the act amounted to an attempt.

(2) That it was an attempt to commit an offence under the Code.

(3) That offence was punishable with imprisonment.

In all case of attempts to commit crimes the prosecution must prove the *actus reus* and the *mens rea*, and the point is really one of evidence (Kenny, p.94; In re, Maragatham, AIR 1961 Mad. 498, (500): 74 M.L.W. 678).

The conception of an attempt to commit an offence is a technical one. It is for the Court, on a consideration of facts proved, to come to a conclusion whether there was an attempt to commit an offence. Witnesses must depose to facts observed by them and not draw inferences for the benefit of Court(Nathui Sao V. Md. Bashir, AIR 1953 Pat. 338(339) : 1953 Cr. Cr. L.J. 1744).

Where the accused were seen going towards the border with a tin case in their hands and when they saw the nakabandi they, immediately turned around and ran away and were chased into the house of one of the accused where they were found hiding the tin box in the heap of wheat in the house, it was held that these facts were sufficient to constitute the offence of attempting to smuggle currency notes and it could not be said that the overt acts already done by the accused were of the harmles variety (Hazara Singh v. Union of India 1973 SCC (Cri) 312).

An attempt in order to be criminal need not be the penultimate act. It is sufficient in law if there is present and intent coupled with some overt act in execution thereof. For purposes of criminal liability it is sufficient have been completed but for extraneous intervention which frustrated its consummation (Om Parkash Tilak Chand (1959) Cri LJ 368).

Where a limestone supplier received payment from the complainant company only after the challan of receipt was signed and sealed by the complainant company's officers and the complainant company suspected that one of its officers was issuing signed and sealed challans to the limestone supplier without receiving supply of the omestone and a chalan signed by one of the officers was recovered from the limestone was supplied on the alleged date, it was held that once the challan was prepared and the initials of other officer obtained by the accused officer, the most important and crucial step towards cheating was completed. Thereafter it only remained for the accused officer to affix the stamp and put his signature and for the supplier to have presented the challan to company's officer and to receive payment. The Court held that the accused did not stop the stage of preparation but amounted to an attempt to cheat (Sudhir Kumar V. State AIR 1973 SC 1555= 1973 Cri LJ 1978 (SC)= 1973 SCC (Cri) 1007).

7. Sentence.— An offence of attempt can be visited with a measure of punishment which is half of the maximum punishment prescribed for the substantive offence. The maximum sentence under Section 486, Penal Code, being one year, the sentence under Section 486/ 511, Penal Code could not be more than rigorous imprisonment for six months only (PLD 1966 Kar. 325).

As maximum sentence under Ss. 411/ 414 is three years, a sentence of 2 years for an attempt to commit the offence is illegal (1968 P.Cr. LJ. 1000= 1968 SCMR 533).

Charge.— The Charge should run as follows :-

I (name and office of the Magistate/ Judge etc.) hereby Charge you (Name of accused) as following :-

That you, on ar about the .... day of .... at ...., attempted to commit (Specify the offence attempted), and in such attempt did a certain act towards, the commission of the said offence, to with (specify the act done): and that you thereby committed an offence punishable under section (specify the section punishing the offence attempted) and Section 511 of the Penal Code, and within my cognizance.

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

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