[1]CHAPTER V-A

CRIMINAL CONSPIRACY

120A. Definition of criminal conspiracy.- When two more persons agree to do, or cause to be done,-

(1) an illegal at, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy :

Provided that no agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation.-It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Synopsis

1. Scope.
2. Conspiracy is substantive offence.
3. Overt act is not necessary.
4. Proof of criminal conspiracy.

1. **Scope**.- The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not those offencs have actually been committed. The very fact of the conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of the unalwful agreement (1956 SCJ 441; 1970 SCC (Cri.) 274; PLD 1979 SC 53).

Criminal conspiracy as defined in section 120-A of the Penal Code is an agreement by two or more persons to do or cause to be done an illegal act or an act which is illegal by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in succesive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other; each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtheranc of the common design of his group only (AIR 1970 SC 45; AIR 1970 SC 549; 1970 CrLJ 707(713); AIR 1980 SC 1382=1980 CrLJ 965).

A conspiracy is not merely a concurrence of wills but a concurrence of resulting from agreement between the two (1982 CrLJ 1025). Where there is no meeting of minds there can not be a conspiracy (1979 SCC (Cri.) 609). Criminal conspiracy postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. It differs from other offences

1. Ch. VA was inserted by the Indian Criminal Law Amdt. Act, 1913 (VIII of 1913), s. 3.

in that mere agreement is made an offence even if no step is taken to carry out the agreement (1970 SCC (Cri) 274).

It is not an ingredient of the offence under this section that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. Where the accused are charged with having conspired to do three categories of illegal acts, the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They can all be held guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable (AIR 1961 SC 1762).

It is not necessary that such member of a conspiracy should be in communication with other members (PLD 1979 SC 53), or know all the details of the conspiracy (AIR 1962 SC 1821). The offence of criminal conspiracy under section 120A is a distinct offence, the very agreement, cconcert or league is the ingredient of the offence. It is not necessary that all the conspirators know each and every detail so long as they are participators in the main object of the conspiracy (AIR 1977 SC 2433).

Where the charge disclosed a single conspiracy, spread over several years, the fact that in the course of years, others joined the conspiracy or that several incidents took place in pursuance thereof does not split the conspiracy into several conspiracies (AIR 1957 SC 340).

It will be seen that the most impoortant ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. Reference to sections 120-A and 120-B Penal Code, would make these aspects clear beyond doubt. Entering into an agreement by two or more persons to do an illegal act or legal act by illegal means in the very quintessence of the offence of conspiracy (AIR 1988 SC 1983; 1989 CrLJ 1 (71,72)= 1988 (3) Crimes 209).

The offences of conspiracy and offences committed in pursuance of that conspiracy form one and the same transaction (AIR 1926 Rang. 53). One of the forms of abetment is conspiracy, and it makes no difference that conspiracy by way of abetment requires an overt act, whereas conspiracy under section 120A to commit an illegal act requires no overt act. Abetment is just as much a substantive offence as is conspiracy under section 120A (PLD 1956 Kar 395). Therefore where an offence has been actually committed, it would be more appropriate to proceed with the trial of the principal offence and abetment thereof rather than with the offence of criminal conspiracy. In such a case, even if the charge of criminal conspiracy does not become irrelevant at least the charge of criminal conspiracy cannot be regarded as the primary charge where offence in pursuance of the conspiracy has been committed (AIR 1961 Cal 461). Where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commison should be charged with the substantive offence while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under section 109 (1957 CrLJ 234). But there cannot be any abetment of conspiracy simpliciter because a conspiracy is not "an act committed" which can be abetted (AIR 1936 Ranj 358).

2. **Conspiracy is substantive offence.**- Criminal conspiracy is now a substantive offence and has nothing to do with abetment (27 CrLJ 286; AIR 1926 Sind 174). The offence of conspiracy is an independent offence and though the offences are

committed in the course of the conspiracy, the liability for conspiracy will not disappear (AIR 1963 SC 1850). It is not like abetment to depend upon a substantive offence to be committed. The offence of a conspiracy to commit a crime is different from the crime itself which is one object of conspiracy. The conspiracy preceeds the commission of the crime and is complete before the crime is attempted. This are thus separate offences. (AIR 1959 SC 119). Conspiracy is a substantive offence, which is committed as soon as the agreement to do an unlawful act is made. It is immaterial whether the actus reus is executed (PLD 1978 Lah 523). In order to constitute the offence of abetment by conspiracy, there must be a combining together of two or more persons in the conspiracy and an act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing. When parties concert together, and have a common object the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of all (PLD 1951 Raj 89). A conspiracy is an independent offence, it does not disappear because other offences are done in pursuance of conspiracy (AIR 1963 SC 1850; (1963) 2 CrLJ 671).

3. **Overt act is not necessary.**- An overt act, unless the conspiracy is not to commit offences is not necessary to frame a charge under this section (NLR 1979 Cr. 209). Where the proof of a conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on their trial for that offence. Where all that is shown against a person is evidence of his association with any of the conspirators that would not be sufficient to convict him of being one of the parties to the conspiracy (26 CrLJ 33).

The mere act of engaging in an agreement to do an illegal act is an overt act, and the word 'act' also includes an illegal omission. The overt acts constituting a conspiracy are acts either - (i) signifying agreement, or (ii) acts preparatory to the offence, and (iii) acts constituting the offence itself. The gist of the offence of conspiracy, therefore, lies in forming the scheme or agreement between the parties. The external or overt act of the crime is concert by mutual consent to a common purpose is exchangeed. It therefore, suffices if the combination exists and is unlawful. (AIR 1970 SC 549; 1970 CrLJ 707). Merely the allegation of conspiracy, without any evidence signifying the agreement itself or acts preparatory to the offence or acts constituting the offence, itself is not enough (1983 CrLJ 612 (618). Where the charge of conspiracy to cause defalcation, failed, conviction under section 406, 409 and 467 were held improper (AIR 1984 SC 151).

In the case of an agreement to commit an offence the agreement must be followed by an overt act (1982 CrLJ 1611). The offence of criminal conspiracy consists in a meeting of minds of two or more persons for agreeing to do or causing to be done an illegal act or an act by illegal means, and the performance of an act in terms thereof. In pursuance to the criminal conspiracy the conspirators commit several offences, then all of them will be liable for the offences even if some of them had not actively participated in the commission of the offences (AIR 1987 SC 773; 1987 CrLJ 709 (712).

4. **Proof of criminal conspiracy.**- Criminal conspiracy is to be inferred from the facts and circumstances of the case. Conspiracy presupposes by its very nature that it is secret and surreptitious and if a rule of evidence is laid down that it should be positively proved, then proof of conspiracy would become almost impossible. If several steps are taken by several persons tending towards one obvious purpose, it can be presumed that those persons have combined together to bring that end which their conduct obviously appears to attain (Qaim Ali Shah Vs. State 1992 PCrLJ 243).

120B. **Punishment of criminal conspiracy.**- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, [1][imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence, punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

Synopsis

1. Scope and applicability.
2. Proof of criminal conspiracy.
3. Offence of conspiracy when cannot survive.
4. Practice and procedure.
5. Punishment.

1. **Scope and applicability.**- Conspiracy is a separate offence by itself whether or not any offence is comitted in pursuance of it. (52 CrLJ 561= AIR 1951 AP 17). This section provides for punishment for criminal conspiracy "where no express provision is made in this code for the punishment of such a conspiracy". Where an offence is committed in pursuance of a conspiracy to commit it, the conspiracy amounts to an abetment, and where conspiracy amounts to an abetment under section 107, it is unnecessary to invoke the porovisions of section 120-A and 120-B, because the code has made specific provision for the punishment of such a conspiracy (AIR 1936 Pat 346; 1937 CrLJ 893).

The offence of criminal conspiracy is of technical nature and the essential ingredient of the offence is the agreement to commit an offence (AIR 1945 Nag 163). The offence of criminal conspiracy consists in the very agreement between two or more persons to commit a criminal offence irrespective of the further consideration whether or not these offences have actually been committed. The very fact of conspiracy constitutes the offence and it is immaterial whether anything has been done in pursuance of unlawful agreement (AIR 1956 SC 469 (474); 1956 SCR 206).

An offence under section 120-B consists in the conspiracy without any reference to the subject matter of the conspiracy. The definition of conspiracy in section 120-B excludes an agreement to commit an offence, from the category of such conspiracies in which it is necessary that the agreement should be followed by some act (AIR 1927 Cal 265). The overt act required by law to give expression to the intention in the case of section 120-B, consists in the agreement of parties (AIR 1927 Cal 265). The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precede the commission of crime and is complete before the crime is attempted or completed. It does not require an element of conspiracy as one of its ingredients, where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, section 120-A and 120-B are wholly irrelevant (AIR 1961 Pat 451).

The words "where no express provision has been made in the code for the punishment of such a conspiracy appearing in section 120-B Penal Code, do not mean that where there is proof of an abetment of an offence the charge should be

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

amde for such abetment; it is optional for the state to proceed or abetment of the offence committed in pursuance of conspiracy or of the offence of conspiracy (AIR 1926 Sind 171). A person charged with section 302 read with section 120B, can be convicted either under section 302 read with section 109 where the conspiracy to murder is proved; and under section 302 read with section 415 where the conspiracy is proved but murder is not committed (AIR 1937 Cal 578). Section 120-B applies to conspiracy to fabricate false evidence (AIR 1938 Nag 444). Charge of cheating and conspiracy. Held proved.- Where there was no doubt that the three accused hatched a conspiracy n getting the wagons allotted under a fabricated letter, unauthorisedly loaded them and prepared forged and fabricated documents related to the booking and despatch in the name of a fake consignor and consignees, the charges of cheating and conspiracy were proved beyond doubt (Jagdish Prasad Vs. State of Bihar 1990 CrLJ 366 Pat).

The offence of conspiracy is an entirely independent offence and though other offences are committed in pursuance of the conspiracy , the liability of the conspirators for the conspiracy itself cannot disappear. Section 120-B which makes criminal conspiracy punishable was added by the Criminal Law Amendment Act, 1913 along with section 120-A. Criminal conspiracy was however, not an unknown thing before the amendment of the Penal Code in 1913. But the amendment made conspiracy itself punishable. The idea was to prevent the commission of crimes by, so to speak nipping them in the bud. But it does not follow that where crimes have been committed the liability to punishment already incurred under section 120B by having entered into a criminal conspiracy is thereby wipped away. No doubt, in the particular circumstances of a case, it may be desirable to charge the offender both with the conspiracy and the offence committed in pursuance of that conspiracy . But that would be a matter ultimately within the discretion of the court before which the trial takes place (AIR 1963 SC 1850). Where an offence is committed in pursuance of a conspiracy whereby the criminal purpose and object of conspiracy is carried out, it is sufficient if the persons concerned are proceeded against for the crime itself and abetment thereof. It is not necessary to charge them for conspiracy also (1968 PCrLJ 1301). Unless the substantive offence against principal offender was established the question of abettor being held guilty under those circumstances not arose (Ex-sepoy Haradhan Chakraverty Vs. Union of India, 1991 (1)BLJR (NOC) 6).

2. **Proof of criminal conspiracy.-** In order to prove criminal conspiracy which is punishable under section 120B of Penal code, there must be evidence to show meeting of mind resulting in an ultimate decision taken by the conspirators to commit the crime (Prabhakar N. Shetty Vs. State of Maharashtra; 1990 (1) Crimes 193 Bom). It is well setted that onus to prove criminal conspiracy rests upon the prosecution and it has to discharge its onus of proving its case against the accused beyond all reasonable doubt. The charge of criminal conspiracy can be proved either by direct or circumstantial evidence. Conspiracy is always hatched in secracy and its origin is secret and in most of the cases it is incapable of being proved by direct evidence and in majority of cases it has to be inferred from the circumstances proved by the prosecution which must give rise to a conclusive or irresistible inference of agreement between two or more prsons who commit the offence. Mere evidence and proof of relationship of wife and husband and association is not sufficient to prove conspiracy. (1986 (1) Crimes 66(71) Pat).

Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in furtherance to their common intention. The prosecution will also more often rely upon circumstantial evidence.

The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual metting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. It is unnecessary to prove that the parties 'acutally came together and agreed in terms' to pursue the unlawful object, there need never have been an express verbal agreement, it being sufficient that there was 'a tacit understanding between conspirators as to what should be done'. The relative acts or conduct of the parties must, however, be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group of irrelevant fact artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict (AIR 1988 SC 1983; 1989 CrLJ 1 (71,72); 1988 (3 Crimes 209).

Conspiracy may be proved either by direct evidence or circumstantial evidencce as direct evidence to prove conspiracy is not usually available (AIR 1965 SC 682=1965 CrLJ 608). The agreement can be proved either by direct or circumstantial evidence or both or from the acts and conduct of the parties to the agreement (AIR 1962 SC 682). In considering the suffifiency of circumstantial evidence, the cumulative effect of all facts proved should be taken together and a decision arrived at (AIR 1970 SC 648).

In proving conspiracy, apart from the approvers evidence, the prosecution produced a number of letters written by the conspirators to each other using code words. All such evidence was held to be admissible. If the court is also satisfied that there is no trick photograph and the photographs produced raised no suspiecion, such phtographs could also be received in evidence (AIR 1957 SC 747; AIR 1968 SC 936=1968 CrLJ 1124).

In considering the question of criminal conspiracy it is not always possible to give affirmative evidence about the date of the formation of the conspiracy , about the persons who took part in the formation of the conspiracy , about the object which the conspirators set before themselves as the object of the conspiracy and about the matter in which the object of the conspiracy was to be carried out. All this necessarily a matter of inference (1957 CrLJ 1107). Criminal conspiracy may be proved either by direct evidence or by circumstantial evidence. Section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied, the act done by one is admissible against the co-conspirators. Section 10 of the Evidence Act will come into play only when the court is satisfied that there is reasonable ground to believe that two or more persons have conspired togethr to commit an offence or an actionable wrong, that is to say, there should be a primafacie evidence that a person was party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it. The evidentiary value of the said act is limited by two circumstance, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. (AIR 1965 SC 682(687).

Under section 120-B there must be an agreement between two or more persons to commit an offence, or where the agreement does not amount to an offence in the doing of an act which is legal, in an illegal way there should also be established an overt act (AIR 1970 SC 549; 1984 CrlJ 1495). For proving the offence under section 120-B it is not necessary that the co-conspirator should also be tried and/or convicted (1981 CrLJ 1873 (1878).

It is settled proposition that the agreement between conspirators cannot generally be directly proved, but only inferred from the established facts of the case (1970) 1 SCC 696). There is no difference between the mode of proof of the offence of conspiracy and that of any other offence. It can be established by direct evidence or by circumstantial evidence. But section 10 of the Evidence Act introduces the doctrine of agency and if the conditions laid down therein are satisfied the acts done by one are admissible against the co-conspirators (AIR 1965 SC 682 (686).

It is not the law that every conspirator must be present at every stage of the conspiracy . If the conspirator concerned had agreed to the common design and had not resisted from that agreement, it can be presumed that he continued to be a party to the conspiracy. It is manifest that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inference drawn from acts or illegal omission committed by the conspirators in pursuance of a common design (AIR 1980 SC 439). Since privacy and screcy are the elements of criminal conspiracy it is difficult to obtain direct evidence in its proof. It can, therefore, be proved by evidence of surrounding circumstances and conduct of accused both before and after the alleged commission of the crime (1974) 76 Punj L.R. 780(786)P&H; 1984 (2) Crimes 971 Delhi).

The essence of conspiracy is that there should be an agreement between persons to do one or the other of the acts described in section 120-A, Penal Code. The said agreement may be proved by direct evidence or may be inferred from acts and conduct of the parties (1980 CrLJ 369(373). Once there is a reasonable ground to believe that two or more persons have conspired together to commit an offence anything said, done or written by one of the conspirators in reference to the common intention, after the said intention was entertained is relevant against the others not only for the purpose of proving the existence of the conspiracy but also of proving that the other party was a party to it. The evidentiary value of the said acts is limited by two circumstances, namely, that the acts shall be in reference to their common intention and in respect of a period after such intention was entertained by any one of them. If the said condition is fulfilled anything said, done or written by any of them in reference to their common intention will be evidence against the other, it can be used against a co-conspirator and not in his favour (AIR 1965 SC 682;1980 CrLJ 369).

To substantiate a charge of conspiracy the prosecution must prove the agreement between two or more persons to do an unlawful act or a lawful act by unlawful means. Such agreement may be proved by direct evidence or inferred from other proved facts. But the inference of fact may be drawn only when the circumstances are such as to be incapable of any other reasonable interpretation. The law requires specific proof against each of the conspirators participating in particular design to do a particular criminal thing. The object of the conspiracy must be proved as laid (AIR 1954 Cal 373=55 CrLJ 979).

Criminal conspiracy is a highly technical offence and all its ingredients must strictly proved (ILR 5 Lah). Unless a detailed and specific proof against each of the accused that they participated in a particular design to do a particular thing has been

established, there can be no conviction under section 120-B (AIR 1957 AP 758 (766). Where one of the two persons tried for an offence under section 120-B read with section 302 Penal Code, is acquitted, the other stands acquitted as a matter of course (101 I.C. Cal 481; AIR 1958 Cal 51; 35 CrLJ 322).

Before this section is invoked, it has to be established by independent evidence that **prima facie** case wherein two or more persons conspired to commit an offence and the accused was a party to such conspiracy , must be established before such evidence is used against the other conspirators (AIR 1958 SC 953).

3. **Offence of conspiracy when cannot survive.**-As one person cannot form a conspiracy, where two persons are tried together both must be convicted or acquitted (AIR 1916 All 141). If four named inviduals were charged with having committed the offence under section 120-B and if three out of the four were acquitted of the charge, the remaining accused could never be held guilty of the offence of criminal conspiracy (PLD 1956 SC 215). In such a case the one person found guilty of an offence can be convicted of the offence though not of conspiracy (AIR 1935 All 357). But in such cases care must be taken to see that the right of the accused to a proper trial should not be infringed. Thus where the accused was tried with other persons under sections 420/120-B but he was convicted alone under section 420 of the offence of cheating his co-accused. It was held that the trial had deprived the accused of an opportunity to cross-examine the co-accused and therefore his conviction was illegal (PLD 1967 Kar 768).

More than one person may be convicted of the offence of criminal conspiracy if the court is in a position to find that two or more persons were actually concerned in the criminal conspiracy (PLD 1957 Ind 68). Thus where apart from the persons placed on trial, there was an approver who implicated himself equally with the other accused persons and a number of other prosecution witnesses as having been privy to the conspiracy , the conviction of only one accused is not illegal (AIR 1956 SC 469).

The offence of conspiracy can not survive the acquittal of the alleged co-conspirators. F cannot be convicted unless there be proof that he had conspired with personor persons other than his co-accused. If all the other accused have been acuqitted of the charge of conspiracy, F alone cannot be held guilty (AIR 1967 ALJ 30;1984 crLJ 164 SC). It was not the case of prosecution that B had conspired with another person and even though the identity of the other person has not been established, B would still be guilty for the offence under section 120-B, Penal Code. On the contrary, the case of the prosecution was that B had conspired with R to extort Rs. 2000 as illegal gratification from N. Held that when R was acquitted of the charge under section 120-B, Penal Code, the basis of the charge against B for conspiracy between him and R disappeared and the charge against B for conspiracy must necessarily fall to the ground (AIR 1972 SC 1502 (1506).

Where two persons are indicted for conspiring together and they are tried together both must be acquitted or both convicted (AIR 1972 SC 1502 (1506).

4. **Practice and procedure.-** If the offence falls under clause (1) - cognizable, if the offence which is the object of the conspiracy is cognizable, but not otherwise - warrant or summons - Bailable, if the offence which is the object of the conspiracy is bailable, otherwise not - not compoundable - court by which the offence which is the object of the conspiracy is triable.

If the offence falls under clause (2) Warrant - Summons- Bailable - Not compoundable - Triable by any Magistrate.

No person can be convicted of the offence of criminal conspiracy unless there is a charge under section 120-B and conspiracy being a different offence it should be the subject of a separate charge (AIR 1965 Cal 598). If the charge for the main offenece and that of conspiracy is jointly framed, it would desirable to split them up so that no prejudice will be caused to the accused (AIR 1961 SC 1241).

When conspiracy is charged, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy have been carried out (40 Bom LR 1092). Where an offence is alleged to have been committed by two or more persons, the person responsible for commission of the offence should be charged with the substantive offence. While the person alleged to have abetted it by conspiracy should be charged with the offence of abetment under section 109 where the matter has gone beyond the stage of mere conspiracy and specific offence are alleged to have been committed (20 DLR 540).

When in pursuance of a conspiracy an offence is committed when the criminal purpose and object of a conspiracy has been carried out, it is sufficient if the persons concerned are proceeded against for the crime itself and abetment of it and it is not necessary to charge them with conspiracy (AIR 1944 Sind 225).

Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy . There is no analogy between this section and section 109 of the Penal Code. There may be an element of abetment in a conspiracy; but conspiracy is something more than an abetment. Offences created by section 109 and this section are quite distinct and where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with conspiracy to commit those offences (1961 2 CrLJ 302 SC; (1963) 2 CrLJ 67 SC).

Where conspiracy is charged, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy have been carried out (AIR 1938 Bom 481; 40 CrLJ 118). Where a criminal conspiracy amounted to abetment under section 107, it is unnecessary to invoke section 120-A and section 120-B (1961) 2 CrLJ 302 SC).

Where sanction is required for the charge of conspiracy but not with reference to the main offence, the court can proceed to try the main offence itself (AIR 1967 SC 1590;1967 CrLJ 1401). The mere fact that charge is vague as not disclosing the mode of committing the offence, the trial will not thereby become illegal, if no prejudice is caused to the accused (AIR 1962 SC 1821;(1962) 2 CrLJ 805). Where numerous offences are committed in pursuance of conspiracy in the course of the same transaction, they may be split up to avoid prejudice but tried together (AIR 1962 SC 1153= 1962 CrLJ 259).

A charge under section 420 read with section 120-B, Penal Code, would lie where the accused had entered into an engagement or association to do an illegal act but nothing were done in pursuance thereof. A conviction under section 420 read with section 34 of the Penal Code is valid in law if the offence had been committed in furtherance of common intention of all, even though the original charge laid against them was under section 420 read with 120-B of the Penal Code (7 DLR 75; AIR 1965 Cal 598). Where the object of criminal conspiracy as for the charge is to commit the offence of cheating by false personation and one of the conspirators was not charged with the offence while the others were individually and specificaly charged with cheating by false personation. Where the object is clear and even if the offence is committed does not fall under section 417, still they could be charged under section 120-B (AIR 1978 SC 512=1978 CrLJ 646).

At the stage of framing a charge if a prima facie case of conspiracy is made out, the charge should be framed (1986 (1) Crimes 481), and the appellate courts should ot quash such charges on assessment of the probity of the evidence as at the stage of cognizance the question is not of the truth or falsity of an allegation but whether on the basis of the allegation a conspiracy to commit an offence is made out (1966 SCC (Cri.) 216). Where numerous offences are committed in pursuance of conspiracy in the course of the same transaction, they may be split up to avoid prejudice but tried together (AIR 1965 SC 682).

Government officers are required to act in accordance with law. Their plea that they had acted in compliance of orders of an authority superior in complicity with its direction is not sustainable in law (1986) 2 SCJ 495=1986 CrLR (SC) 266).

No person can be convicted of the offence of criminal conspiracy without there being a charge under section 120-B Penal Code (AIR 1934 Pat 561). The charge in the case of conspiracy while stating the object, the same degree of certainty as is usually expected in a charge for the main offence, cannot be expected (16 CrLJ 497). The mere fact that the charge of conspiracy is vague and does not disclose the manner in which the offene was committed would not make the trial illegal especially when no prejudice is caused to the accused (1962 SC 1821=(1962) 2 CrLJ 805).

Where there is a general charge of conspiracy and the prosecution case is that specific offence were committed by one or other of the accused in pursuance of the conspiracy even if the main charge fails, conviction of one or more accused in respect of one or more of the specific charges is legal (AIR 1963 Cal 64). Conspiracy to commit an offence is distinct from the main offence for which the conspiracy is entered into. Such an offence if committed would be the subject matter of a separate charge (1981 Chand Cr. C 43).

There can be no conspiracy without an agreement duly established (1982 CrLJ 1025).

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

That you on or about the .....day of ..... at ..... agreed with (name of the conspirator) to do (or cause to be done) an illegal act, namely ..... (or an act which is not illegal by illegal means) and besides the above said agreement that you did some acts, in pursuance of the said agreement to commit the offenc of ..... punishable with death or imprisonment for life or rigorous imprisonment for a terms of two years or upwards or a criminal conspiracy other than a criminal conspiracy to commit an offence punishable under section 120-B Penal Code and within my cognizance (or the cognizance of the court of Sessions). And I hereby direct that you be tried (by said court) on the said charge.

5. **Punishment.**- Punishment under section 120-B will depend upon the circumstances whether the illegal act in pursuance of the conspiracy has been carried out or not. If the illegal act in pursuance of the conspiracy has been carried out punishment will be in accordance with section 109. If the illegal act in puruance of the conspiracy has not been carried out punishment will be in accordance with section 116. Therefore, where a charge of conspiracy is laid it is open ot the prosecution to charge further that the illegal acts in pursuance of the conspiracy have been carried out. Where a person is charged for conspiracy under section 120-B and also for offence committed in pursuance of the conspiracy and is convicted on both the counts, it is not necessary to award a separae sentences both under section 120-B and the main offence (AIR 1947 Lah 220=48 CrLJ 708).

In a case of conspiracy to murder under section 109, if the deceased was murdered in consequence of that conspiracy, the punishment is either death or imprisonment for life. If, on the other hand, murder is not committed in consequence of the conspiracy then under section 115 the maximum punishment is rigorous imprisonment for seven years. In any case a sentence of ten years rigorous imprisonment is illegal (1937) 1 Cal 484).

The offence of conspiracy is a separate offence from the offence of participation in a particular dacoity or the dishonest reception of property stolen in a dacoity knowing it to be stolen. Separate sentences can be awarded to run consecutively for participation in separate dacoities and to these can also be added a consecutive sentence for participation in conspiracy (30 CrLJ 473=AIR 1928 Ori 507). Acts done in pursuance of the conspiracy can not be separately punished unless these acts are separately charged and particularised as required by the Cr. P.C. (1938) 40 Bom L.R. 1092).

Where the offence is murder, the punishment can only be death or imprisonment for life. The court is in error in inflicting the sentence of rigorous imprisonment for two years for the offence under section 120-B (Part - 1) read with section 302 Penal Code. But if the accused have been found guilty and convicted of an offence under section 302, read with section 34 Penal Code, and sentenced to imprisonment for life and no separate sentence is awarded to them for the conviction under section 302 read with section 109 Penal Code, no conviction or sentence under the charge for the offence under section 120-B Penal code, need be recorded and any sentence imposed under section 120-B Penal Code is illegal (1976 CrLJ 37 (38).

CHAPTER VI

OF OFFENCES AGAINST THE STATE

121. Waging or attempting to wage war or abeting waging of war against Bangladesh.- Whoever wages war against Bangladesh, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life [1][and shall also be liable to fine.]

[2][Illustration]

[3]*A joins an insurrection against Bangladesh. A has committed the offence defined in this section.

[4]* * * * * * * * * * *

[5][121A. Conspiracy to commit offences punishable by section 121.- Whoever within or without Bangladesh conspires to commit any of the offences punishable by section 121, or to deprive Bangladesh of the sovereignty of her territories] [6]* * * or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government [7]* * *, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, [8][and shall also be liable to fine.]

Explanation.-To constitute a conspiracy under this section it is not necessary that any act or illegal omission shall take place in pursuance thereof.

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1. Substituted by the Indian Penal code (Amendment) Act, 1971.
2. Subs. by A. O. 1961, Art 2 and Sch. for "Illustrations" (with effect form 23rd March 1956).
3. The brackets and letter "(a)' were omitted, ibid (with effect from the 23rd March, 1956).
4. Illustration (b) as amended by the Federal Laws (Revision and Declaration) Act, 1951 (Act XXVI of 1951), s 4 and III Sch. was omitted by A. O. 1961, Art, 2 and Sch, (with effect from the 23rd march, 1956).
5. Section 121A was inserted by the Indian Penal Code Amendment Act, 1870 (Act XXVII of 1870), s. 4.
6. The words "of British Burma" were omitted by A. O. 1949, Sch.
7. The words "or the Government of Burma" were omitted by A. O. 1949, Sch.
8. These words were inserted by Act XVI of 1921, s.

122. **Collecting arms, etc., with intention of waging war against Bangladesh.**- Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against Bangladesh, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

123. **Concealing with intent to facilitate design to wage war.**- Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against Bangladesh, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[1][123A. **Condemnation of the creation of the State and advocacy of abolition of its sovereignty.**- (1) Whoever, within or without Bangladesh, with intent to influence, or knowing it to be likely that he will influence, any person or the whole or any section of the public, in a manner likely to be prejudicial to the safety of Bangladesh, or to endanger the sovereignty of Bangladesh in respect of all or any of the territories lying within its borders, shall by words, spoken or written, or by signs or visible representation, condemn the creation of Bangladesh [2][in pursuance of the proclamation of Independence on the twenty-sixth day of March, 1971], or advocate the curtailment or abolition of the sovereignty of Bangladesh in respect of all or any of the territories lying within its borders, whether by amalgamation with the territories of neighbouring States or otherwise, shall be punished with rigorous imprisonment which may extend to ten years and shall also be liable to fine.

(2) Notwithstanding anything contained in any other law for the time being in force, when any person is proceeded against under this section, it shall be lawful for any Court before which he may be produced in the course of the investigation or trial, to make such order as it may think fit in respect of his movements, of his association or communication with other persons, and of his activities in regard to dissemination of news, propagation of opinions, until such time as the case is finally decided.

(3) Any Court which is a Court of appeal or of revision in relation to the Court mentioned in sub-section (2) may also make an order under that sub-section.]

124. **Assaulting President, Government, etc. with intent to compel or restrain the exercise of any lawful power.**- Whoever, with the intention of inducing or compelling the [3][President] of Bangladesh, or [4][the government], [5]* * [6]* * [7]* * to exercise or refrain from exercising in any manner any of the lawful powers of the President or the Government,

assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, the President, [8]* * *

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

1. Section 123A was inserted by the Pakistan Penal Code (Amdt.) Act, 1950 (LXXI of 1950), s. 2.
2. The words within square brackets were substituted for the words "by virtue of the partition of India which was effected on the fifteenth day of August, 1947" by Act VIII of 1973, Second Sch. (w. e. f 26th March, 1971).
3. Subs. by A. O. 1961, Art. 2, for "Governor-General" (with effect from the 23rd March, 1956).
4. The words "the Government" were substituted for the words "the Governor of any Province" by Act VIII of 1973, Second Schedule.
5. The words "or a Lieutenant-Governor" were repealed by A. O. 1937.
6. The words "or a Member of the Council of the Governor-General of India" were omitted by A. O. 1949.
7. The words "or of the Council of any Presidency" were repealed by A. O. 1937.
8. The words "or Governor" were omitted by Act VIII of 1973

[1][124A. **Sedition.**- Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation.- The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation.-Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred contempt or disaffection do not constitute an offence under this section.

Explanation.-Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

125. **Waging war against any Asiatic Power in alliance with Bangladesh.**- Whoever wages war against the Government of any Asiatic Power in alliance or at peace with Bangladesh or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

126. **Committing depredation on territories of Power at peace with Bangladesh.**-Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with Bangladesh, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or inteded to be used in committing such depredation, or acquired by such depredation.

127. **Receiving property taken by war or depredation mentioned in sections 125 and 126.**- Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

128. **Public servant voluntarily allowing prisoner of State or war to escape.**- Whoever, being a public servant and having the custody of any state prisoner to escape from any palce in which such prisoner is confined, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

129. **Public servant negligently suffering such prisoner to escape.**- Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any palce of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

1. Substituted by the Indian Penal Code Amendment Act, 1898 (Act IV of 1898), s. 4, for the original section 124A, which was inserted by the Indian Penal Code Amendment Act, 1870 (Act XXVII of 1870, s. 5.

130. **Aiding escape of, rescuing or harbouring such prisoner.**- Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.-A state prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in Bangladesh, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

CHAPTER VII

OF OFFENCES RELATING TO THE ARMY, [1][NAVY AND AIR FORCE]

131. Abetting mutiny, or attempting to senduce a soldier, sailor or airman from his duty.— Whoever abets the committing of mutiny by an officer soldier, [2][sailor or airman], in the Army, [3][Navy or Air Force] of [4][Bangladesh,] or attempts to seduce any such officer, soldier, [2][sailor or airman] from his allegiance or his duty, shall be punished with [9][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.

[5][**Explanation.**-In this section the words "offcer", [6]["soldier"] [7]["sailor"] and "airman"] include any person subject to the [8][Army Act, 1952 or the Navy Ordinance, 1961 or the Air Force Act, 1953], as the case may be.]

132. **Abetement of mutiny, if mutiny is committed in consequence thereof.** Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Banglaesh, shall, if mutiny be committed in consequence of that a betment, be punished with death or with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

133. **Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.**— Whoever, abets an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Bangladesh,

1. Substituted by the Repealing and Amendment Act, 1927 (Act X of 1927)s. 2 and Sch. I for "and Navy".
2. Subs ibid, for "or sailor".
3. Subs. ibid, for "or Navy".
4. The word "Bangladesh" was subtituted for the word "Pakistan" by Act VIII of 1973, 2nd Sch., (w. e. f. 26th March, 1971).
5. Explanation was inserted by the Indian Penal Code (Amendment) Act. 1870 (Act XXVII of 1870), s. 6.
6. Subs. by the Repealing and Amending Act, 1927 (Act X of 1927), s. 2 and Sch. I for "and 'sailor".
7. Ins by the mending Act, 1934 (Act XXXV of 1934) s. 2 and Sch.
8. The words within square brackets were substituted for the words "Army Act, the Indian Army act, 1911, the Pakistan Army Act, 1952, the Naval Discipline Act or that Act as modified by the Pakistan Navy (Discipline) Act 1934, the Air Force Act or the Indian Air Force Act, 1932 or the Pakistan Air Force Act, 1953" by Act VIII of 1973, Second Scheduly
9. Subs. by Ord. No XLI of 1985, for "transportation".

on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

134. **Abetment of such assault if the assault is committed.**— Whoever, abets an assault by an officer, soldier sailor or airman, in the Army, Navy or Air Force of Bangladesh, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

135. **Abetment of desertion of soldier, sailor or airman.**-Whoever abets the desertion of any officer, solder sailor or airman, in the Army, Navy or Air Force of Bangladesh, shall be punished with imprisonment of either description for a time which may extend to two years, or with fine, or with both.

136. **Harbouring deserter.**— Whoever, execpt as hereinafter excepted, knowing or having reason to believe that an officer, soldier, sailor or air man, in the Army, Navy or Air Force of Bangladesh, has deserted, harbours such officer, soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.-This provision does not extend to the case in which the harbour is given by a wife to her husband.

137. **Deserter concealed on board merchant vessel through negligence of master**-The master or person incharge of a merchant vessel, on board of which any deserter from the Army, Navy or Air Force of Bangladesh is concealed, shall though ignorant of such concealment, be liable to a penally not exceeding five hundred [1][taka] if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

138. **Abetment of act of in subordination by soldier, sailor or airman**-whoever abets what he knows to be an act of insubordination by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Bangladesh shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprionment of either description for a term which may extend to six months, or with fine, or with both.

138A. [Application of foregoing sections to the Indian Marine Srvice.] Rep. by the Amending Act, 1934 (XXXV of 1934), s. 2 and Sch.

139. **Persons subject to certain Acts.**— No person subject to the [1]* * * [2]Army Act, 1952,] the [3][navy Ordinace, 1961], the [4]* * [5]Air Force Act, 1953,]

1. The words "Army Act, the Indian Army Act, 1911, the Pakistan" were omitted, ibid.
2. Ins by the Central Laws (Statute Reform) Ordinance, 1960(XXI of 1960), s. 3 & 2nd Sch., (w. e. f. 14th October, 1955).
3. The words "Navy Ordinace, 1961" were substitued for the words "the Naval Discipline Act or that Act as modified by the Pakistan Navy (Discipline) Act 1934", by Act VIII of 1973, 2nd sch.
4. The words "Air Force Act or the indian Air Force Act, 1932 or the Pakistan" were omitted, ibid.
5. Ins. by the Central Law Reform) Ordinance, 1960 (XXI of 1960), s. 3 & 2nd Sch., (with in the 14th October, 1955). is subject to punishment under this Code for any of the offences defined in this Chapter.

140. **Wearing garb or carrying token used by soldier sailoror airman**-Whoever, not being a soldier, sailor or airman in the Military, Naval or Air service of Bangladesh, wears any garb or carries any token resmbling any garb or token used by such a soldier sailor or, airman with the intention that it may be believed that he is such a soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred taka or with both.

CHAPTER VIIT

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

141. Unlawful assembly-An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is -

First.-To overawe by criminal force, or show of criminal force, [1][Government or Legislaturel], or any public servant in the exercise of the lawful power of such public servant; or

Second.-to resist the execution of any law, or of any legal process; or

Third.-To Commit any mischief or criminal trespass, or other offence; or

Fourth. -By means of criminal force, or show of criminal force, to any person to take or obtain possossion of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incoporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right;or

Fifth.-By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.-An assembly which was not unlawful when it assembled, my susequently become an anlawful assembly.

Synopsis

1. Scope and object.
2. Assembly of five or more persons.
3. Common object.
4. Mere presence in the assembly not sufficient.
5. To overawe by criminal force.
6. Reistance to legal force.
7. To commit any mischief or criminal tresspass or other offence.
8. Forcible possesson or disossession.
9. "To compel any person....."
10. Explanation.

1. Scope and object.- This section defines an 'unlawful assembly' by declaring an assemblage of more than five persons, for any purpose indicated in the section, illegal. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor

1. The words "the Cenrral or any Provincinal Government or Legislature" were first substituted for the words "the Legislative or Executive G. of I., or the Govt. of any presidency, or any Litutenant-Governor" by A. O., 1937 and then the word" Government" was subs, for the words "the Central or any Provincial Government" by Act VIII of 1973, Second Sch. (w. e. f. 26th March, 1971).

making a motion towards its execution. To object of the section is to protect public peace from dangers caused by an unlawful assemblage of a number of person and of avert serious crimes like rioting, murder, etc., if not nipped in the bud.

An asembly of persons intended to carry on their ordinary business is not unlawful; and this is true even though it should occur on a day and in a manner not authorised by law, unless their action will in some way disturb the rights of others or the public rights.

It is settled law that active participation in actual violence is not necessary. Persons who by words or by signs or otherwise encourage violene are equally members of the unlawful assembly (AIR 1961 Raj 24; 1984 CrLJ 772).

To constitute an unlawful assembly there must be : (1) an assembly of five or more persons;

(2) they must have a common object;

(3)the common object must be one of the five specified in the section;and

(4) the common object must be unlawful.

To constitute an unlawful assebly, there must not only be an assembly, of five or more persons but they must all have one of their common objects enumerated in the section which they will carryout by unlawful means (9 WR 19; AIR 1960 punj 171). Mere presence in an assembly of five or more persons cannot make a person liable unless the assemblage was with a common object being one of those enumerated in section 141 (AIR 1964 MP 30; AIR 1956 SC 181). Persons who by words or by sings or otherwise encourage violence actually members of an unlawful assembly (AIR 1961 Raj 24; (1961) 1 CrLJ 155).

The test of an unlawful asembly is whether act of an unlawful assembly could reasonably be inferred from some direct evidence as well as the circumstantial evidence including the conduct of the parties who constitute such unlawful assembly. there must be some element present for immediately carrying into effect the common object. A meeting for deliberation only and to arrange plans for future action to the taken individually and not jointly does not constitute an unlawful assembly (45 DLR (1993) 267 (Para 26).

2. Assembly of five or more persons.- Before there can be an unlawful assembly and rioting, there must be five persons who have a common object (53 SCJ 143). The assembly must consists of five or more persons, having one of the five sepecified objects as their common object (AIR 1946 Pat 127; 48 CrLJ 165). Where it is found by the court that the number of persons who committed an offence under section 147 was five or more, the acquittal of some of the accused can not dispel the aplication of section 147 to the others. The essential question in such a case is whether the number of persons who took part in the crime was five or more than five. The identity of the persons who were members thereof relates to the determination of the guilt of the individual accused (AIR 1929 Lah 59; 29 CrLJ 850; 52 CrLJ 924).

A finding that there were a number of persons who took part in the riot is not enough (AIR 1955 NUC 5017). Moreover five or more persons must have a common object to bring them within the ambit of this section. Where two of the five persons convicted of rioting were found to have no object common with the other three, the conviction as against them cannot stand (11 CrLJ 197). But where two separate parties acting with a common object have a total of five or more persons but they act separately for trapping the accused, they can all be convicted under the section (AIR 1950 All 418).

Where five persons are charged under sections 143, 147 P.C. and two of them are convicted, the charge will not fail if the court on the evidence before it comes to the conclusion that there were other members of the unlawful assembly and the number was more than five (AIR 1965 Assam 86). It is only when the number of the alleged assailants is definite and all of them are named, and the number of persons proved to have taken part in the incident is less than five, that it cannot be held that the assailant party must have consisted of five or more persons. The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named excludes the possibility of other persons to be in the assailants party and especially when there is no occasion to think that the witnesses naming all the accused could have committed mistakes in recognizing them (AIR 1961 SC 1787). On the same principal if only four persons are charged and out of them only one accused is found guilty, he cannot be convicted of the offence of rioting (67 Cal LJ 217). Where five persons were convicted by trial court but on High Court admitted revision of one of the accused for consideration as only a Lalkara was attributed to him. Supreme Court upholding conviction/sentece of four convicts with observation that validity of their conviction under section 148 remained in doubt until case of fifth conviction was decided by High Court (NLR 1986 SCJ 225).

3. Common object.- The only ingredient necessary that the object should be common to the persons who composed the assembly that is to say, they should all be aware of it and concur in it. There must also be some present and immediate purpose of carrying into effect the common object. The object of the unlawful assembly had to be considered with reference to what transapired on the date of the occurrence (AIR 1953 TC 275). Where the common object of the assembly, whatever be their number, is not one or more of the objects specified in section 141, it will not constitute an unalwful assembly. The mere fact that an assembly consisting of five or more persons is likely to disturb the public peace, does not prove that the common object of the assembly is one of those enumerated in that section (1983 CrLj 1259 Ker).

The common object has to be determined with referene to the subsequent conduct of the assembly. It is not necessary to prove that there was a previous concert regarding the common object. It may even be that when the crowd originally assembled there may not have been any such common object. The common object can be even after the original assembly was formed (AIR 1954 SC 657). The common object can be inferred from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence or the injury inflicted (AIR 1966 Ori 199). If common object is proved, the mere fact that specific offences with which members of an unlawful assembly are charged, are not proved does not mean that the unlawful assembly should be found to be non-existent (1955 Andh N.R. 868). But it must be noted that in order to sustain a conviction in a case of unlawful assembly the rule is that the common object stated in the charge must agree in essential particulars with the common object stated in the charge must agree in essential particulars with the common object established in the evidence. Where the alleged common object of an unlawful assembly fails, the accused persons cannot be convicted under sections 147 and 148 of the Penal Code. They can however be convicted, if undividual acts of illegality can be proved against each of them individually (1968 PCrLJ 300).

"It is incumbent upon the Magistrate to specify the common object of the unlawful assembly in the charge itself under Section 147 of the Penal Code. Mere statement of the common object to commit rioting would not be sufficient in law to indicate as to what realy their common object was. The magistrate should have

mentioned one of the objects as the common object as enumerated in Section 141 Penal Code (ALi Ahmed Vs. The State 38 DLR (1986) 299 (para-19).

The only ingredent necessary is that the object should be common to the persons who composed the assembly, that is to say, they should all be aware of it and concur in it (AIR 1953 Trav-Co 27). No previous concert is necessary. In this respect it differs from the common intention required by section 34 (AIR 1954 SC 657; AIR 1956 AP 53). The test of an unlawful assembly is whether the common object of the assembly could reasonably be inferred from direct as well as circumstantial evidence including the conduct of the parties, it is not the nature of the right but the criminality involved in the determination to use force and the activities other than in due course of law that determine the nature of an assembly (55 Mys HCR 317).

Members of an unalwful assembly may have a community of object only up to a certain point; beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of objects (22 Cal 306; AIR 1936 at 481)..

A common object is different from a common intention in that it does not require prior consert and a prior meeting of minds before the attack and an unlawful object can develop after the people get there. In a case of common object there need not be a piror meeting of the minds. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object (AIR 1956 SC 513 = 1956 CrLJ 921).

Common object of the unlawful assembly can be collected from the nature of assembly, arms used by them and the behavior of the assembly at or before the scene of occurrence. The common object is an inference of fact to be deduced from the facts and circumstances of each case. The commission of overt act is certainly an evidence of fact that the accused was the member of an unlawful assembly, but the converse is not true. In other words, it cannot be contended that if there is no proof of commission of certain overt act by the accused he is not a member of the unlawful assembly (AIR 1966 Ori 199 = 1966 CrLJ 1176).

Although there is a distinction between section 34 which deals with common intention and section 149 which deals with constructive liability based on common object, there may not be much diference btween intention, and object, because if there is common intention to commit an offence it must also be assumed that the common object was to commit that offence. Similarly, if the common object of a group of persons be to do an act that would mean that the group of persons have a common intention to do that act although the act may be such that section 141 would apply to an assembly of five or more persons which has the common object of doing that act, but section 34 would not apply to the case because for the application of section 34, the common intention must be to do a criminal act whereas the common object falling under section 141 need not necessarily be a criminal act. For instance, the common object of an unlawful assembly may be to take or obtain possession of any property or to deprive any person of the enjoyment of right of way or of the use of water of which he is in possession or enjoyment although in such cases the common object must be to do so by means of criminal force or show of criminal force. If the common object of a group of criminal act, and if some members of an assembly share a common intention to commit an offence, it can also be assumed that their common object was to commit that offence. Therefore it may be possible to make a distinction between similar object and common object just as

distinction has been drawn between similar intention and common intention (AIR 1960 GUj 13).

A charge over in the common object can only be established by evidence of the conduct of the assembly by words spoken, by the acts done and generally by the other details connected with the movement in the activity of the assembly (1958 Andh. LT 856). Where a crowd has dispersed without taking any action, the intention and common object of that crowd can only be inferred from the surrounding circumstances, and among other circumstances the attitude and demeanor of the crowd itself is one of the points which must be taken into consideration (AIR 1928 Pat 98). The common object of the unlawful assembly has to be considered with reference to what transpired on the date of occurrence (AIR 1953 Trav-Co 275). In this connnection the circumstances of the case, the attitude and deportment of the persons assembled very often furnish a key to their mental bent. Inidividual action of some emmbers of an assembly is not to be confused with the common object of the persons composing the assembly (AIR 1960 Punj 271). It is not proper merely to take all the actual offences committed by it in the course of a riot, and to infer that all those were originally part of its common object, the inference must be based on more evidence than the mere acts themselves (AIR 1953 Mys 41). Thus where different groups shout slogans inciting people to violence and violence is committed, all the group cannot be held guilty of the offence (AIR 1964 MP 30). Where the accused who were more than five in number went out of their field armed with lathis, and beat their enemies who claimed joint possession of land with them (1958 Raj LW 505), or where in the middle of night the accused are found together in a temple with various implements of hosue breaking, or if five or more persons assembled together armed with lathis and some of them attacked their opponents while the others, who at first kept in the background, proceeded to assault the opponent's helpers, it was held that each one of them constituted an unlawful assembly within section 141 (12 CrLJ 274).

Persons who had come there quite lawfully, in the first instance, thinking there were thieves could well have developed an intention to beat up the 'theives' instead of helping to apprehend them or defend their properties; and if five or more share the object and joined in the beating then the object of each would become the common object. If five or more exceed the original lawful object and each has the same unlawful intention in mind and they act together and join in the beating then they in themselves form an unlawful assembly. There is no difference in principles between this and a case in which the original object was unlawful. The only difference is that a case like this is more difficult to establish and must be scrutinized with greater care (AIR 1956 SC 513 (514, 515, 518).

4. Mere presence in the assembly not sufficient.- Mere presence in an assembly does not make a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under section 142 (AIR 1956 SC 181 = 45 DLR 267 (Para 26). Unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it can not be said that he is a member of such an unlawful assembly. What has to be proved by the prosecution is that the accused was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by section 141 (AIR 1965 SC 202).

A person can not be said to be a member of an unalwful assembly if his presence in the assembly was due to duress and that he did not share any comon object with the other member of the assembly (AIR 1957 All 84). Mere spectators

can not be branded with common intention unless they commit some overt act (AIR 1965 SC 181; 1956 CrLJ 345). Whenever an uneventful rural society something unusual occurs, more so where the local community is factionridden and a fight occurs amongst factions, a good number of people appear on the scene not with a view to participating in the occurrence but as curious spectators. In such an event mere presence in the unlawful assembly should not be treated as leading to the conclusion that such persons were present in the unlawful assembly as members thereof (AIR 1978 SC 1647 = 1978 CrLJ 1713). In a crowd there usually are mere spectators and those who by their words, gestures or even by conduct encourage the riot. The latter class are without doubt participants. But on a large scale when the crowd assembles it is not always easy to distinguish between actors, who have assigned to themsevles some active role, and others, who form the audience and content themselves by merely gozing on. But when an authorised person ike a Magistrate commands an assemly to disperse after declaring it to be unlawful, persons who are volunterily and deliberately remaining there in disobedience to the proclamaltion, are no neutrals or curiosity smitten spectators (AIR 1960 Punj 271).

Mere presence does not make him a member of the unlawful assembly unless he has done something or omitted to do something which would make him a member and that he did some overt act in pursuance of the common object of the unlawful assembly (AIR 1954 SC 648; 55 CrLJ 1668).

The formation of an unlawful assembly is not to be assumed merely because five or more persons meet at a particular place and shortly afterwards some offence or offences are committed (ILR 3 Assam 96). The mere presence in a crowd cannot render anybody liable, unless there was a common object and he was actuated by the common object and that object was one of those set out in section 141 (AIR 1964 MP 30). Thus the mere fact that a person resides in the same street or his mere presence at the time when the offence of rioting is committed, is not sufficient to show that he was a member of the unlawful assembly which committed an offence (AIR 1956 Bom 609).

Mere presence in an assembly does not make a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142 (PLD 1956 SC 249; AIR 1964 MP 30). But this proposition cannot be read as laying down a general rule of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. What has to be proved by the prosecution is that the accused was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by section 141 (AIR 1965 SC 202).

Active participation in actual violence is not necessary; persons who by words or by sings or otherwise encourage violence are equally members of the unlawful assembly (AIR 1961 Raj 24). Therefore it is necessary to establish a connection between those who take active part in a riot and those who merely utter some words intended to provide encouragement. This can only be done by showing that the former became aware of what the latter said (AIR 1951 Nag 47).

Some unmistakable overt act contributing to the prosecution of the common object should always be proved before a person is convicted for membership of an unlawful assembly or for rioting. Mere presence will not usually be that unmistakable act; but presence plus the carrying of weapons will bring him nearer to the common object, unless he explains why he carries the weapon concerned. If, in addition to presence and weapons, there are cries clearly indicating a determination to attack

members of another group, the position is stronger still against him. Finally, while going in a crowd with war cries, if he marches along with the others into the opposting group and uses his weapon, then it is complete evidence of membership of the assembly (AIR 1964 MP 30).

Mere presence in an assembly does not make an person present a member of an unlawful assembly unless it is shown that he has done something or omitted to do something which would make him a member thereof or unless the case falls under section 124, Penal Code. It can not be laid down that overt act on the part of a member is necessary to be established. What has to be proved is that he was one of the persons constituting the assembly and that he entertained along with others the common object as defined in section 141, Penal Code. The question to determine is whether the assembly consisted of five or mroe persons and whether the said persons entertained one or more of the common objects specified in section 141. In determining the question it becomes necessary to ascertain whether the assembly consisted of some persons who were mere passive witnesses. In fact section 149 makes it clear that if the offence is committed by any of the members and others knew that such offence was likely to be committed, then every of the members are vicariously liable (AIR 1963 SC 174 = (1964) 1CrLJ 573).

It is well settled that a mere innocence presence in an assembly of persons, as for example, a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking if in a case where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another, the accused who were not present or who did not share the common object of the unalwful assembly at other stages can not be convicted for the activities of the assembly at those stages (1976) 2 CrLJ 1987 (1989-90) SC).

5. To overawe by criminal force.- To bring a case within the mischief of this clause, it is necessary to prove that the accused showed criminal force which could overawe and intimidate his adversary and this must be judged objectively. The calling of a Magistrate and police by the accused for protection does not amount to show of criminal force by the accused (AIR 1949 All 351) Similarly where a person in a procession taken out to give vent to the feelings of the people against the police shout slogans, it does not come within the mischief of the section because the slogans cannot overawe the police. But when members also resort to pelting of stones on the police forces, resulting in actual injuries to members of police force, that act of the crowd brings their conduct within the four corners of section 141, clauses (1) and (3) (AIR 1960 Punj 271).

6. Resistance to legal process.- This clause relates to resistance to the execution of any law or legal process. Resistance is something more than disobedience or dificence. It consists of an overt act showing an intention to oppose the execution of any law or legal process. An assembly does not become unalwful merely because it continues without dispersing in defiance of a lawful order to

disperse (AIR 1922 Lah 135; AIR 1923 Pat 1). Where there was a police order not to proceed with a procession without licence and the accused in defiance of that order led the procession without obtaining licence, it was held that it amounted to offering resistance to the execution of the law (AIR 1946 Pat 381).If there is an assemblage of five or more men with the common object of resisting by force or show of force the execution of process of law, every one of them is guilty of being a member of an unlawful assembly whether resistance is offered or not. Being member of an unlawful assembly and resisting process of law are two separate offences though they may be committed in the course of the same transaction (AIR 1938 Pat 548).

Where a procession is taken out without a licence although a licence is necessary to do so, in view of a notification issued under section 30, Police Act, the person organizing the procession comes within the mischief of this section, and if any person persists in remaining with the procession after becoming aware of the fact that the convener has failed to take out a licence as required by law, he must be taken to share the common object of the convener to resist the execution of the order (AIR 1931 Mad 484; AIR 1923 Pat 1).

7. To commit any mischief or criminal tresspass or other offence.-This clause sepcifies only two offences, viz., mischief and criminal tresspass, but the words 'or other offences' seem to denote that all offences are included though only two are enumerated in a hapharzard way. This construction is borne out by the fact that the word 'offence' has been given a wider significance in this clause. 'Offence' under this clause means a thing punishable under the code, or under any special or local law if punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine (section 40) (33 Bom LR 1169; 55 Bom 725).Thus to loot the house of a person and cause damage to the property, or to belabour a person and his party is an unlwaful common object and makes the assembly an unlawful assembly (AIR 1953 All 749; AIR 1959 Raj 226). But where the assembly is not committing and has no common object of committing an unlawful act, it cannot be held guilty of an offence under the section. Thus an assembly of five or more persons illegally seizing cattle and taking them to the pound cannot constitute an unlawful assembly within section 141 (3) as no offence is committed by the assembly (AIR 1943 Oudh 280). The accused entered into a vacant manai, broke down a wall and rebuilt it. The wall belonged to one of the accused. It was held that there could be no unlawful assembly as the accused were there to build their own wall nor could they be convicted of mischief (11 CrLJ 533). Similarly where the accused are put into possession of land and crops by a civil court under O. 21, R. 95, Civil P.C. they are entitled to cut the crop standing on it whether ripe or unripe, and they cannot be convicted under sections 143 and 427, P.C. (AIR 1936 Cal 157). Where the assembly does an illegal act but the penalty for it is imprisonment for less than six months or only fine, this sectin does not apply. It follows that if a procession is taken out in defiance of the conditions of licence taken out by the organizers, Cl. 3 does not apply as an offence under the Police Act is punishable with a fine of Rs. 200 only (AIR 1946 Pat 381).

8. Forcible possession or dispossession.- To bring a case within this provision, the prosecution must prove not only that the accused was a member of an unlawful assembly but also that being such a member he used criminal force or by show of criminal force had obtained possesion of any property or deprived any person of the enjoyment of a right of way or the use of water (1971 PCrLJ 528).

The words 'to enforce a right or supposed right' in clause 4 show that it is perfectly immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality

being the determination to use criminal force and act otherwise than in due course of law so as to threaten the public peace (14 Mad 126) The section preventing resort to force in vindication of supposed rights. The mere fact that the accused entertained honestly a claim cannot take the case out of section 141 if the claim was disputed and not an admitted or ascertained right. The section also explains the distinction between a disputed cliam and an ascertained right (10 CrLJ 427).

The object of this clauses to prevent the resort to forc in enforcement of a person's right or supposed right (10 CrLJ 427). Where a civil court has declared the right of way with resect to a path and if the accused bars the cmoplainant access, the fourth clause will not be attracted (AIR 1954 Assam 57). It is immaterial whether the act which one seeks to prevent by the use of criminal force or show of criminal force is legal or illegal, the test of criminality being the determination to use criminal force and act otherwise than in due course of law so as to threaten public peace (ILR 14 Mad 126) unless the circumstances show that a right of private defence exists. The expression 'to enforce a right' implies that the party claiming a right has not **ossession** over the object of the right. This is in contrast with the right of a party in maintaining the right which implies his being in possession of the right entitled to resist any one opposing him by aggression (14 CrLJ 463). Thus, a person seeking to enforce a right will be the aggressor and the person seeking to maintain the right will only be a defender entitled to maintain possession already outlined (AIR 1925 Oudh 425).

Where a person is in lawful possession of any property and intends to maintain his possession clause 4 has no application (AIR 1957 SC 1674 = 1957 CrLJ 1479). If any one is in wrongful opossession of his proerty, the owner in taking or obtaining possession must not do so by means of force or show of criminal force. but if he can obtain possession in a peaceful manner he has every right to do so even if it implies peaceable easy ejectment of any one found in the premises (AIR 1934 Cal 273; 35 CrLJ 1313). Where there is an actual invasion of one's property or person and there is no time to seek the aid of public auhtorities, the right of private defence will be available and that right is exercisable under this section (ILR 1952 Cut 219).

This clause only refers to taking and obtaining of possession, not in maintaining of possession (AIR 1923 Oudh 167). A person out of possession cannot be permitted to obtain possession by th use of criminal force. He can only enforce his right in accordance with law (15 CrLJ 232). Where a person in possession of property resists an invasion against it in exercise of his right to that property, if that invasion amounts to an offence under the code, he is entitled to resist it for by force using the minimum number of persons to assist him and using such arms as are absolutely necessary provided there is no time to have recourse to the protection of polic̣e (19 CrLJ 141).

Where tenant's lease expires, the landlord is in the eye of law is in possession of the leased lands and is entitled to get upon the land and use force to assert and maintain his possession (AIR 1925 Pat 17). When both the parties are entitled to joint possession neither of them is entitled to forcible possession (5 CrLJ 19), even if a party has a right to possession they will be guilty if they choose to enforce that right by criminal force. Where two persons are on a field each claiming possession he who has title is in law deemed to be in possession. If such owner allows the trespasser to get into possession he will have to seek his remedy under section 9 of the Specific Relief act or for other remedies open to him (AIR 1928 Pat 124). If an owner allows himself to be dispossessed and subsequently seeks possession on the basis of his title with the assistance of his friends they will all be members of an unalwful assembly and guilty of rioting (AIR 1943 Mad 590). A trespasser in

possession is entitled to defend his possession against every one seeking to dispossess him in his possession was acquiesced in by the rightful owner. Where the accused forcibly took away the crips under a bonafide belief that they were entitled to possession, it was held that the accused could not be held gilty of trespass as the landlord formed an unlawful assembly for committing theft of the crips (AIR 1972 SC 949).

'Supposed right' is a mere pretension to a right which does not exist. If people were to set up their own motions of what is right or wrong in vindication of armed force, it will be a plea available to every one who cared to raise it. Such a plea would be totally subversive of all security and order. Where a grown up woman is carried away by force by an assembly of men against her own will even with the object of restoring her to her husband, it was held that an offence of constituting unlawful assembly was committed (AIR 1942 Lah 89). The mere facts that a rumour is spread that certain muslims intending to sacrifice a cow at some spot, the hindus do not have a right to collect with lathis and take the law into their own hands (AIR 1935 All 931).

Where a numbr of men assembled and forcibly interrupted a procession on the ground that they had right to do so because it caused them annoyance and was a nuisance, they were rightly convicted of riot as their acton was held to be one clearly falling within this clause (2 M.C.C. 252; SC Langford, Cr. N. 602).

9. "To compel any person .....".- This clause is very comprehensive and applies to all the rights a man can possess, whether they concern the enjoyment of property or not. It differs from the preceeding caluse in the omission of any reference to a right or supposed right. The mere use of criminal force or show of criminal force by any person to take poossession of any property is not sufficient to bring a case within this clause unless some criminal intent is proved against the persons so using force or show of force (1907) 12 CWN 96). It is not sufficient to prove that the common object of the accused's party was to compel the complainant by means of force to omit, for the time being, to do a certain act. The act omitted must be one which the complainant was legally entitled to do and if it was not such an act, clause (5) cannot apply (AIR 1925 Oudh 425).

10. Explanation.- An assembly which was lawful when it assembled can become unlawful subsequently (PLD 1975 SC 351). It may turn unlawful all of a sudden and without previous concert among its members. The common object required by section 141 differs from the common intention required by section 34 in this respect (PLD 1963 SC 109). But to establish such a development it would be necessary to prove circumstances applicable to all the persons assembled which influenced them all in one direction, namely, that of using criminal force or committing mischief, criminal trespass, or other offences or of resisting the execution of law or legal process (15 DLR (SC) 65; PLD 1963 S.C. 109).

An assembly which is lawufl at its inception becomes unlawful the moment one of them calls upon others to assault a member of the other party and they, in response to his invitation, start to chase a member of the other party who was running away (AIR 1954 SC 657). Where two persons out of a group of five, seize cattle illegally they are not an unlawful assembly but when the owners seek to take them back, an a fight ensues, in which the former are assisted by nine others, they become and unlawful assembly (AIR 1943 Oudh 280). Where Muslims being apprehensive of breach of the peace being committed by Hindu processionists, assemble either to protect themselves or to protest against the action of the processionists in taking an unlicensed route, it cannot be said that they become members of an unlawful assembly at that stage. But if when the Hindus are receding,

the Muslims chase them, the Muslims become members of an unlawful assembly (43 CrLJ 871).

An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts, or by repelling an attack made on it by persons who had no right to obstruct it or by exceeding the use of the right of private defence, or because it continues without dispersing in defiance of the lawful orders to disperse for there is no clause under section 141 to say that an assembly refusing to disperse in obedience to a lawful command becomes an unlawful assembly, or because some persons present there were found preaching violence, specially when it is also found at the same time that others were opposing the use of violent mehtods (AIR 1916 Mad 1062; AIR 1922 Lah 135; ILR 3 Raj 436).

The accused assembled with others for a lawful pourpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed and with good reason to suppose that a breach of the peace would be committed by those who opposed it. It was held that they could not be convicted of being members of an unlawful assembly (AIR 1969 All 130 = 1969 CrLJ 359). An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them nor by exceeding the lawful use of their right of private defence (AIR 1916 Mad 1062 = 16 CrLJ 743).

An assembly which is not unlawful in its inception does not become an unlawful assembly because of its refusal to obey an order to dispersed (23 CrLJ 5; AIR 1922 Lah 135). An assembly does not become unlawful by reason of its lawful acts exciting others to do unlawful acts (AIR 1929 Nag 43; 30 CrLJ 38). The unlawful common object may have developed subsequently although it may not have been present when they assembled (AIR 1958 Raj 276).

142. **Being member of unlawful assembly.**-Whoever, being aware of facts whcih render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

143. **Punishment.**- Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Comments

This section provides the punishment for any person being a member of unlawful assembly. this section deals with membership of an unlawful assembly. If the unlawful assembly commits any offences, they are liable to be punished for such of the offences committed. If on a charge of rioting the common object charged is not proved there can not be a conviction (AIR 1963 Cal 3; 1963 CrLJ 46). It follows that the accused may be convicted for being members of an unlawful assembly as well as for the actual offence committed by the assembly. Therefore the accused can be lawfully convicted under this section as well as for rioting (48 CrLJ 590 DB (Lah), or for criminal trespass (AIR 1960 Moni. 23).

The section would apply only where the common object of the assembly is unlawful as where they commit an offence. Where an assembly commits an assault in pursuance of its common object to defend a right or to maintain a right, then such an assault by itself can not be said to be illegal (AIR 1958 Pat 492).

Where a substantive offence is not proved, it would be difficult to convict the accused under section 143. Thus where the accused are charged under section 143

and 147, if the evidence is insufficient to prove the substantive charge of criminal trespass it would be difficult to hold that the accused committed an offence under section 143 (AIR 1955 Cal 515). Similarly if the charge is under section 143 and 379 and the theft is not proved, the accused can not be convicted because no other common object can be substituted for the one alleged in the charge (1936 Mad WN 896).

Where ten accused are charged by prosecution and six of them are acquitted the remaining four can not be convicted under section 143 (62 CWN 500). But where there is evidence to show that there were more than five persons forming unlawful assembly, conviction of three persons under section 143 is not bad (AIR 1965 Assam 86). In ascertaining the number of persons constitutng the unlawful assembly the acquitted persons must be excluded. Whether the number still remains at five or more must depend upon whether the charge or evidence indicates that there might be other persons also than those acquitted (1966 CrLJ 223 relying on AIR 1963 SC 174).

It is not necessary to establish that the members actually met and conspired to do any of the acts enumerated in section 141 in order to establish its intention, such intention can be inferred from the circumstances of the case. What the witnesses actually saw and heard as to what the mob was doing and saying all that is admissible and their impressions and **opoinions** (AIR 1965 SC 202 = (1965) 1 CrLJ 226; 1965 CrLJ 186).

Where the common object was to take forcible possession of property and the accused were all servants who acted on behalf of their masters the punishment may be lenient (5 CrLJ 19). Where the accused were under bonafide belief that they were entitled to possession of land and the complainants case that he cultivated land was doubtful, it was held that the conviction under sections 143 and 379 could not be upheld (AIR 1972 SC 949 = 1972 S. C. Cr. R. 420).

An offence under section 148 is an aggravated form of an offence under sections 143 and 147. Separate conviction under these sections were held to be unnecessary (1969 CrLJ 1577).

Practice and procedure.- An offence under this section is cognizable, but summons may issue in the first instance. It is bailable but not compoundable. It is triable by any Magistrat and may be tried summarily. But in order that the accusd may be so tried the offence must be strictly one under this section and not one of graver kind, as for instance, rioting. Where, therefore, on the facts disclosed by the evidence, the offence committed was one of rioting, but the magistrate convicted them summarily under this section, it was held that the offence should not have been mitigated merely for the purpose of introducing a different jurisdiction, or a lower scale of punishment or of applying the summary mode of procedure and that if the accused so desired, they were entitled to retrial on the more serious charge (P.R. No. 5). This offence does not involve the use of force, so that a conviction under this section does not justify and order for security under section 106 of the Criminal Procedure Code (ILR 35 Cal 315).

The points requiring proof of unlawful assembly are -

(i) that there was an assemblage of at least five persons;

(ii) that the object of the meeting was any of the five objects mentioned in section 141;

(iii) that the accused shared that object with at least four others of the meeting;

(iv) that the accused intentionally joined the meeting -

(a) having knowledge of its object, or

(b) continued therein having had that knowledge.

Where the common object set out in the charge is itself a separate substantive offence and the evidence offered in proof of this substantive offence is also relied upon in establishing the common object, acquittal of the charge for this separate offence must necessarily entail aquittal of the charge under section 143 Penal Code. (AIR 1968 Ori 160).

It lies on the prosecution to prove all the ingredients constituting the offence (112 IC (Nag) 902), which cannot be done merely by the opinion of witness sincce the offence can only be proved by such facts as the cries of the rioters and the like (105 IC (Pat) 234).

Charge.- The charge should state the common object of the assembly (26 Cal 630). Omission to state it does not vitiate a conviction if there is evidence on the record to show it (39 Cal 781). It is incubent on the magistrate to specify in the charge the common object of the unlawful assembly (AIR Ori. 190). It is sufficient if it is specified in the complaint and found by the court (AIR 1926 (Bom) 314). Such an omission is a mere irregularity which will vitiate the trial only if it had caused miscarriage of justice on the merits; and the test of such a **miscarriate** is whether the accused were prejudiced by the omission and had no notice during the trial of the case of the prosecution as to the common object so as to enable them to meet it in their defence and in cross - examination.

Where the offence alleged to have been committed by the members of an unalwful assembly in furtherance of their common object is hurt, whether simple or grievous, it is sufficient to state in the charge that the common object of the members of the unalwful assembly was to assault the persons to whom hurt was caused. It is not necessary to state that the common object was to cause simple or grievous hurt, as the case may be (6 Pat 832).

The charged 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 ....., were a member of an unlawful assembly, the common object of which was (specify the object), and thereby committed an offence punishable under section 143 of the Penal code, and within my cognizance.

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

144. **Joining unlawful assembly armed with deadly weapon.**-Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

145. **Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.**-Whoever joins or continues in unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term whcih may extend to two years, or with fine, or with both.

146. **Rioting.**-Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecttion of the common object of such assembly, every member of scuh assembly is guilty of the offence of rioting.

147. **Punishment for rioting.**-Whoever is guilty of rioting, 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. Offence of rioting.
2. Any member thereof.
3. Mere presence not sufficient.
4. Evidence and proof of rioting.
5. Charge.
6. Conviction and sentence.

1. Offence of rioting.- This section defines rioting. The offence of rioting consists in the use of force or violence by an unlawful assembly. To sustain a charge of rioting, the prosecution has to establish that there was an unlawful assembly, that force or violence was employed and that an offence was committed (AIR 1953 Mys 41(42).

The offence invovles -

(i) the use of force or violence;

(ii) by an unlawful assembly or by any number thereof;

(iii) in prosecution of the common object of such assembly. (AIR 1968 Mad 310(311). In state of M.P. Vs. Bhawani Din (1980 Cri.L. R. 237 (240 MP), the number of culprits was more than five. The evidence made out that the persons assembled had quarrelled with the police officers who were acting in discharge of their duties. One of the police officers was also hurt. Their object was to beat the police officers. It was held that the assembly was unlawful and had committed rioting.

Where violence was used in pursuance of a common object of an unlawful assembly, section 147 will be applicable. The common object of a riotous mob may be presumed to be that indicated by their conduct throughout their proceedings in the absence of evidence to the contrary (ILR 22 Cal 276). The common object must be common to at least five persons (AIR 1946 Pat 127).

For the commission of an offence under this section it is not necessary that force or violence should be used by all the members of the unlawful assembly. It is enough if force is used by any one member or some members and the other members of the unlawful assembly who share the common object would be guilty of rioting (1970 CrLJ 1316).

In a case of rioting involving a large number of accused the court should bear in mind the following five fundamental principles:

(i) Notwithstanding the large number of the rioters or of the persons put up in court for rioting, and the consequent difficulty for the prosecution to name the specific acts attributed to such of the accused, the court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the porosecution before convicting that particular accused;

(ii) spectators, wayfarers, etc. attracted to the scene of the rioting by curiosity should not be by reason of their mere presence at the scene of rioting and with the rioters, held to be members of the unalwful assembly, or rioters;

(iii) it will be very unsafe, in the cse of such large mobs of rioters to rely on the evidence of a single witness's speaking to the presence of an accused in that mob for convicting him, especially, when no overt act is proved against him. An ordinary rule of caution and prudence will require that an accused identified only by one witness, and not proved to have done any overt act, etc. as described above, should be acquitted by giving him the benefit of the doubt;

(iv) where there are such acute factions, one based on agrarian disputes and troubles, another on political wrangling and rivalry and a third on caste division or the division of the haves and the have nots, the greatest care must be exercised before believing the evidence of the particular witness belonging to one of those factions against an accused of the opposite faction;

(v) mere followers in rioting deserve a much more lenient sentence than leaders who misled them into such violent acts by emotional appeals, slogans and cries (AIR 1952 Mad 267; ILR 1952 Mad 728 = 1952 CrLJ 583; 1982 CrLj 1998 (All).

Where there is fight between two fections, it is wrong for the prosecution to charge both the parties without making an attempt to discover who acted on the aggressive and who acted on the defensive (1939 MWN 1256).

2. Any member thereof.-If it is found that the accused were members of an unlawful assembly within the meaning of section 146 the fact that some of them did not do any overt act will not exonerate them from the charge of rioting (36 DLR (AD) 234). Whether only one,or more than one of the persons assembled, use force, the penal consequences apply equally to all. It is sufficient if force or violence is used by any member of the unlawful assembly (AIR 1957 Raj 331 = 1957 CrLJ 1187).

If any person encourages, or promotes, takes part in riot whether by words, signs, or gestures, or by wearing the badge or in sign of the rioters, he is himself considered a rioter. Active participation in actual violence is not necessary. Some may encourage by words, others by sings, and others again may actually cause hurt and yet all would be equally guilty of rioting (1970 CrLJ 1316 Mad). Where the presence of all the accused at the time of the occurrence is fully proved by the evidence of the prosecution wintesses, it is not necessary for the prosecuton to prove in a case of riote. What each individual rioter was responsible for (AIR 1937 Oudh 276 = 34 CrLJ 732). Where the evidence was that six accused formed an unlawful assembly and used force in executing their common object, namely, the release of the cattle and inflicted injuries to the persons lawfully taking the cattle to the pond, whatever was done by each one of the accused was in furtherance of the common intention of all and they would all be jointly liable for those acts (AIR 1958 All 348 = 1958 CrLJ 588). Nothwithstanding the acquittal of some of the accused if the court is able to find that the convicted person and some others, though known or unknown, were members of an unlawful assembly, then the conviction of the known or identified person can stand (1959) KLT 704). When the evidence has clearly established that 6 persons had formed theunlawful assembly it is immaterial when all the 6 persons were charged for the offence or not and it does notmake any difference that only 4 persons have been charged of the offence under section 147 and two others have been discharged. So, in the facts of the present case the conviction of the 4 acused u/s. 147 of the Penal Code is legally sustainable (Mozammel Haque Vs. The state 35 DLR (1983) 331 = 1984 BLD 94).

3. Mere presence not sufficient.- Mere presence of a person at a place where number of an unlawful assembly are gathered does not incriminate him (AIR 1971 SC 2381). Unless he activly participates or does some overt act in pursuance of the

common object of the unlawful assembly he is not punishable for rioting (AIR 1969 Bom 383 = 1969 CrLJ 1351). There must be other evidence direct or circumstantial to justify a finding that he shared the common object with others (AIR 1954 Mys 75 DB). Where three of the accused had actually joined in the assault on the deceased and the other three accused were only abusing, although they had lathis in their hands, when the quarrel developed suddenly, it can not be said that they had all shared the common object of committing assault on the deceased (AIR 1965 Pat 45). But where a person intentionally joins or continues in an unlawful assembly, he cannot be allowed to say that he was merely a harmless spectator. He must prove that he was there owing to no fault of his own and that he could not get out of the crows. Otherwise he is liable to be convicted under section 147 (AIR 1928 Pat 115 = 29 CrLJ 79(DB).

The mere fact that the accused were identified in a crowd and were arresed from the house where the occurrence had taken polace is not sufficient to establish that they also shared the common object of the unlawful assembly. It may be that they were silent spectators who out of fright took shelter with others there. In the circumstances they should be given the benefit of doubt and aquitted (20 DLR 1968 (SC) 347).

4. Evidence and proof of rioting.-The points requiring proof under this section are -

(i) That five or more persons were assembled including the accused.

(ii) that they constituted an unlawful assembly, within the meaning of section 141.

(iii) That the accused was a member of that assembly.

(iv) That force or violence was used by any member of that assembly.

The common object must be common to at least five persons. A common object of assault, even if established with regard to four persons cannot be used to justify a conviction for rioting (NLR 1986 SCJ 225); 48 CrLj 165).

The common object of the assembly when it became unlawful has to be proved and that the accused were members thereof. There must be also identification of the accused at the time when the assembly became unlawful. There can be no presumption that the assembly is unlawful. It is not necessary that the accused is guilty of every overt act. It is sufficient if his participation and sharing the common object is proved (AIR 1976 SC 1265; 1979 CrLJ 856).

A charge of rioting can not be said to have been proved if it is not proved as to what was the cause for the assault and the persons involved there. (AIR 1953 Mys 41 = 1953 CrLJ 100). When two factions are fighting, it is not proper to charge both for rioting. The aggressor has to be found and charged by the porosecution (1939 MWN 1256).

The alleged common object of an unlawful assembly must be established by evidence and inference can be drawn and there can be no conviction for rioting (23 CrLJ 670 = 1956 CrLJ 291). Common object should be mentioned in the charge. Omission to mention does not vitiate the trial if no prejudice is caused to the accused (AIR 1956 SC 116 = = 1956 CrLJ 291). In the absence of a finding that five or more persons took part, and conviction under section 147 is not sustainable (AIR 1938 Mad 392).

5. Charge.- The charge under this section must specify the common object of the unlawful assembly (1954 MWN 124). Mere statement of the common object to

commit rioting would not be sufficient in law to indicate the real common object and the court should mention one of the objects as the common object enumerated in section 141 (AIR 1957 Ori 190 = 1957 CrLJ 988).

Though in charges under section 147, it is desirable that the common object should be mentioned so as to give the accused clear notice of charges against them; omission to specify common object in the charge does not vitiate the trial unless the omission has prejudiced the accused or resulted in a failure of justice (AIR 1928 Bom 286; AIR 1956 SC 116 = 1956 CrLJ 291). Where the common object stated in the charge was the forcible occupation of a disputed piece of land but the trial court, after discussing evidence, held the accused guilty of forming unlawful assembly with the common object of causing hurt to the complainant. The common object found at the trial was never put to the accused and the accused did not get an opportunity to meet this new accusations. The common object subsequently established, not having been put to the accused, they can rightly complain that they have been prejudiced in their trial. The conviction was set aside (1969 PCrLJ 636 Dhaka).

Where the charge did not specify the properly, the taking possession of which was stated to be the common object of the unlawful assemly, and its specification would have altered the whole completion of the case . It was held that the omission had prejudiced the acccused and was not cured by section 537, clause (a) of the Cr. P.C. (AIR 1936 Cal 429 = 38 CrLJ 68).

Proper course in framing charges is to state exactly what prosecution has proved. If common object is not ascertainable it is also not to frame any charge involving common object (1936 MWN 1131). Charge under section 147, need not include the words "by force by show of force", because suggestion of force is contained in the word 'rioting' which is to be included in the charge (AIR 1936 Pat 627 = 38 CrLj 87).

Where there is a fight and riot between two factins, it is wrong for prosecution to charge both the parties without making an attempt to discover who acted on the aggressive and who acted on the defensive (41 CrLJ 903 DB). Where two opposing factions commit a riot each faction should be tried separately preferably by the same judge but they should not be treated as a single unlawful assembly both factions not having the same common object under section 141 Penal code. It will be desirable that the trial must take place consecutively, the evidence in the first case to be followed by the other case and each case dealt with separately, the judgment in each case being based on the evidence adduced in each of the cases (AIR 1927 PC 26 = 28 CrLJ 254; AIR 1975 SC 147 = 1975 CrLJ 236).

An offence under section 147 has been made a substantive offence by the penal Code, and there is no illegality in the accused being charged under that section in addition to charge under sections 323 and 325 (AIR 1938 Oudh 95 = 39 CrLJ 341). Where the common object went on changing during the course of incidents so that offence not contempolated in the beginning were committed, the court was justified in framing a joint charge for all the offences committed with the charge under section 147 (AIR 1935 Oudh 190 DB).

6. Conviction and sentence.- For the offence of rioting, that there must be clear finding as to the common object of the unlawful assembly and also to common object so found should have been stated in the charge, in order that the accused persons might have an opportunity of meeting it (AIR 1934 Sind 164 = 36 CrLJ 23). Any court which convicts the accused before it for the offence of rioting should record a difinite finding that the number of persons was five or more than five and not that there were a number of persons who took part in the riot (AIR 1955 NUC (Raj) 517).

Where out of 11 persons charged, only 4 were found guilty. It was held that as there was no finding that more than four perons were present at the scene of the crime or that they formed an unlawful assembly, therefore conviction under section 147 could not be sustained (16 DLR 185).

Before the accused ccould be convicted of sharing the common object of the assembly or of being members of the same at a time when the assembly became unlawful it had to be proved by the prosecution that the accused were members of the unlawful assembly at the time when the assembly became unalwful and started peltng stones. If there is no evidence of identification of accused at the stage when the morcha became unlawful it cannot be explained away by presuming that as the morcha moved on it must be presued to be unlawful and any person who was a member of that assembly must be presumed to share the common object of the unlawful assembly. This overstating the law on the subject. Before the court is satisfied that an accused is a member of an unlawful assembly it must be shown either from his active participation or otherwise that he shared the common object of the unlawful assembly. It is not necessary that the accused should be guilty of any overt act. It is sufficient if it is shown that as a participant of the unlawful assembly he was sharing the common object of the same. (AIR 1979 SC 1265; 1979 CrLJ 856).

Where it is found that five or more persons took part in the riot but some of them are acquitted on the ground that they could not properly be identified and their presence at the occurrence was not satisfactorily proved, the remaining accused, even if they are less than five can be legally convicted of rioting (AIR 1929 Lah 59). Where the common object of the five out of nine accused is not traceable, the conviction of the remaining four under section1 47 can not be sustained (AIR 1923 Mad 94).

The identity of the persons comprising an assembly is a matter relating to the determination of the guilt of the individual accused and even when it is possible to convict less than five persons only, sction 147 still applies if upon the evidence in the case the court is able to hold that the person or persons who were found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified (AIR 1950 FC 80; AIR 1960 Bom 515 = AIR 1954 All 249). Thus where one of the accused has absconded the court can try the remaining four accused under this section (2 DLR 241 DB). But if in such a case the court entertains a reasonable doubt as to the presence of some of the named persons and the number of remaining persons is less than five, it would cast a reasonable doubt on the presence of at least five members in the unlawful assembly and there can be no cocnviction under section 147 (AIR 1960 Bom 515; ILR 1960 Bom 626 = 1960 CrLJ 1571).

When it is alleged that a particular number of persons took part in rioting and prosecution could not establish that five or more than five persons out of them took part in the crime, a charge under section 147 cannot be sustained (25 DLR 319; 1955 Andh WR 325). Where out of 11 persons charged only 4 were found guilty. It was held that as there was no finding that more than four persons were persent at the scene of crime or that they formed any unlawful assembly, conviction under section 147 could not be sustained (16 DLR 185). However, when the evidence has clearly established that 6 persons had formed an unlawful assembly, it is immaterial whether all the 6 persons were charged for the offence or not and it does not make any difference that only 4 persons have been charged of the offence under section 147 and two others have been discharged. The conviction of the 4 accused under section 147 of the Penal Code is legally sustainable (35 DLR 311 DB).

Where the accused formed themselves into an unlawful assembly but they did not do any violence against any person they deserve considerable leniency in the matter of sentence when convicted for their action (AIR 1935 Pesh 65). The accused can not be said to be guilty under section 147 because where the common object of the entire assembly was the commission of criminal tresspass and where causing hurt or grievous hurt was separate object of only one of the members of the assembly and was committed by that single number in prosecution of that object; it could not render the unlawful assembly riotous (1982) 34 DLR 94 DB).

An assembly of five persons or more is an unlawful if it has as its common object any of the unlawful acts which have been specially described in section 141 of the Penal Code. When force or violence is used by an unlawful assembly or any of its members then the offence of rioting is committed. When rioting is committed by a member of an unlawful assembly being armed with deadly weapons he is liable to higher punishment under section 148 Penal Code. (1987 BCR (AD) 6).

Separate sentence under section 147 and 324 is not illegal (24 DLR 207). Although accused persons could be convicted for both the offence of rioting and tresspass, there ought to have been only one sentence for any of the offences and even if there were two separate sentences they ought to have made concurrent (1985 BLD 65).

Eleven persons were on trial under section 147, Penal Code, of whom four were found guilty under the same charge and the rest were acquitted. There was no finding in the judgment that other seven persons were also present with the common object of the unlawful assembly. Held, that the four convicted persons could not form an unlawful assembly and, therefore, their conviction under section 147, Penal Code, cannot be sustained (16 DLR 185; 25 DLR 319). Where the common object of the whole assembly is stated to be theft, and the common object of some is stated to be theft and assault conviction under section 147 and 148 penal Code is not legal (9 DLR 71).

If the common object of an unlawful assembly had been to beat the complainant and his party men and if the evidence established that the accused did so beat them, it might have been argued that the alteration of the conviction from section 147 of the Code to 323 was not illegal, because section 323 may then be held to be covered by the common object of the assembly; but when the charge recites the common object of the assembly as merely to steal away paddy seedlings, the alteration of the section from 147 to 323 of the code was illegal and has prejudiced the accused (3 DLR 144).

In cases of charges under section 147 against several accused there is often little difficulty in coming to the conclusion that there was an unlawful assembly. The real difficulty is to find whether the individuals who deny their presence were members of the assembly. It is the duty of the appellate court to discuss the evidence aginst each of the accused (48 CrLJ 522 DB(lah); 1958 Andh, L. T. 559).

Where the accused are identified by the compolainant and he is corroborated by other witnesses, conviction is justified (1968 PCrLJ 1631). But where two of the accused persons were arrested from the house where the members of an unlawful assembly had taken refuge but no particular criminal act was ascribed to them and there was no evidence that they carried any weapons, they cannot be convicted for rioting on the mere fact that none of the prosecution witness had any enmity with them. Those persons could as well be non-partisans present at the sport (PLD 1968 SC 372; 20 DLR SC 347). As a general rule where the prosecution witnesses rope in almost all the ablebodied members of the opponents families, some of them possibly

merely because they were related to the actual culprits, it is a case in which congiction must be confined tot he injuried persons, the presence of injuries being a guarantee of their presence, in spite of the fact all the eye-witnesses are unanimous that all the accused were present and had joined the attack (48 CrLJ 590 DB (Lah).

An offence under section 147, is a substantive offence and becomes complete as soon as force or violence is used by a member of an unlawful assembly. If other offences are committed by member liable for the offence committed by an individual members also, if the same is done in furtherance of the common object or is such as the members of that assembly knew to be likely to be committed in the prosecution of that object (PLD 1968 SC 372 = 20 DLR WP 347).

Where a large number of persons are convicted under section 147, it is hardly proper to pass the same sentence on all the accused regardless of the part played by each of them, their age, and so on. Even if the offence is committed by all of them, it does not follow that every accused must receive the same punishment. Ring leaders deserve a higher punishment than the followers (1937 MWN 391; AIR 1952 Mad 267)

It is desirable that the common object is mentioned in the charge but its absence could not vitiate the trial unless porejudice is caused (AIR 1956 SC 116 = 1956 CrLJ 988). A person can not be punished both under sections 147 and 148 (1953 MWN 178). He can be punished both under sections 147 and 323 or 326 (AIR 1953 All 726 = 1953 CrLJ 677).

Where a charge is brought against several persons of rioting with the common object of cutting and taking away the crops of the complainant and theft under sections 147 and 379, it is necessary to find out which of the parties had grown the crops. If it is found that the crops were grown by the complainant party, whoever among the accused party removed the crops would be guilty of theft under section 379, and if they were members of an unlawful assembly, they would also be guilty under section 147 (AIR 1965n Ori 166 DB). But when the court found that the common object of an unlawful assembly was to commit theft but did not find as to which of the persons composing the lawful assembly removed the property stolen, it was illegal to convict them both under sections 147 and 379 and to pass separate sentences for each offence (AIR 1920 Pat 196; 1920 CrLJ 480). Accused cannot be convicted under sections 147 and 148 when the charge against them is merely under section 395, unless the case is one to which sections 236 and 237 Cr.P.C. are applicable (AIR 1945 All 87; 46 CrLJ 495). The accused can be convicted for rioting under section 147, Penal Code, and also for the commission of the offence which was the common object of the unlawful assembly, though they can not be sentenced under both the sections (8 DLR 95; 1971 DLC 276).

Where there was a free fight between two parties full armed and there was no evidence of individual assault, no case is made out under setion 148 or 149 (AIR 1976 SC 2423). Where all the accused were charged with and found guilty of rioting under section 147 and some of them of an offence under section 436. The accused who played a passive role in the commission of the latter offence can not be held guilty of destruction of a house by fire by applying section 149 to the case (36 DLR (SC) 234).

Co-villagers having entered into compromise by intervention of wellwishers in order to promote healthy relationship and neighbourly feelings amongst themselves, it is just and proper that the accused persons should be acquitted of the offences for which they were convicted by the lower appellate court (1989 (2) Crimes 607 (608) Ori).

148. **Rioting, armed with deadly weapon.** -Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprionment of either description for a term which may extend to three years, or with fine, or with both.

Synopsis

1. Applicability.
2. Section 147 and 148.
3. Conviction and sentence.

1. Applicability.- The offence punishable under this setion is an aggravated form of rioting under section 147. This section will be attracted only when a rioter is armed with a deadly weapon or with a weapon of offence likely to cause death. a person can not be punished under this setion unless he a ctually had a deadly weapon (AIR 1942 Mad 420 = 43 CrLJ 745; 1976 CrLJ 1883). For aconviction under this section all the elements of roting and the accused being armed with a deadly weapon have to be established beyond doubt (AIR 1969 SC 892 = 43 CrLJ 745; 1976 CrLJ 1883). To attract section 148, a person has to be actually armed with dangerous or deadly weapons (AIR 1942 Mad 420). Where the weapon used is likely to cause death it is a deadly weapon (1969 UJ (SC) 423). A Person cannot be ound guilty under section 148 of the Penal Code unless he carried with him a dangerous weapon. A general statement that the accused persons were armed with dangerous weapons like Dhal, Katra, Lathi and Sorki is not sufficient to arrant a conviction under this section (Nurul Haque Matbar & ors. Vs. The State; (1994) 14 BLD 178).

The evidence was clear that the first three accused were armed with spears and the other five with sticks. There was no evidence of any witness to show that the sticks in this case were dangerous weapons. Held that the charge framed should therefore have been under section 147 against the accused who were not armed with weapons and under section 148 against accused so armed and the accused should have been convicted accordingly. Section 149 can hardly have been intended to make rioters constructively guilty of the offence of rioting (AIR 1941 Mad 489 (490, 491).

Section 148, Penal Code, prescribes enhanced punishment to only those persons who while committing rioting are armed with deadly weapons or with anything which used as a weapon of offence is likely to cause death. it is, however, not necessary that any such weapon or anything which used as a weapon of offence likely to cause death was actually used in rioting. It would suffice if it was merely displayed. The application of the principle of constructive or joint responsibility laid down in section 149, Penal Code, is impossible of being extended by the very terms of section, to section 148 Penal Code (1982 CrLJ 654, 658). It is well settled that only the actual persons who are armed with a deadly weapon would be liable for the aggravated offence under section 148, and that the other rioters who were not so armed would be liable only under section 147, Penal Code (1963) 2 CrLJ 70, 73).

There is no scope for reading this section along with section 149. Section 149 contemplates only constructive liability whereas section 148 deals with direct liability. Being armed with weapon can not be made to be a constructive liability and one who does not carry a weapon himself cannot be convicted under section 148 by virtue of section 149 (AIR 1955 Assam 105, 106 DB).

There is no legal bar to frame a charge under section 148 along with a charge under section 302/149. A charge under section 148 needs be framed if it is sought

to secure a conviction thereunder. But if a person is not charged under section 148 it does not mean that setion 149 can not be used. When an offence such as murder is committed in prosecution of the common object of the unlawful assembly or an offence which the members of the unlawful assembly knew to be likely to be committed, individual responsibility is replaced by vicarious responsibility and every person who is a member of the unlawful assembly , at the time of committing the offence becomes guilty. It is not, therefore, obligatory to charge a person under section 148 when charging him for an offence with the aid of section 149 because the ingridient of section 148 are implied in a charge under section 149. It may, however, be advisable to add a charge under section 148 to a charge for other offences of the Penal Code read with section 149 (28 DLR (SC) 170). In all cases where charges are framed under sections 147, 148 for a substantive offence read with section 149 of the Penal Code, additional, separate charges should be framed against each individual accused for an offence directly committed by him while being a member of such assembly and they should carefully take note of the provisions of sections 221, 233 and 236 of the Cr. P.C. (34 DLR 94).

2. Sections 147 and 148.- When rioting is committed by a member of an unlawful assembly being armed with deadly weapons he is liable to higher punishment under section 148, penal Code. Rioting is punishable under section 147 Penal Code (1987 BCR (AD) 6). Only persons armed with deadly weapons are liable under section 148 others not so armed are liable under section 147 (1963) 2 CrLJ 70; ILR 162 AP 313 = 1956 CrLJ 1358). All accused having one or other weapons are liable under section 148 (1966 Cut LT 695).

Offences under section 147 and 148 are not compoundable and, therefore, no acquittal can be allowed by reason of compromise in regard to convictions under these sections (1968 Jab LJ 1050; 1961 MPWR 660).

Offences under section 147 and 148 are distinct from offences under section 323 and 324, Penal Code (1968 CrLJ 266). Where the offence under section 323 was compromised the accused was still held liable for offence under section 147 (1970 all Cr C 176). As offence under section 148 is an aggravated from of the offences under sections 143 and 147, separate conviction under those sections is not necessary.

A rioter is guilty either under section 147 or 148. He can not be convicted under both (AIR 1942 Mad 592). Where some members of unlawful assembly are armed with deadly weapons in prosectuion of the common object of the unlawful assembly and if rioting is committed, the other members of the assembly who are not so armed with deadly weapons cannot be convicted under section 148 read with section 149. They can be convicted only under section 147 (AIR 1941 Mad 489; 42 CrLJ 821 (DB).

Where eight persons ar convicted of murder but it is found that death was caused by a spear wound and only one person carried a spear, another person carried a garasa, while the others did not carry any deadly weapon; it was held that the accused who was armed with a spear was guilty of murder and the one who was armed with garasa was guilty under section 148 and the rest were guilty of rioting (23 Pat LT 684).

3. Conviction and sentence.- For a conviction under section 148, it must be found that each of the accused individually carried a dangerous weapon. Under section 148 penal Code, it is the duty of the court to find whether the accused individually carried any dangerous weapon within the meaning of that section. In the absence of such a finding, the conviction udner section 148 Penal Code, cannot be

maintained (10 DLR 518). Offence under section 148 being an aggravated form of offence under section 143 and 147, separate conviction under these sections is not necessary (1969 CrLJ 1577). Where an accused is acquitted under section 148 conviction under section 323 or 455 or 324 read with section 149 can not stand (AIR 1961 Ori 29).

Where the accused is charged with offences under sections 148, 323, 504 and 506 the basis of police report and the offences except under section 148 are compounded, the Magistrate has to charge the accused for offences under section 148 (1970 CrLJ 1038).

Where there is acquittal under section 148, conviction under sections 323 and 455 or under section 324 read with section 149 is liable to be set aside. (AIR 1961 Ori 29).

If it can be found on the materials on record that there was use of force and violence by the accused as members of an unlawful assembly , the omission to record a formal conviction under section 148 would not affect the conviction for other offences by the application of section 149 (1974) 40 CLT 325).

Where all the persons have been shown in the charge and less than five have been convicted and there is a clear finding that the case as against others has not been made out, conviction under section 148 must fail (1970 Cut LT 750; 1983 CrLJ 607). But of six accused, three were acquitted. Remaining three cannot be convicted under sections 147/148. Section 149 also can not be pressed into service (AIR 1976 SC 2027).

Where in proceedings charges under sections 148, 300 and 302, Penal Code counsel for the State conceded that charge under section 148 related to murder taking place at the place other than the place of abduction of deceased and did not relate to abduction common object would not be available for sustaining conviction for abduction (1984 CrLJ 814;AIR 1984 SC 911).

Where accused committed offence of rioting when armed with deadly weapons. They would be guilty under section 148 (1987 SCMR 1015). Only those members of an unlawful assembly can be convicted under section 148 who are actually armed with deadly weapons and not others (PLD 1959 Dhaka 139).

Where there is no evidence to prove that the accused was assisted he can not be said to be guilty under section 147 because where the common object of the entire assembly was the commission of criminal tresspass and where causing hurt or grievous hurt was a separate object of only one of the members of the assembly and was committed by that single member in prosecution of that object, then it could not render the unlawful assembly riotous (34 DLR 94).

In a case of a sudden fight the accused may be given benefit of the doubt as to charge under sections 147/148 (1986 PcrLJ 2471). Thus where occurrence took place all on a sudden. There was neither common intention nor any common object, each of the accused would, therefore, be liable for his own individual act and would not be vicariously liable (1985 PCrLJ 2518).

Where some of the accused are found constructively guilty of murder under section 149 and are convicted under section 148 of rioting, they cannot escape punishment for the former offence merely because the judge sentences them for rioting (1953 MWN 253). Where the convictions are under section 324 and under section 148, only one sentence should be passed under either one of the sections (AIR 1934 Lah 614). Infliction of separate sentences for offences under sections 148 and 325 read with section 149, on all of the accused who are members of an

unlawful assembly except the members who caused grievous hurt, is not according to law (AIR 1940 Nag 120 = 41 CRLJ 360). There can be no conviction under section 304 read with section 149 without there being a substantive charge under section 147 or section 148 (AIR 1955 NUC (Pat) 1308).

In a case as the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141, Penal Code. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under section 148, or section 149, Penal Code, for any offence, for the first condition to be fulfilled in designating an assembly an 'unlawful assembly ' is that such assembly must be of five or more persons, as required under section 141, Penal Code. The convictions of the appellants under section 148 and 149 Penal Code cannot be sustained (1989 (2) crimes 607, 608 Ori).

Where five named persons are charged with having committed offences under section 148 and section 302 read with section 149 as well as section 302 read with section 149, Penal Code, and two of them are acquitted and the membership of the assembly is reduced from five to three that makes section 141 inapplicable which inevitably leads to the result that section 149 can not be invoked against the remaining accused. As soon as two of the five named persons are acquitted the assembly must be deemed to have been composed of only three persons and that clearly can not be regarded as an unlawful assembly (AIR 1963 SC 174, (178, 179) 1962 All Cr. R. 448).

149. **Every member of unlawful assembly guilty of offence committed in prosecution of common object.**-If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Synopsis

1. Scope and applicability.
2. "In prosecution of the common object".
3. "Knew it likely to be committed."
4. Evidence and proof.
5. Sections 34 and 149.
6. Constructive or vicarious liability.
7. Mere presence does not raise presumption of complicity.
8. Conviction of less than five persons.
9. Assembly to exercise right to self defence.
10. Charge under section 149, if recourse can be had to section 34.
11. Charge and conviction.
12. Punishment.

1. **Scope and applicability.**- Section 149 of the Penal Code by itself does not create any offence at all. It carries the liability of each member of an unlawful assembly for the act done in prosecution of their common object. The specific object of this sction is to render the guilt of offence committed by one or more or several persons imputable to acts committed in prosecution of common object of the unlawful assembly. The necessary ingredients, therefore, appear to be that the object should be common to the person who compose the assembly, that is to say, all of them should be aware of it and concurring it..... In essence therefore, it comes to this that members of an unlawful assembly who have an object common to all, each and every member of such assembly is actuated or animated to achieve that object and in furtherance of that common object, the same is achieved, then only section 149 Penal Code may be applied irrespective of the fact whether such act is done by

one or more members of such an unlawful assembly and every member of such an assembly shall be saddled with the constructive liability under section 149 Penal Code (State Vs. Giasuddin 45 DLR 267, 273; see also 43 DLR 633=1991 BLD 196).

This section does not create a new offence but deals with the vicarious liability of the members of an unalwful assemly - (1) for acts done in furtherance of its common object and (2) for such offences as its member knew to be likely to be committed in prosecution of its common object (AIR 1960 SC 725=1960 CrLJ 1144). This section declares that every member of an unlawful assembly having a common object in mind is responsible for the acts committed by any other member of that assembly in pursuance of such common object or one which he must have known, was reasonably likely to be committed in prosecution of its common object and he is guilty of the substantive offence and punishable for that offence. Where the offence is not committed in prosecution of its common object, the person who actually committed the offence is liable (AIR 1972 SC 1221).

This section takes the accused out of the region of abetment and makes him responsible as a principal for the acts of each member from the circumstances of his being a member of the unlawful assembly sharing a common object although they did no overt act except their being memebrs of the assembly. (AIR 1978 SC 1021=(1978) 2 CrLJ 780).

The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in section 141 Penal Code. Common object of the unlawful assembly , can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case (AIR 1989 SC 754=1989 CrLJ 650 (852). For applying section 149 against an accused three conditions must be fulfilled : (a) the accused must have been a member of the unlawful assembly at the time the offence was committed; (b) the offence must have been committed in prosecution of the common object, or (c) the offence must be such as the members of the assembly knew to be likely to be committed in prosecution of that object (Rafiqul Islam Vs. State 44 DLR (1992) AD 264=1993 BLD (AD) 117).

The section contains two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part the offence must be connected immediately with the common object of the unlawful assembly of which the accused were members. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew was likely to be committed (AIR 1959 SC 572, (576) and this is what is required in the second part of the section. Section 149 is intended to lay upon all the members of an unlawful assembly responsibility for any offence other than the offence of rioting committed by any members of the unlawful assembly in prosecution of the common object (AIR 1941 Mad 489, (490, 491); ILR (1941 Mad 592=42 CrLJ 821). Section 149 unlike section 34 creates a specific offence and deals with the punishment of that offence alone (AIR 1955 SC 216, (221)=1955 SCJ 106).

Under this section a person who is a member of an unlawful assembly , is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. The section creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty. The finding that all members of an assembly are guilty of the offence committed by one of them in prosecution of the common object at once subjects all the members to the punishment prescribed for that offence and the relative sentence. There is no queŝtion of common intention in section 149. An offence may be committed by a member of a unlawful assembly and the other memebrs will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence, provided the conditions laid down in that section are fulfilled (AIR 1955 SC 274 (276, 279).

This is not to say that five persons must alays be convicted before section 149 can be applied. It is possible in some cases for Judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 should be good (AIR 1953 SC 364, 366).

In order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done is prosecution of the common object of that assembly or the act done is such as the members of that assembly knew, to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly redners himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it may be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their assciate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in setion 141 will render his companion constituting the unlawful assembly liable for that offence with the aid of section 149 Penal Code. It is not the intention of the legislature in enacting section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke section 149 it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly . Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence, being committed in prosecution of the common

object they would be liable for the same under section 149 Penal Code. as the members constituting the unlawful assembly had gone to the house of A to kill him that was the common object of the unlawful assembly. For accomplishing that common object it was not necessary to kill the two girls who were not an hindrance to accused Nos. 1 and 2 accomplishing their common object. Accused Nos. 3 to 6 cannot be convicted for the injuries caused to the two minor girls by accused Nos. 1 and 2 with the aid of section 149, Penal Code (AIR 1989 SC 1456; 1989 CrLJ 1466, 1474, 1475).

For the application of section 149 it is necessary (1) that one should be a member of an unlawful assembly, (2) that in prosecution of the common object of that assembly, an offence should be committed by a member of that unlawful assembly, and (3) that the offence should be of such a nature that the members of that assembly knew the offence to be likely to be committed in prosecution of their common object. If these three elements are satisfied then only a conviction under section 149, may be substantiated, and not otherwise (AIR 1955 Assam 226).

The section has two parts one dealing with liability for offences which are committed in prosecution of the common object of the unlawful assembly and the second dealing with liability for those offences which the members of the assembly knew to be likely to be committed in prosecution of that object (PLD 1961 Lah 1). In the first alternative an offence had to be committed before the common object could be achieved and in the second it was not necessary that it should be committed but in all probability it would be (PLD 1961 Lah 1). The second part of the section would clearly come into play where the offence was such as the members of the assembly knew to be likley to be committed in the prosecution of that object (PLD 1961 Lah 1). It follows that the distinction between the two parts of section 149, cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of section 149 or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and fell within the second part (PLD 1961 Lah 1).

Before section 149 can be called in aid, the court must find with certainty that there were at least five persons sharing a common object. A finding that out of seven men in question three "may or may not have been" at the site of the offence betrays uncertainty on this vital point and consequently a conviction resting on that uncertain foundation cannot be sustained (AIR 1953 SC 364). But the section would apply where some members of the assembly are identified and are convicted whereas others are not identified (AIR 1935 All 132).

Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or mroe persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is on common object. There is no question of common intention in section 149. The act must be one which upon the evidence appears to have been done with a view to accomplishing the common object attributed to the members of the unalwful assembly. Thus every person who is engaged in prosecuting the same object, although he had no intention to commit the offence, will be guilty of an offence which fulfills or tends to fulfil the object which he is himself engaged in prosecuting in the circumstance mentioned in the section. It is in this sense that common object is to be understood. (1970 CrLJ 1369, (1390, 1391); AIR 1970 SC 1492).

When there is a mutual fight between the parties, a Court will not be justified in convicting any of the accused by having recourse to section 149 Penal Code. In a mutual fight, there is no common object (AIR 1971 SC 335).

If really the accused were not the aggressors, no case either under section 147 or section 148 of the Penal Code can be maintained against them, and then it is for the prosecution to prove the individual assaults. In such a case, the conviction under section 326 section 324 and section 323 of the Penal code, founded against each of them on the basis of section 149 of the Code is not sustainable (AIR 1976 SC 2423,2427).

The first essential element of section 149 is the commission of an offence by any member of an unlawful assemly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object (AIR 1956 SC 731).

This section applies not only to offences actually committed in pursuance of the common object but also to offences that members of the assembly know are likely to be committed (AIR 1956 SC 241, 245). Thus where an assembly sets out heavily armed to rescue the two accused in lock-up guarded by armed police and at dead of night, even if the common object was only to rescue the two accused in the lock-up the use of violence was implicit in that object. People do not gather at dead of night armed with crackers and choppers and sticks to rescue persons who are guarded by armed police without intending to use violence in order to overcome the resistance of the guards; and a person would have to be very native and simpole minded if he did not realise that the sentries posted to guard prisoners at night are fully armed and are expected to use their arms should the need arise; and the would have to be a moron in intelligence if he did not know that the murder of armed guards would be a likely consequence in such a raid. Held, that it would be impossible on the facts of the case to hold that the members of the assembly did not know that murder was likely to be committed in pursuance of a common object of that kind by a large assembly. Accordingly even if the common object be not placed as high as murder the conviction on the murder-cum-rioting charge was fully justified (AIR 1956 SC 241, (245).

2. **"In prosecution of the common object".**-The section contains two parts. The first aprt of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomoplish the common object. In order that the offence may within the first part of the offence must be connected immediately with the common object of the unlawful assembly of which the accused were members (AIR 1959 SC 572). The plain meaning of the first part of section 149, is that all the members of an unlawlful assembly render themselves liable to punishment for any and every offence committed by any member or more members of that assembly in prosecution of the common object of the unlawful assembly which means that its commission was in the contemplation of the unlawful assembly directly or impliedly (AIR 1962 All 272, (276). To fasten vicarious responsibility on any member of an unlawful assembly, there must be a nexus between the common object and the offence committed (Jakir Ibrahim Khan Vs. State of Maharashtra 1991 (1) Crimes 738 Bom HC).

Where an offence was committed by a member of an unlawful assembly, the liability of the other members thereof for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour at or before the scene of action. If such knowledge may not reasonably be atrributed to the other members of the assembly, then their liability for the offence committed during the occurrence does

not arise. But when it reasonably may be held that other members of the assembly knew before hand that the offence actually committed was likely to be committed in prosecution of the common object, then such other members of the assembly are liable for the offence committed to the same extent as the actual perpetrator of the crime (AIR 1964 Pat 242; AIR 1954 SC 695, (699); AIR 1958 All 285; 1958 CrLJ 424).

The necessary ingredients of common object are a prior meeting of minds of the accused to form a pre-arranged plan. Accused have to share the motive with each other either to be directly inimical to the deceased or to be close relation/friends/associates/companions of each other or to have been hired by the principal accused to commit the crime. There must come forth some evidence that the accused were in concert and in pursuance to pre-arranged plan, the criminal act was committed (1983 PCrLJ 2293). In some earlier cases it has been held that it is not necessary that there should be a preconcert in the sense of a meeting of minds of the members of the unlawful asembly as to the common object, it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part, the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members (PLD 1961 Lah 1).

This section cannot be construed to mean that for every act done by a member of an unlawful assembly, all other members of that assembly would be equally liable with him. If, for instance, one member of such assembly commits an offence which is not in prosecution of the common object of that assembly or an offence which the memebrs of that assembly could not have known was likely to be committed, or an offence which was not in any way, connected with the prosecution of the common object of that assembly section 149 will have no application (PLD 1959 Lah 405). Where the common object of the unlawful assembly was found to be only the giving of beating to certain persons and the highest offence which members of such assembly knew to be-likely to be committed was grievous hurt. In the absence of evidence of any special intention or knowledge (apart from the general object or knowledge attributable to all members of assembly) members of such assembly could not be convicted of murder under section 302 P.C. read with section 149 P.C. (PLD 1953 FC 35). Similarly where the common object of the accused was not to cause grievous hurt, but grievous hurt was caused, the offender being unascertainable, conviction of all must be under section 332 and not section 225 (AIR 1933 Lah 159).

Where the common object of the assembly was rioting but dacoity was committed by some members of the assembly, all the members of the assembly are not liable for dacoity (AIR 1953 Ori. 1). Where the common object of the unlawful assembly was to commit dacoity but after that object had been achieved, one of the dacoits shot and killed his pursuers, others were not liable for murder because it was not committed in pursuance of the common object (AIR 1933 Oudh 53).

Where one of the members of an unlawful assembly which had the common object of taking away a woman by force, suddenly committed murder by inflicting a blow on the head, the other members could not be held guilty of such offence because the offence was not committed in prosecution of the common object (PLD 1952 Lah 609). Where the common object of an unlawful assembly was only to commit house trespass but one accused suddenly formed a different intention and committed murder, it was held that other accused cannot be sadled with liability for acts done by the latter (NLR 1987 SCJ 383).In order to attract section 149 Penal Code, an overt act on the part of a member of unlawful assembly is not necessarily required (Sitaram Vs. State of MP 1991(3) Crimes 523 MP).

In Mariadasan Vs. State of Tamil Nadu (AIR 1980 SC 573, 574), there were five accused persons. But there was no satisfactory evidence to prove the formation of any unalwful assembly at any time with the common object of assaulting or killing either the deceased or P.W. 1. The whole fight started suddenly on the spur of the moment in a heat of passion. It was held that the accused could only be liable for the individual acts committed by them. For these reasons there was no evidence to support the conviction of rioting under section 149, 148 or 147, Penal Code.

If in prosecution of the common object of the entire assembly the murder of a person is committed all the members of the unalwful assembly will be responsible under section 302/149, Penal Code, for the murder. It is immaterial that only some of the members of the assembly assaulted deceased and the rest assaulted others (AIR 1959 All 453, (459).

Where the appellants were variously armed with dangerous weapons and had committed lurking house trespass by entering the wireless station after breading open the doors and windows and assulted the witness, it was held that in these circumstances, all the appellants must be deemed to have shared the common object of committing lurking house trespass punishable under section 455 of the Penal Code (AIR 1979 SC 1761, (1766).

Where the common object of the unalwful assembly constituted by the five accused persons was to give a good thrashing to the deceased and no more, it was held that the fatal blow by one of the accused to the deceased was not given in the prosecution of the common object of that assembly (1982) 1 SCC 488 (291).

Where a large crowd collected all of whom are not shown to be sharing the common object of the unalwful assembly, a stray assault by any one accused on any particular witness could not be said to be an assault in prosecution of the common object of the unalwful assembly so that the remaining accused could be imputed the knowledge that such an offence was likely to be committed in prosecution of the common object of the unalwful assembly (AIR 1978 SC 860, (863).

When several persons are armed with lathis and one of them is armed with a hatchet and are agreed to use these weapons in case they are thwarted in the achievement of their object, it is by no means incorrect to conclude that they were prepared to use violence in prosecution of their common object and that they knew that in the prosecution of such common object it was likely that some one may be so injured as to die as a result of those injurious. The offence made out on account of the death caused by their concerted acts would be the offence of murder (AIR 1961 SC 1541(1543).

The expression 'common object' is not used in the same sense as 'the common intention' in section 34, which means the intention of all whatever it may have been. The emphasis under this section is on common object. The act must be one which upon the evidence appears to have been done with a view to accomplishing the common object attributed to the members of the unalwful assembly. Thus, every person who is engaged in prosecuting the same object, although he had no intention to commit the offence, will be guilty of an offence which fulfils or tends to fulfil the object which he is himself engaged in prosecuting in the circumstances mentioned in the section. It is in this sense that common object is to be understood (1970 CrLJ 1389 SC). A common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlalwful object can develop after the people get there. Persons who had come to a place quite lalwfully, in the first instance, thinking there were thieves could well have developed an intention to beat up the thieves instead of helping to apprehend

them or defend their properties and if five or more shared the object and joined in the beating, then the object of each would become the common object and they will form an unalwful assembly (1959) SCJ 503; 1956 CrLJ 923).

Where three of the accused were armed with jell is and there was nothing to rule out the probability that each of them gave one blow to the injured witnesses, it was held that assuming that one of the accused with a jell did not cause any injury, that fact would not exculpate him because the conviction of the accused was for the offence under section 326 read with section 149 as the circumstances of the case indicated that the injuries which were caused to the victim were in prosecution of the common object of all the accused appellants to cause grievous injuries (1972 CrLJ 645 SC; AIR 1972 SC 860). Where one of members of the unlawful assembly all of a sudden stuck the deceased on the head and the blow proved to be fatal, the other accused cannot be held guilty under section 304 read with this section (1981 CrLJ (NOC) 177 Ori).Where the accused variously armed with dangerous weapons entered and attacked a police wireless station after breaking open the doors and windows and also assaulting a policeman, the assault upon the policeman being an individual act of an unknown accused, it was held that all the accused persons shared only the common object of committing lurking house trespass under section 455 and they would not be liable for the assault upon the policeman or for more serious offences like sections 302, 395, etc. Hence, their conviction under section 455 read with section 149 alone was confirmed (1982 SCC (Cri.) 260).

Where the circumstances of the case indicate that the injuries were caused in prosecution of the common object of all the accused to cause grievous injuries even if one of the accused with Jelli did not cause any injury, that fact could not exculpate him if the conviction of the acused is for the offence under section 326 read with section 149, Penal Code (AIR 1972 SC 860, (863).

If some persons had collected at one place and on seeing deceased alighting from the bus, emerged from that place and chased him, and some of them belaboured him, it can be said that they had met for a purpose and has a common object and acted in concert. Now, if some persons combined to attack and if they emerged together one can say that those who were the members of this assembly shared the common object of the assembly, viz, to assault and even to cause hurt. That at that stage an unlawfull assembly is formed is unmistakably established (1979)1 SCJ 194 (211).

The appellants cannot derive any benefit from the inability of the prosecution witnesses to state as to which particular injury was caused by which of the accused, when the injuries were caused to the deceased in prosecution of the common object of all the accused to cause the death of the deceased (AIR 1973 SC 2673, (2676).

In the instant case the lower courts found that the assailants were members of an unlawful assembly and force and violence was used by members of the unlawful assembly in prosecution of its common object. The Indian Supreme Court on appeal held that it is possible that when the accused started abusing and peling stones at the charmars, their common object was only to cause hurt to the chamars, but when they went after deceased, dragged him out of the room and one of the assailants struck him with a knife and another picked up a leg to a bed stead and gave a blow with it on the head of the deceased, and others also gave stick blow to him after he had fallen, there can be no doubt that they developed the common object to kill or at least to give him a beating with full knowledge that it would be likely to cause death and it was in prosecution of this common object that he was killed and an offence under section 304, Part II, was committed. This would be sufficient to sustain the

conviction under section 304, Part II, read with wection 149 (1975 CrLJ 290, (293) SC).

The question as to what was the common object of the unlawful assembly is essentially a question of fact which has to be determned on the fact and circumstances of each case. The motive for the crime, the weapons used in the attack, the conduct of the assailants, both before and at the time of the attack are relevant considerations (1981 SCC (Cri.) 795). It was observed in a case that a mere innocent presence in an assembly of persons, for example,as a bystander, would not make the accused a member of an unlawful assembly unless it was shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus, the court was not entitled to presume that any and every person who was proved to have been near a riotous mob at any time, or to have joined or left it at any stage during its activities, was in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of an unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all those stages (1976 CrLJ 1987 SC = AIR 1976 SC 2566).

Where all the six accused persons were travelling in a ling distance bus with a prior plan to commit dacoity, and more than one amongst them were armed with pistals and cartridges, and on the way one of the accused asked the bus driver to stop the bus in a lonely place and upon his refusal to do so he was shot dead and in execution of their plan the accused robbed two victims of cash worth more than a lakh, it was held that the common objct of the unlawful assembly was to commit dacoity at all costs including the use of fire arms in the porocess, and as the murder of the bus driver could not be said to constitute a separate transaction, the liability of all the other accused persons would be co-extensive with that of the actual murderer by the application of section 149 (1980 CrLJ (NOC) 131 MP).

In view of the conclusion that the accused wanted to get rid of the deceased who had become a rival in trade and was annoying them, a conviction under section 302/149, Penal Code, is fully justified even if the ocmmon object was only to teach the deceased a lesson for under - selling and it cannot be ascertained as to which of the accused had caused the fatal injury and if it is held that it is not known as to who caused the injury individually which was sufficient to prove fatal (AIR 1973 SC 486 (487, 488).

3. "Knew it likely to be committed".- In a case of vicarious liability the law provides that the offence must be committed in prosecution of the common object of the assembly or the offence committed must be such as the members of the assembly knew it likely to be so committed. The word 'knew' imports a sense of expectation founded upon facts that an offence of a very particular kind would be committing in prosecution of that common object of the assembly, which is something more than speculation (33 DLR 334).

Section 149, Penal Code, fixes vacarious liability of the members of an unlawful assembly for the acts done in prosecution of the common object of the assembly. But such liability is not limited to the acts done in prosecution of the common object of the assembly. It extends even to acts which the members of the assembly knew it to be likely to be committed in prosecution of that common object. If an offence is committed by a member of an unlawful assembly knew to be likely to be committed in prosecution of the common objct, every member who had that knowledge will be

guilty of the offence so committed (1982 CrLJ 1167 Ori). Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under section 149 if it can be held that the offence was such as the members knew to be likely to be committed (PLD 1967 SC 18; AIR 1965 SC 202). In other words the resultant consequence of the act of one or more persons of an unlawful assembly must be shared by all the members of the unlawful assembly (19 DLR 927; 1968 PCrLJ 263).

Under section 149 the liability of other members for offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise (AIR 1946 Pat 242). accused must be shown to have known through cogent facts and reasoning that offence charged was likely to be committed (1987 SCMR 1015; 33 DLR 334).

This section does not subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly , he himself had not directly contemplated, unless it were proved that he knew it to be likely that such offence would be so committed (1873(20 WR (Cr)5 (11). Such knowledge might be inferred from the nature of the actions committed by others in an unlawful assembly which the member held vicariously liable continued to associate himself with despite these actions being seen by him or known to him (AIR 1975 SC 654 = 1975 CrLJ 602 SC). Where it could not be said on the basis of the evidence in the case that the members of an unlawful assembly knew that someone of them would cause one or two such injuries as might result in the death of the victims, it was held that the accused appellants could only be convicted under section 325 read with section 149 as it was common knowledge that not all head injuries caused by a lathi would result in the death of the victim (1973 CrLJ 98 MP).

The accused were originally members of an unlawful assembly with common object of only beating the deceased, they came armed with deadly weapons some with spear and gandasa and some with lathis in the desperate manner and attacked the deceased causing his death. It was held that the accused would be guilty under section 302 read with section 149 if the members of the unlawful assembly knew that by using these weapons death would be caused (1974) 4 SCC 568 = 1974 CrLJ 1029 = AIR 1974 SC 1564).

When several persons armed with lathis and one of them armed witha hatchet agreed to use those weapons in case they are thwarted in the achievement of their object, it can be presumed that they knew that in the prosecution common object it was likely that some one may be so injured as to die as a result of those injuries (AIR 1961 SC 1541).

Where the conduct of the accused, five in number, armed with spear, lathis and pistol showed that they were prepared to take forcible possession of the land from the complainants party at any cost, the murder committed by one of the accused must be held to be immediately connected with the common object (AIR 1959 SC 572).

A choice of arms by the members of an unlawful assembly is an important factor to be taken into consideration to come to the finding of fact as to the type of opposition expected and the type of possible injury to be inflicted by the members in

case of opposition. In the instant case all the members were armed with lathis only. Lathis are not deadly weapons and not usually used to kill but only cause assault short of killing and this fact of being armed only with lathis will go to show the offences which were expected by the members to be committed in case of opposition (33 DLR 334).

Two persons were arrested and were placed in a police lock-up. A crowd armed with deadly weapons attacked the police station and killed two constables it was held that members of crowd must have known that the murder of the police guards was likely to be committed (AIR 1956 SC 241 = (1955) L SCR 1057).

When people go armed with lethal weapons to take poossession of land which is in possession of others, they must have the knowledge that there would be opposition and the extent to which they were prepared to go to accomplish their common object would depend on their conduct as a whole. Applicability of section 149 has to be concluded from the weapons carried and the conduct of the appellants (AIR 1959 SC 572 = 1959 ALJ 408).

Under the explanation to section 141, Penal Code an assembly which was not unlawful when it assembled may subsequently become an unlawful assembly . An offence will no doubt fall within the purview of section 149, Penal Code, even if members of the assembly knew that it was likely to be 'committed' in prosecution of their common object or if the offence was such as the members of that assembly knew to be likely to be committed in prosecution of that object (AIR 1978 SC 1021(1025).

Where evidence proves that the common object of all the members of the assembly was that murder was likely to be committed in prosecution of a common object namely, to commit murder, assault, mischief and criminal trespass and all the members of the assembly were armed with weapons, it was held that they knew that murder was to be committed in prosecution of that object and, therefore it could not be said that the appellant was not guilty of the charge under section 302/149 of the Penal Code. (1970 CrLJ 1389, (1391) = AIR 1970 SC 1492).

Actually in every case under section 149, it is not necessary that the common object should directly be to commit a particular offence. It is sufficient that the particular result was such that the members of the assembly knew to be likely to committed in the prosecution of that common object (AIR 1964 MP 30(41).

When the members of the unlawful assembly were armed with lathis and spear the common object of which was to assault victims it was held that the common object may not be to murder but the members of the assembly must have known that at least grievous hurt with a sharp cutting weapon was likely to be caused by any member of the assembly in prosecution of the common object. All the accused could, therefore, have been convicted under section 326, read with section 149 of the Penal Code (1975 CrLJ 149 (253).

This section cannot be construed to mean that for every act done by a member of an unlawful assembly , all other memebrs of that assembly would be equally liable with him. If, for instance, one member of such an assembly commits an offence which is not in prosecution of the common object of that assembly, or an offence which the members of that assembly could not have known to be likely to be committed, or an offence which was not in any way, connected with prosecution of the common object of that assembly, section 149 will have no application (PLD 1959 Lah 405). On a plain reading of section 149 Penal Code, it would appear that it is in two parts and that an accused who is found to be a member of an unlawful assembly can be convicted of a lesser offence if under the second part of that section it is clear

that he was aware that such a lesser offence was likely to be committed in prosecution of the common object. Although some members of the assembly may have travelled beyond that object and committed a graver offence. In construing this section each case has to be judged upon its own facts, for, it has to be determined with refrence to the facts of each case what offence the members must have known to be likely to be committed. If such offence is minor to the offence committed by the principal offenders there is no reason why they should not be convicted accordingly. Again if some members of the unlawful assembly commit a more serious offence which was not the object of common assembly they can be convicted for offence of their individual acts in addition to punishment for offence done in pursuance of the common object. If the common objct of the unlawful assembly is to inflict no more than grievous hurt but some of the members of the assembly deliberately went beyond the common object and killed the victim, the killers would be liable for murder but the remaining members would be constructively liable for inflicting grievous hurt ((1968) 20 DLR (SC) 347; 1969 PCrLJ 982 SC).

If the act is an individual act of one member and it is not actually done in prosecution of the common object, all the members will be liable for it, provided they knew it likely to be committed and positive knowledge is necessary, it is not sufficient to show that they ought to have or might have known or that they had reason to believe that it might happen that the act was likely to be committed in prosecution of the common object. The use of the word 'likely' in the second part of section 149 implies something more than a possibility. A thing is 'likely' to happen only when it will probably happen or may very well happen (36 DLR (AD) 234).

4. Evidence and proof.- It is to be borne in mind that for sustaining a conviction applying section 149 of the Penal Code, the following conditions must be fulfilled, namely (i) the accused must be a member of the unlawful assembly when the ofence was committed, (ii) the offence must have been committed in prosecution of the common object of the assembly, or (iii)the offence must be such as the members of the assembly knew it likely to be committed in prosecution of that object. When a particular offence is committed by an individual member of the unlawful assembly, which was neither done in prosecution of a common object of the assembly nor other members of the assembly knew that the offence would be committed, other members of the assembly cannot be held liable for the offence (Abdus Satter V. State; (1994) 46 DLR (AD) 139; 1994 BLD (AD) 133). Facts to be proved for an offence under this section are -

(1). That their must have been an unlawful assembly .

(2). That an offence should have committed by one of the members of that assembly.

(3). That the offence is committed in prosecution of the common object of the assembly;

or that the person sought to be made liable knew and the offence was merely to be committed in prosecution of that common object.

(4). That such person was a member of the said unlawful assembly at the time of commission of that offence.

(5). That he intentionally joined and continued to be a member of that assembly at the time of committing the offence. The burden of proof is on the prosecutin which will have to establish all the above facts.

It is incumbent upon the prosecution to show that the person concerned was a member of the unlawful assembly at the time of commission of the offence, if the

person concerned goes away and ceases to be a member to the unlawful assembly before the commission of the offence, no vicarious liability can be fastened upon him under section 149, Penal Code, because of any subsequent act done by the other members of the unlawful assembly (AIR 1974 SC 1228).

Direct evidence is seldom available to prove the formation of the common object. As such the object of the assembly is largely a matter of inferences from the acts committed by the accused poersons, their conduct and the surrounding circumstances. The formation of an unlawful assembly and the common object for which it is formed are the questions of fact and like all other facts must be proved by the prosecution. The formation of an unlawful assembly is not to be assumed merely because five or more culprits have been put to trial. If the formation of an unlawful assembly and the common object for which it is formed stand proved, it is then not necessary to establish precisely what part each member took in the incident. If the common object to commit a particular offence is established and the offence is committed in prosecution of that common object every member of scuh an unlawful assembly is liable for that particular offence under the first part of section 149 Penal Code, even in absence of any overt act by him. Section 149, Penal Code, constitutes in itself a substantive offence (AIR 1989 SC 754 = 1989 CrLJ 850 (852).

To warrant a conviction vicariously by the application of section 149, the ingredients of the offence must be proved beyond all reasonable doubt and when they are wanting a person cannot be visited with the consequences of the offence and with the vengence of the law, vicariously be the application of section of the Penal Code. Arms carried serves as indication what kind of offence is likely to be committed. A choice of arms by the members of an unlawful assembly is an important factor to be taken into consideration to come to the finding of fact as to the type of opposition expected and the type of possible injury to be inflicted by the members in case of opposition (33 DLR 334).

Whenever the High Court convicts any person or persons of an offence with the aid of section 149 a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under section 149 of the Penal code, the essential ingredient of section 141 of the Penal Code must be established. Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or more persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is on common object (AIR 1981 SC 1219 (1220).

A mere presence is not sufficient to make one a member of an unlawful assembly . There must be evidence direct or circumstantial to show that the particular person was a member of an unlawful assembly . as such an inference can not be drawn merely by his presence on the spot (1985 CrLJ 99 (110) Raj). Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is inference to be deduced from the facts and circumstances of each case (AIR 1989 SC 754 = 1989 CrLJ 850 (852).

Each accused and weapon used by him has to be specified. Where some only of th eaccused are named. Conviction of other accused under section 148, 324/149 and 326/149 of the Penal Code can not be sustained merely on the basis of omnibus statements of the witnesses that they and several others came armed with weapons like leja and sorki. For coming a definite finding whether each of the accused perosns were members of an unlawful assembly and did commit the offence of rioting in prosecution of the aforesaid common object of the assembly, overt act of

each accused and weapon used by each accused have necessarily to be considered (1982) 34 DLR 94).

In the case of members of unlawful assembly it is difficult to obtain direct evidence of their common object, and therefore, common object is often a matter of inference to be drawn from the conduct of its members, not, of course, merely from the effect of their acts but generally from their conduct from the very beginning of the transaction and the circumstances of the case (AIR 1955 NUC (Trav-Co) 538). This section and section 34 to some extent overlap and it is a question to be determined on the facts of each case whether the charge under this section overlaps the grounds covered by section 34. If the common object which is the subject matter of the charge under this section does not necessarily involve a common intention, then the substitution of section 34 for this section might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under this section would be the same if the charge were under section 34, then the failure to charge the accused under section 34 for this section must be held to be a formal matter. It cannot be laid down as a broad proposition that in law there could be no recourse to section 34 when the charge is only under this section or vice versa. Whether such recourse can be had or not must deopend on the facts of each case (AIR 1954 SC 204).

Where three unarmed accused out of seven were acquitted and the number of members of the unlawful assembly thus became reduced to four, it was held that section 149 would not be attracted and the conviction of the first three accused under section 148 could not be maintained, but the facts that they came armed with knives, that they all attacked the victim together on vital parts of his body and departed together would to show that they had the common intention to cause the death of the victim or atleast to cause such injuries as were sufficient in the ordinary course of nature to cause his death and hence, they would be guilty under section 302 read with section 34 (1983 CrLJ (NOC) 86 All). Common object of assembly will have to be decided first and then liability of members which depends upon intention or knowledge regarding the offence to be committed (1983 PCrLJ 809). The common object of an unlawful assembly must be definitely found and not merely left for conjecture or inference from other facts found in the judgment. There should also be a finding as to whether the acts done were committed for the prosecution of the common object of the assembly or such as the memebrs of that assembly knew to be likely to be committed in prosecution of that object, or even as to when the assembly came into being (AIR 1956 Trav-co 230).

Whether on facts and circumstances of the case accused formed unlawful assembly with common object of causing death of any member of complainant party or that they knew that murder was likely to be committed in prosecution of their common object, such determination could only be made by trial court after taking into consideration evidence of prosecution and defence produced before it. Common object of unlawful assembly at a particular stage of incident is determined after taking into consideration nature of assembly, arms it carried and behaviour of its members at or near the scene of occurrence (PLD 1985 Sh. C. 18). In a case of rioting it is not necessary that any specific act should be attributed. It is sufficient if it is proved that all the members of the unlawful assembly shared the common object (AIR 1980 SC 957). Before this section can be applied, the court must find with certainty that there was at least five persons sharing the common object (1954 SCR 145). Where there was no evidence to prove formation of unlawful assembly, sudden fight started at spur of moment in heat of passion, the accused could not be convicted under section 149, 148 or 147 (AIR 1980 SC 573).

An object is entertained in the human mind and it being merely a mental attitude, no direct evidence can be available and like intention has generally to be gathered from the act which the person commits and the result therefrom. But neither the result nor the words used can be the sole criterion for determining the common object of an assembly (AIR 1955 Bhopal 9). Every case has to be decided on its own facts. Thus if a number of men armed with spears rush at another and plunge their spears into his body, then there is only one inference, in law and fact, that the common intention of the assailants was to kill the man, and all of them can be convicted under section 302 (AIR 1935 All 362).

Where in an attempt to rescue certain cattle from being driven to the pound, one of the accused party order the others to use their lathis and beat the other party and one of the opponents died as a result thereof, or the accused who were proved to be the aggresors went to the spot armed in order to assert a supposed title and to establish possession by force and a murder was committed in prosecution of the common object of the rioters, all the members of the unlawful asembly would be liable for murder under section 302 P.C. (AIR 1915 All 218; NLR 1985 Cr. 183). But where a murder was committed in a sudden fight in which many persons participated all of them were not held guilty of murder under section 149 (Madh. B.L.J 1955 H.C.R. 228). Where there was no evidence to prove formation of unlawful assembly, sudden fight started at spur of moment in heat of passion, the accused could not be convicted under sections 149, 148 or 147 (AIR 1980 SC 573). Where there was admitted enmity between two facitions, the nature of injuries on prosecution party and gunshot injuries on accused party suggested that the attack by accused party followed firing of pistol though nothing could be determined with certainty. The accused were held guilty under section 326 read with section 149 (AIR 1980 SC 864).

Where a large crowd was collected, all of whom were not shown to be sharing the common object of the unlawful assembly, a stray assault by any one accused on any particular person could not be said to an assault in prosecution of the common object of the unlawful assembly (AIR 1978 SC 1647 = 1978 CrLJ 1713).

In case of rioting, even if none of the rioters can be held to have been satisfactorily proved guilty of any specific offence, every person whose presence is proved beyond reasonable doubt is guilty of all offences committed in furtherance of the common object (1936 Mad WN 987). Therefore where it is clear that the accused acted in pursuance of their common object, it is not necessary for the prosecution to prove that a particular accused caused a particular injury to the deceased (AIR 1956 Bom 183).

Before accused can be convicted of sharing the common object of the assembly or of being members of the same at a time when the assembly became unlawful, it has to be proved by the prosecution that the accused were members of the unlawful assembly when became unlawful and started pelting stones. In the undernoted case, to begin with there was not such evidence. The evidence merely shows that the appellants were members of the *morcha* but there is a absolutely nothing to show that they were members of the unlawful assembly when the members of the assembly started pelting stones. This before the court is satisfied that an accused is a member of an unlawful assembly it must be shown either from his active participation or otherwise that he shared the common object of the unlawful assembly. It is not necessary that the accused should be gulty of any overt act. It is sufficient if it is shown that as a participant of the unlawful assembly he was sharing the common object of the same (AIR 1979 SC 1265, (1266). Before this section can be applied, the court must find with certainty that there were at least five persons sharing the

common object (1976 SCC (Cr.) 332). This does not, however, mean that five persons must always be convicted before this section can be applied. If the Judge concludes that five persons were unquestionably present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest would be good; but if this is his conclusion, it behoves him particularly in a murder case where heavy sentences have been imposed, to say so with certainty (1972 CrilJ. 227 SC = AIR 1972 SC 254).

Where the members of an unlawful assembly were armed with lathis and spear and their common object was to assault the complainant and the deceased, though it might not have been to murder the deceased, it was held that the members of the unlawful assembly must have known that at least grievous hurt with a sharp cutting weapon was likely to be caused by any member of the assembly in prosecution of their common object and hence, all the appellants could have been convicted under section 326 read with section 149, but the High Court itself had taken a very cautious and lenient view in favour of the appellants in adopting the course of convicting one of the accused appellants R alone under section 302 and the others under section 323 read with section 149 (AIR 1975 SC 185 = 1975 CrLj 249).

If there are two explanations of the presence of a particular person on a particular occasion, one of which is lawful and the other of which is unlawful, the court would not, as against an accused person, assume the unlawful explanation (AIR 1942 All 225 = 43 CrLJ 654).

In a case of rioting and murder read with section 149, it is ot necessary that any specific act sould be attributed to the accused persons. A general statement that they took part in the beating of the deceased is sufficient if it is proved that all the members of the unlawful assembly shared the common object of the said assembly which was undoubtedly to cause the murder of the deceased (1980 CrLJ 735; AIR 1980 SC 957).

It is well settled that if persons are in a mob holding lathis and are in company of other persons who are holding deadly weapons like bhalas and if they come together and go together after the occurrence, it cannot be held that they did not share the common object. The provision contrined in section 149 will be attracted, unless it is established that the persons holding lathis at the place of occurrence were mere sight seers. That is a question of fact which has to be decided on the basis of evidence or record (1976 CrLJ 800 Pat). From the nature of the attack the court may infer that more than five persons must have taken part in it and that there was no likelihood of false implication of any accused in the case (PLD 1967 SC 18).

Where a member of an unlawful assembly is named as an offender who committed an offence for which the members of the unlawful assembly are liable under this section, and the evidence at the trial is insufficient to establish that the named person committed the act attributed to him, he may still be convicted of the offence if it is proved that he was a member of the unlawful assembly and that the act was done by some member of the assembly in prosecution of the common object or which the members knew was likely to be committed in prosecution of that object. Failure to prove the presence of the named offender among the members of the unlawful assembly will not affect the criminality of those who are proved to be members of the assembly, if the other conditions of the applicability of this section are established. If the court refuses to accept the testimony of witnesses who speak to the presence of and part played by a named offender, the weight to be attached to the testimony of those witnesses is so far as they involve others may undoubtedly be affected, but it cannot be said that because the testimony of witnesses who depose to

the assault by the named offender is not accepted, other members proved to be members of the unlawful assembly escape liability arising from the commission of the offence in the prosecution of the common object of the assembly (AIR 1969 SC 689 = 1979 CrLJ 106).

Where no overt act was attributed to any of the appellants on the deceased, the mere fact that the appellants were armed with lathis would not by itself prove that they shared the common object with which the main accused was inspired (1981 CrLJ 725 SC = 1981 SCC (Cri) 595.

Where a large number of the accused members of an unlawful assembly took shelter in a house after the occurrence and two of the persons arrested from that house took up the defence that they were not member of the unlawful assembly. No overt act against both of them was proved, save that they were arrested from the house along with the other accused. The mere fact that no prosecution witnesses was shown to have any enmity against the two accused, could not be sufficient ground for convicting them. Benefit of doubt must be given to the accused (20 DLR (SC) 347 = PLD 1968 SC 372).

5. Section 34 and 149.- These sections do not confer punishment for any substantive offence. They are intended to deal with liability for constructive criminality. Section 34 applies where criminal act is done by two or more persons in furtherance of the common intention of all. Whereas section 149 applies in the case of a member involved in unlawful assembly for common object. So there is difference between the two sections as there is a difference between object and intention (Ataur Rahman v. State DLR (1991) 87).

Section-149, like section 34, does not create and punish any substantive offence. This section deals with the liability for constructive criminality, that is, liability of one person for an offence not committed by him but committed by another person.Thse sections may be added to the chagre of any substance offence, no charge under either of them can be conceived of section 34 provides that when a criminal act is done by several persons (two or more) in furtherance of the common intention of them all each of such persons is liable for that act in the samed manner as if it was done by him alone. Section 149 postulates an unlawful assembly and commission of an offence by any of the members of the unlawful assembly in porosecution of the common object of the unlawful assembly. Both sections deal with combination of persons to become pounishable as 'sharers in an offence'. They have certain resemblances, and may, to some extent, overlap. Section 34 refers to cases in which several persons both intend to do an act and actually do that act. Section 149 refers to cases in which several persons intend to do an act, but any one of them does quite a different act. Basis of a case under section 34 is the element of participation, and that of a case under setion 149 is membership of an unlawful assembly. The scope of the latter is wider than that of the former (Abdus Samad Vs. The State 44 DLR (AD) 233; 1992 BLD (AD) 145; 36 DLR (AD) 234).

Both sections 149 and 34 Penal Code deal with a combination of persons who become liable to be punished as sharers in the comission of offences. The non-applicability of section 149 is, therefore, no bar in convicting the accused under substantive section read with section 34 if the evidene discloses commission of an offence in furtherance of the common intention of them all (AIR 1991 SC 2214).

Once the court finds that an offence has been committed by any member of an unlawful assembly in prosecution of the common object of the unlawful assembly, then whether the principal offender has been convicted or not all other members may be constructively liable and convicted for the offence provided they had the

intention and knowledge as required in section 149. The only thing to be seen is whether their presence as members of an unlawful assembly at the time of the commission of the offence has been proved (44 DLR (AD) 233 (para 9). In order to make an accused constructively liable with the help of section 34 for an offence not actually committed by him, it is essential to prove that he had intention to commit the offence. Unless such intention is proved, he cannot be made liable under that section (Belal Ahmed Vs. The State, 40 DLR 154).

"Like section 149, section 34 also deals with case of constructive criminal liability. It provided that when a criminal act is done by several persons in furtherane of a common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone. The essential constituent of the vicarious criminal liability prescribed by section 34 is the existence of a common intention. If the common intention in question animates the accused persons and if the said common intention leads to the commission of the criminal offence charged each of the persons having common intention is constructively liable for the criminal act done by one of them just as, the combination of persons in the same common object is one of the features of an unlawful assembly. So the existence of a combination of perons showing the same common intention is one of the features of section 34. In some ways the two sections are similar and in some way they overlap. But nevertheless the common intention which is the basis of section 34 is different from the common object which is the basis of the composition of an unlawful assembly. Common intention denotes action-in-concert and necessary postulates the existence of a pre-arranged plan and that must mean a prior meeting of minds. It would be notified that the cases to which section 34 can be applied disclose an element of participation in action on the part of all the accused persons. The acts may be different, may vary in character but they all actuated by the same common intention. It is now well settled that the common intention required by section 34 is different from the intention or similar intention. As has been observed by the Privy Council in Mahbub Shah (72 IA 148), common intention within the meaning of section 34 implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and that the inference necessary inference deducible from the circumstances of the case" (AIR 1963 SC 174; (1963) 1 CrLJ 100). For application of section some overt act by each of the accused is necessary in the commission of the crime by two or more persons but in the case of application of section 149,if one is found to be a member of the unlawful assemble for the commission of the crime, whether he takws active part in it or not, he comes within its mischief, and so far as section 109 is concerned, it is simply for abetment of the offence committed (Abul Khayer & ors. v. State (1994) 46 DLR 212).

In common intention there is prior meeting of mind, existence of pre-arranged plan and action in concert. But under section 149 only sharing of any object without any specific participation is the basis for bringing the accused under its clutches (1989 East Cr. C. 381 (392) Pat).

To attract the operation of section 34 and fix constructive guilt on each of the several accused under that section there must be participation in action although different accused might have taken different parts. Here is the distinction between section 149 and section 34 of the Penal Code. Under section 149 if several persons form an unlawful assembly with the common object of committing any crime then even if only one of those persons commit that crime and others do not act or participate then also all of them will be equally guilty for that crime. But under section 34 when the crime is committed by several persons in furtherence of their

common intention then only all those several persons will be guilty of that crime and consequently if only one of the several persons commits crime and others in their company do not act or participate those others will not be guilty under section 34. For the applicability of the section 34 it is essential that the act of murder is done by several poersons. In other words, all the persons who was sought to be made liable by virtue of section 34 must have done some act and those of the accused who had not taken any part either by word or action in doing the act of murder cannot be made liable under that section (Abu Sayed Vs. State 38 DLR 17).

Section 34 refers to cases in which several persons intend to do an act. It does not refer to cases where several persons intend to do an act and someone or more of them do an entirely different act. In the latter class of cases section 149 may be applicable but section 34 is not (36 DLR (SC) 234; AIR 1949 All 180). It is however to be noted that section 149 will apply only where the other act was done in prosecution of the common object and not where it is an altogether different act. Thus where some persons have collected to fight a rival faction but when a police officer intervenes, they attack and kill him, they cannot be said to have acted in prosecution of a common object and as such if their common intention can be said to have been formed suddenly, they will be guilty under section 302/34 Penal Code (15 DLR (SC) 65; PLD 1963 SC 109).

Neither section 34 nor section 149 creates and punishes any substantive offence; but they are intended to deal with liability for constructive criminality, that is to say, liability for an offence not committed by the person charged. Section 34 applies in a case where criminal act is done by two or more persons in furtherance of the common intention of all, whereas section 149 applies in the case of members of an unlawful assembly when a criminal act is committed by any member of the unlawful assembly in prosecution of the common object of the unlawful assembly (1984 DLR (SC) 234). Section 149 is wider in its scope than section 34. Section 34 refers to cases in which several persons intend to do an act and does not refer to cases here several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases, section 149 may be applicable but section 34 is not. Section 149 will, however, only apply if that other act was done in the prosecution of the common object of all (PLD 1954 Lah 78).

The principal element in section 34 is the common intention to commit a crime. In furherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation section 34 provides that each one of the accused would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in section 149. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention of that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled (PLD 1954 Lah 78). Whereas section 34 does take into account the fact of participation of every individual offender in an offence which is therein described as a criminal act, as well as his mental state which is therein connoted by the word intention section 149 completely ignores both these factors. Section 34 is merely declaratory of a rule of criminal liability and does not create a distinct offence. Section 149 on the other hand is not merely declaratory and does create a distinct offence (AIR 1956 All 241).

A common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there. The distinction between the

common intention required by section 34 and the common object set out in section 149 lies just there. In a case under section 149 there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five or more and they act as an assembly to achieve that object. It is true that the two sometimes overlap but they are used in different senses in law and should be kept distinct (AIR 1963 SC 174).

Where the accused are convicted both under sections 302/149 and section 302/34 and in appeal conviction under section 302/34 is set aside, it will not effect conviction under section 302/149 and the accused would be liable to serve the sentence passed by the lower court (AIR 1964 Pat 158).

There may not be much distinction between a common object and common intention and where one is proved, the other may be held to exist. But a common object must be distinguished from a similar object just as common intention should be distinguished from similar intention (AIR 1960 Guj 13).

Under section 34, however, when a criminal offence is committed by a number of persons in furtherance of common intention of all of them each of such person is liable for the offence committed. Common intention means a pre-arranged plan and meeting of minds. Section 149 speaks of a common object while section 34 speaks of common intention, section 149 is of a wider amplitude than section 34. While under section 149 constructive liability arises even against these persons who do not participate in the crime but the offence is committed in pursuance of their common object. Section 34 speaks of a pre-arranged and pre-meditated cocnert. To make section 34 apply it is not necessary for the prosecution to prove that the act was doen by a specified person. Thus, it is seen that under section 149 liabilities arise by reason of being member of an unlawful assembly with a common object. Even though there may not be active participation at all. Section 34 takes with account the participation of every individual offender in the offences as well as his mental state showing his intention (1957 CrLJ 270).

For attracting section 34 of the Penal Code, participation in some way or other in a crime is of an unlawful assembly at the time of committing the offence will fasten the liablity on all the members of that assembly of the offence committed. Under the former section participation in some action with common intention of committing the crime is necessary, whereas under the latter mere membership with common object of an unlawful assembly which committed the crime is the basis. Although all the members of the unlawful assembly might not have committed the crime, but each one of them shall have to be held responsible as a member. On behalf of the appellants, it was conceded and rightly held, that even if no charge is framed under section 34 of the Penal code along with the substantive section, on the basis of the materials on record a person may be convicted, if no prejudice is caused. Section 149 of the Penal Code creates specific and disting offence, then a charge under that head must be framed (1984 CrLJ 386, 390 Pat). It has to be seen whether the charge under section 149 overlaps the grounds covered by section 43 (AIR 1954 SC 204).

While section 34 takes into account the fact of the participation of every individual offender in the offence charged falling under the words 'criminal act' and intention section 149 ignores both these facts completely (1956 CrLJ 452; AIR 1971 SC 1467). If an offence is committed by a person in pursuance of the common object of the unlawful assembly every member of the unlawful assembly would be guilty of that offence although there may not have been any communication and no participation by other members in the actual commission of the offence (AIR 1972 SC 1467).

Where an accused is charged with a substantive offence invoking section 34, there is no bar to his conviction for the substantive offence unless prejudice is caused and it is incumbent upon the accused to show that it misled him, causing failure of justice (AIR 1974 SC 778).

The distinguishing feature of the section 34 and 149 are :

(a) Section 34 is wider regardless of number of offenders while section 149 limits the persons to be not less than five,

(b) where the common intention is undefined section 149 is limited by section 141, and

(c) a conviction under section 34 involves a co-operative criminal act. While under section 149 all members of the unlawful assembly are liable.

Though the sections appear to overlap, a clear distnction has been made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds while common object does not necessarily require proof of prior meeting of the minds or pre-concert. Common object may be formed even on the spur of the moment (AIR 1963 SC 174 = 1963) CrLJ 100). Both the sections deal with combination of persons who became punishable as 'shares in an offence'. They have a certain resemblance and may to some extent overlap. Section 34 applies to a case in which several persons both intend to do an act and in fact do the act; it does not apply to a case where several persons intend to do an act but some one or more of them do an entirely different act; in such a case section 149 may apply provided other requirements are fulfilled. The basis of constructive guilt under section 149 is mere membership of an unlawful assembly; the basis of the offence under section 34 is participation in an act with the common intention of doing that act. So where common intention and common object are the one and same in a given case, both these sections may apply. The alteration of the finding by applying section 149, instead of section 34, is not bad in law (The State Vs. Abed Ali 1984 BLD (AD) 324; 36 DLR (AD) 234). Similarly the non-applicability of section 149 is therefore, no bar in convicting the accused under substantive section read with section 34 if the evidence discloses commission of an offence in furtherance of the common intention of them all (AIR 1991 SC 2214).

Section 149 of the Penal Code is wide enough to cover the principle of section 34 of the Penal Code. It has been held in the case of Abdul Motin Munshi Vs. Idris Pandit and others 27 DLR (AD) 22, that the evidence and circumstances which led to the finding that the common object of killing the victim had been proved, were sufficient for an inference of the existence of the common intention to cause his death (36 DLR (AD) 22 Para 11).

6. Constructive or vicarious liability.- Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section creates a specific and distinct offence. In other words, it creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However the vicarious liability of the members of the unlawful assembly extnds only to the acts done in pursuance of the common object of the unlawful assembly to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial (AIR 1989 SC 754 = 1989 CrLJ 850 (852).

Where the object of the unlawful assembly was found to be only the giving of beating to certain person and the highest offence which members of such assembly knew to be likely to be committed was grievous hurt, in the absence of evidence of any special intention or knowledge, members of such assembly could not be convicted for murder under sections 302/149 of the Penal Code (State v. Giusuddin 45 DLR 267 (Para 26).

Section 149 of the Penal Code by itself does not create any offence at all. It carries the liability of each member of an unlawful assembly for the act done in prosecution of the common object. The specific object of the unlawful assembly who have an object common to all each and every member of such assembly is actuated or animated to achieve that object and in furtherance of that common object, the same is achieve then only section 149 Penal Code may be applied irrespective of the fact whether such act is done by one or more members of such an unlawful assembly and every member of such an assembly shall be saddled with the constructive liability under section 149 of the Penal Code (Tenu Mia v. state 1991) 11 BLD 196 = 43 DLR 633).

The principle of section 149 is that in a riot all are principals, the rioter, who with his own hands commits the offence, being a principal in the first degree, and the other rioters being principals in the second degree on the ground that by their presence they have aided and abetted the doing of the act (AIR 1946 Pat 242 (246). The liability of the other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms, or behaviour, at or before the scene of action. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during the occurrence does not arise. But when it may reasonably be held that the members of the assembly knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object, then such other members of the assembly are liable for the offence committed to the same extent as the actual perpetrator of the crime (AIR 1936 Pat 481 = 37 CrLJ 630).

Section 149, Penal Code deals with the constructive liability of members of an unlawful assembly for the offence having been committed by one or more of the members of the assembly. For the purpose of that libaility this section may be divided into two parts (a) the offence must have been committed in prosecution of the common object of the assembly or (b) the offence must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object. Manifestly the liability of every member extends not only to the acts contemplated by all but also to those offences which are likely to be committed in achieving the common object. It, therefore, follows that this section does not make the members liable for every offence that may be committed by any one or more of them while the assembly is operating and carrying into effect the object of the assembly, unless the act falls within either of its two parts. Considering the effect of the section it must first be decided as to what is the common object of the assembly, and after having reached a conclusion on that question, the next question which would follow is what was the liability of the members of the assembly depending upon the intention or knowledge as regards the offence which may have been committed. These are questions of fact which are to be decided on consideration of the surrounding circumstances (1983 PCrLJ 809; PLD 1971 Kar 68).

The accused's cattle were doing considerable damage to the crops belonging to complainants who drove them to the cattle pound. While they were on the way to the pound the accused came armed with clubs, to rescue the cattle. At the command given by one of them, the others assaulted the deceased and beat him with the result he died. It was held that the offence was committed in pursuance of the common object and each of one of the accused was guilty of an offence under section 302 (1985 SCC (Cri) 470).

Seven persons armed with lathis were charged with constituting themselves into an unlawful assembly with the common object of committing theft and also to assault those who came to abstruct them. Evidence on record showed four assailants of the deceased and the fatal blow to the deceased could not be attributed to any of them. It was held that none of the accused persons could be held guilty of murder, but all the seven being members of the unlawful assembly must be deemed to have knowledge that at least grievous hurt would be caused by assault with lathis. Therefore, the other three who did not actually participate in the actual assault on the deceased could also be guilty of constructive liability for the offence under section 325 read with section 149 (1966 CrLJ 856).

Where the mob chased A and murdered him. The only evidence against the accused was that he was a member of the mob. It was held, that it was probable that the accused was merely present when the mob surrounded the deceased; he could not be convicted unless it was proved that he took part in the chase and murder (AIR 1942 Pat 321) Where the accused was present at the riot and he was not only the brother of the principal offender but a sympathizer with the attacking party. The evidence of actual participation by the use of the lathi on the part of the accused, was vague and general, and the evidence, showed that the accused was actually kicking the principal offender, saying 'let him off, he will die'. It was held, that the accused was clearly excluded from the general liability which may otherwise be imposed upon him by the application of section 149 (AIR 1926 All 340).

Where there is a spontaneous fight between two parties, each individual is responsible for the injuries he caused himself and for the probable consequences of the pursuit by his party of their common object. He cannot plead that because he might at any moment be struck by some members of the other party his own blows were given in self-defence (AIR 1943 Mad 492 (493).

Often, in a case of a free fight both sides try to conceal the true facts and exaggerate the part palyed by their adversary. Therefore in case of a free fight, each accused would be liable for the part played by him (PLD 1976 Lah 194). Where the accused had no intention to commit any offence and they went to negotiate an amicable settlement of their dispute, but hot words were exchanged which resulted in a free fight, this section was not attracted and each person was liable for his own acts (1981 PCrLJ 575). If a fight has taken place between two armed mobs, and there is no evidence as to what actually occurred, a mere suspicion that the accused were present cannot form the basis for a conviction (AIR 1940 Pat 365 = 1976 CrLJ 1883).

Where the evidence showed that there was a free fight between the two parties, and it was not possible to say that the accused were the aggressors though undoubtedly the prosecution side got the worst of it,s and there was no evidence regarding individual acts of assault committed by the accused, it was held that if really the accused were not aggressors, no case either under section 147, or section 148 read with section 149 could not also be sustained (AIR 1976 SC 2423).

The section deals with the liability of every member of an unlawful assembly if in the prosecution of the common object of that assembly an offence is committed or such as the members of the assembly knew to be likely to be committed in prosecution of the common object. If these ingredients are proved then member of the said assembly would be guilty of the said offence regardless of whatever role they had played in that connection (PLJ 1979 SC 365). It is not correct to say, that under section 149 all persons must combine together or help one another at the time of the assault (AIR 1959 Cal 457) If some members of an unlawful asembly commit certain offences in pursuance of the common object of the assembly, all the members of the assembly would be held guilty of the commission of those offences even though some of them have not actually taken part in the commission of the offence (PLD 1957 SC 18; PLD 1962 SC 450).

Where the appellants armed with *jaillis*, *pharsa* and *ballams* attacked the deceased, and from the conduct of the accused persons it could be inferred that the members of the unlawful assembly were prepared to attack the complainant party at any cost, and the *lalkara* raised by the appellants that they would teach them a lesson for the construction of the wall encroaching upon a public street was indicative of the fact that they were fully prepared even to commit murder if it was necessary for the accomplishment of their common object, and there could be no doubt that considering the various lethal weapons with which the appelalnts had gone armed, they must have known that murder was likely to be committed in prosecution of the common object, it was held that their convictions under section 302 read with section 149, section 329 read with section 149 and section 148 were proper (1981 CrLJ 190 (P&H); 1977 CrLJ 1148 SC).

Original common object of the accused was to abduct a girl and in furtherance of this object, they armed with deadly weapons, broke open the door of a dwelling house and one of them fired a shot killing a woman (not the girl). Even if no reliable evidence was available asto which of the particular person killed the woman yet all the accused charged were burdened with vicarious liability under section 149 Penal Code notwithstanding that the original common object was to forcibly abduct the girl. The accused being armed with deadly weapons the intention to use these arms in case of resistance was, therefore, manifest. The accused were therefore guilty of the offence under section 302/149 (22 DLR (SC) 127).

Where the accused were members of an unlawful assembly having a common object of beating the complainant, the mere fact that they did not take part in actual beating cannot exornerate them of their liability for the offence under section 323 Penal Code, committed by other members of the assembly. They would be guilty under section 323, when it is proved that they were present in the assembly at the place of occurrence (AIR 1953 All 778).

The individual liability of the accused must necessarily depend on the intention or knowledge of the members. If the common object of the unlawful assembly is to inflict no more than grievous hurt in circumstances where death was not the likely consequence but some of the members of the assembly deliberately went beyond the common object and killed the victim, the killers would be liable for murder but the remaining members would be constructively liable for inflciting grievous hurt. Thus even if the principal offenders have in such a case also committed grievous hut, the common object of the assembly and the other members can legitimately be held to have constructively committed grievous hurt. Because, they must have in the circumstances of the case, known that a grievous injury was likely to be caused (PLD 1968 SC 372) Where two of the accused carried daggers while the others were armed with bangs. One of the dagger carrying accused attacked the deceased with a

dagger, the other dagger carrying accused caught hold of the deceased when he tried to run, and thereafter all of them chased the deceased and encircled him. Both dagger carrying accused stabbed the deceased and one other struck the deceased's hand with a bang. All of them were held liable to conviction under section 326/149 but the dagger carrying accused were further held liable to conviction under section 302/34 Penal Code (1968 PCrLJ 645).

Where the persons participating in an assault upon the deceased are members of one unlawful assembly, the mere fact that some of the members of that assembly run away after inflicting one or two injuries each upon the deceased, cannot absolve them of the responsibility for the death even though it was not the direct result of the injuries inflicted by any one of them but was the cumulative result of the injuries inflicted by them and other members of the same unlawful assembly. It is impossible to dissociate the act done by one member of unlawful assembly from the acts of other members of the same assembly if all those acts form part of the same transaction (1952 CrLJ 1261).

Before applying section 149 the court must have indubitable evidence that the members of the unlawful assembly constituted the statutory number of five, though some of them might not have been named, or brought to trial. In the present case, there being no such evidence, application of section 149 becomes untenable after the acquittal of five. The decision in this case rests, however, not so much on the ground of the absence of the statutory number constituting an unlawful assembly but on a more important ground, namely, that the common object of causing death was not proved. Evidence and circumstances do not show that the common object was to kill Abul Hossain but, as the High Court Division says it was to teach the informant praty a good lesson. Killing was the individual act of Shahid Mia which the appellant did not share (Rafiqul Islam Vs. State 44 DLR (AD) 1992 (264).

Where the circumstances of the case underringly pointed to the conclusion that the deceased party had gone to the house of the appellants without any evil intention or aggressive design and at the invitation of the appellants for amicable settlement of their dispute by having bilateral talks, but the appellants, acting pursuant to a pre-arranged plan and a common object to liquidate the deceased's party, had overwhelmed the deceased and his companions by their superiority in number and in arms, it was held that all the appellants would be equally liable by virtue of section 149 for the murders of the two deceased persons and the attempted murder of two others (1980 SCC (Cri.) 968; AIR 1975 SC 455=1974 SCC (Cri) 922).

Where it was clear from the evidence that the accused respondents had the common object of committing encroachment on the land belonging to the widowed aunts of PW 1 and to cause the death of any person who tried to resist their attempt to encroach upon the said land, and in prosecution of their common object they did in fact cause the death of four persons and serious injuries to PW2 by means of deadly weapons, it was held that the charge against them under section 320 read with section 149 as well as under section 147 and 148 had been clearly established against them (1982 SCC (Cri) 223).

Where the appellant, armed with a gun, exhorted the other assailants of the deceased persons to open fire just before the occurrence, and in pursuance to his exhortation all the three guns in the hands of the assailants were fired, it was held that the mere fact that only one person was hit by a gun could not exclude the posibility of the other guns having been fired because it was poossible that even though the other guns were also fired, their bullets did not hit anybody. His

conviction under section 302 read with section 149 section 307 read with section 149 and section 148 was therefore proper (1979 CrLJ 831 (SC); AIR 1979 SC 1509=AIR 1986 SC 316=1986 CrLJ 313).

A person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he indorses all that the other members say or do. Nor is he therefore responsible for their acts of which he was not clearly cognizant. For example, two persons may be induced by another to assist him in thrashing his enemy with whom he did have a quarrel. They may consent to lend him their assistances so far, but if he had secretly planned to kill him and does so they cannot be held responsible for his act (ILR 29 All 282). This shows that the members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary not only according to the information at his common but also according to the extent to which he shares the community of object and as a consequence the effect of this section may be different on different members of the same unlawful assembly (ILR 22 Cal 306). In dealing with such cases, it is, on the one hand, necessary for the protection of accused persons that they should not, merely by reason of their association with others as members of the unlawful assembly, be held criminally liable for offences committed by their associates which they themselves neither intended nor knew to be likely to be committed; on the other hand it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties of offences for which, though committed by others, the law has made them liable for reason of their association with the actual offenders with one common object (ILR 22 Cal 306).

In law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. Committed in prosecution of that object; every persons, who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly (AIR 1965 SC 202; AIR 1980 SC 957).

Where appellants were members of the assembly, the unlawful common object of which developed at the spot and they continued as its members. Held that they are clearly liable to be proceeded against and convicted under section 326 read with section 149, Penal Code, though no overt act was proved against them (AIR 1972 SC 109).

Though as a matter of law, it is not the rule that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member thereof where members of the unlawful assembly at the time were alleged to be armed with deadly weapons, such as lathis and brickbats, and the occurrence took place inside a village basti, prosecution should prove clearly and unambiguously some overt act against the accused person charged under this section (1976) 42 Cut LT 207 (225).

Accused along with 6-8 persons forcibly entered into office of union leader. Deceased not receiving any serious injury inside union office and managed to escape. In open space some members of crowd giving fatal blows. Accused cannot be said to have shared common object of committing murder. accused convicted under section

326 read with section 149 and not under section 302/149 Penal Code (AIR 1992 SC 1751).

Where the gist of evidence against the accused was that he was one of the four persons who first assembled outside the house of the deceased and challenged him to come out and later on took part in the actual assault when the accused gave a stick blow he was one of those who broke open the door of the house and dragged out the deceased. The participation of accused in the occurrence, therefore, is not shown to extend to his being a member of the unlawful assembly. Held "Accused deserves to be given the same benefit" (AIR 1981 SC 1223, 1226, 1227).

7. Mere presence does not raise presumption of complicity.- A mere presence is not sufficient to make one a member of an unlawful assembly. There must be evidence direct or circumstantial to show that the particular person was a member of an unlawful assembly, as such an inference can not be drawn merely by his presence on the spot (1985 CrLJ 99 (110) Raj).

The test of an unlawful assembly is whether act of an unlawful assembly could reasonably be inferred from some direct evidence as well the circumstantial evidence including the conduct of the parties who constitute such unalwful assembly. There must be some element present for immediately carrying into effect the common object. A meeting for deliveration only and to arrange plans for future action to be taken individually and not jointly does not constitute an unalwful assembly.

Where presence in a crowd cannot render any body liable, unless there was common object and he was actuated by the common object as set out in section 149 of the Penal Code (State Vs. Giasuddin (1993) 45 DLR 267(273).

A person would not be guilty of a crime because he was present unless his complicity in the crime can be inferred by some act or the other or by way of constructive liability (Abdul Hamid and others Vs. State of U.P. 1990 (3) Crimes 708 (SC).

In cases where many persons are present at the place of an offence and some of them are involved in the incident, it is not possible to say that all the persons gathered are forming part of an unlawful assembly, and as such, the common object to commit the offence has to be established by proving the overt acts done by each of the persons present (Franciso Paulo Saldanha and others Vs. The State 1990 (3) Crimes 295 (Bom).

When a particular offence is committed by an individual member of the unlawful assembly, which was neither done in prosecution of a common object of the assembly nor other members of the assembly knew that the offence would be committed, other members of the assembly cannot be held liable for the offence (Abdus Sattar Vs. State, (1994) 46 DLR (AD) 239).

8. Conviction of less than five persons.- Before applying section 149 the court must have indubitable evidence that the members of the unlawful assembly constituted the statutory member of five, though some of them might not have been named, or brought to trial. In the present case, there being no such evidence, application of section 149 becomes untenable after the acquittal of five (Rafi 44 DLR (AD) 264). In a case as the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141, Penal Code. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, can not be convicted under section 148 or section 149 Penal Code, for

any offence, for the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under section 141, Penal Code. The convictions of the appellants under sections 148 and 149 Penal Code, can not be sustained (AIR 1987 SC 826).

In Mohan Singh Vs. State of Punjab, AIR 1963 SC 174, it was held that in cases where "both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried, then section 149 cannot be invoked." It was further observed that "even in such cases, it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who ahve not been identified and so have not been named."

Provisions of section 149, Penal Code, cannot be invoked for convicting the four accused when the prosecution has not proved the involvement of other persons in the commission of the crime (K. Nagamalleswara Rao and others Vs. State of AP 1991 (1) Crimes 812 SC).

The court must find with 'certainty' that there were at least five sharing the common object. A finding that three of them 'may or may not have been there' betrays and uncertainly on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation (Dalip Singh Vs. State of Punjab; AIR 1953 SC 364). But in a number of cases it has been held that even though the number of convicted persons is less than five, the court can still apply this section in convicting them under certain circumstances. There is nothing in law which prevents the court from finding that the unlawful assembly consisted of the convicted persons and some unidentified persons, who together number more than five. In doing so the court does not make out a new unlawful assembly different from that charged; the assembly is the same assembly but what has happened is that the identity of all the members has not been clearly established (1960) 2 SCR 172; AIR 1972 SC 254=1972 CrLJ 227; 1974 SCC (Cri) 639). A combined reading of section 141 and section 149 Penal Code show that an assembly of less than five members is not an unlawful assembly within the meaning of section 141 and cannot, therefore, form the basis for conviction for an offence with the aid of section 149 Penal Code. The effect of the acquittal of the two accused person by the High court and without the High court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two aquitted accused persons were not members of the unalwful assembly. Thus, only four accused could be said to have been the members of the assembly but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of section 141, Penal Code. The existence of an unlawful assembly is a necessary postulate for invoking section 149, Penal Code. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of section 149, Penal Code, cannot be recorded or sustained. The failure of the prosectuion to show that the assembly was unlawful must necessarily result in the failure of the charge under section 149 Penal Code. Consequently, the conviction of appellants 2 to 4 for an offence under section 326/149, Penal Code cannot be sustained and the same would be the position with regard to the conviction of all the

appellants for other offences with the aid of section 149 Penal Code also (Subran @ Subramanian and others Vs. State of Kerala 1993(2) Crimes 15).

If five or more persons constitute an unlawful assembly and if after acquittal of some of the accused, the number of persons convicted is reduced to less than five, the conviction will not be illegal, if there be evidence to show that in the assembly there were five or more persons named or unnamed (1973 CrLJ 1086=AIR 1974 SC 1567).

Consistent prosecution case that certain named person formed unlawful assembly, some acquitted. Only three remaining. They cannot be convicted under section 148 and by applying section 149 (AIR 1991 SC 2214).

Where the High Court gives a clear finding that there were more than five persons and believes the eye witnesses who identify two of them, the mere fact that the only two out of the band of attackers were satisfactorily identified, does not weaken the force of the finding that more than five were involved and conviction of the rest would be good (1954 SCR 145; AIR 1975 SC 1917). Where the prosecution case is that certain named person formed unlawful assembly and the court acquitted some of them. Only the remaining three cannot be convicted under section 148 and by applying section 149 (AIR 1991 SC 2214).

Where it is not proved that five persons took part in the assault, the accused cannot be held constructively guilty of murder under section 149 read with section 302 because section 149 only applies where there is an unlawful assembly (AIR 1925 Lah 532). Where five persons were charged but two of them who were alleged to have attacked and inflicted injuries on the deceased were acquitted. The acquittal would render the charge of unlawful assembly untenable and it would become technically incorrect to place on them constructive liability for the offences of murder and attempt to murder under section 149 Penal Code (1969 PCrLJ 1067). It is however to be noted that where the participation of five or more persons in the commission of the offence is proved, even less than five may be convicted provided it is possible to conclude that though five persons were unquestionably at the place of occurrence the identity of one or more was in doubt (19 DLR (1967) SC 216=PLD 1967 SC 167; PLD 1954 Lah 783). Where however the accused are specified and some of them are acquitted and only less than four are convicted, section 149 does not apply (AIR 1939 Lah 416; AIR 1951 All 660). But even that proposition is not of universal application, because there may be a case in which some of the accused are falsely included in place of the real culprits who in fact had not been identified. The court while acquitting those who in its opinion appear to have been so implicated may yet convict by the application of section 149, one or more persons with respect to whose participation there could not possibly be any doubt and if it be of a definite opinion that the member of the participants could not be less than five and they formed an unlawful assembly (AIR 1951 Pepsu 152)

Where more than five persons were charged under section 302/149 but only less than five were convicted, there is no objection to convict less number than five found actually responsibility for murder under section 34 when the common object was to commit murder (ILR 1955 Punj 324). Where of eight persons convicted by the trial court under section 302/149 six were acquitted by the High Court. It was held that as the common intention of the remaining two was proved from the evidence, they may be convicted of section 302/34 (PLD 1962 Kar 583). Even if the Court acquits all except one accused, giving them the benefit of the doubt but at the same time definitely finds that the one accused was associate with some at least of

those acquitted persons in-the commission of the alleged act and accordingly convicts him of the commission of the alleged act applying section 34, such conviction is valid (AIR 1951 All 660).

In Rahmat Vs. State, a case decided in 1957, but reported later in 1969 SCMR 537, where there was no allegation by the prosecution that any other persons other than the five accused were involved in the attack the Pakistan Supreme Court held that the acquittal of two of them by the High Court rendered the charge under section 148 untenable and it would be technically incorrect to place the constructive liability under section 149 of the Code for offence alleged to have been committed.

In Bharwas Mepa Dana Vs. The State of Bombay AIR 1960 SC 289(290) it was held :

"Where the finding is that the number of persons who constituted the unlawful assembly was more than five, though the identity of four only was established and the killing was done in prosecution of the common object of the entire unlawful assembly, there can be no serious difficulty in applying section 149 to such a case. Whether such a finding can be given or not must depend on the facts of each case and on the evidence led. Any mere error, omission or irregularity in the charge will not invalidate the finding as a matter of law in the absence of prejudice to the convicted persons".

The principle of vicarious liability does not depend upon the necessity to convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. Neverthless, if the court, whose duty is to separate the chaff from the grain, does hold that the convicted persons were certainly members of an unlawful assembly which must have consisted of more than five persons; there is nothing which could stand in the way of the application of section 149 Penal Code, for convcting those found indubitably guilty of participation in carrying out of the common object of an unlawful assembly (AIR 1975 SC 1917, 1921, 1922).

"The essential qeustion in a case under section 147 is whether there was an unlawful assembly as defined in section 141, Penal Code, of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, section 147 still applies, if upon the evidence in the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons known or unknown, identified or unidentified . In the present case, there is such a finding and that concludes the matter" (1`950 FCR 834).

If five accused out of seven were acquitted and not found guilty of the offence under section 302 read with section 149 Penal Code, on the ground that the murder of the deceased was not the initial object of the unlawful assembly and the firing at him was the result of developments which could not have been anticipated, it was held that the conviction of the other members of the assembly for the said offence could not be sustained (AIR 1972 SC 2555; AIR 1978 SC 1233).

The fact that a large number of accused have been acquitted and the remaining two have been convicted are less than five cannot vitiate the conviction under section 149 read with the substantive offence, as in this case, the court has found that there were other persons who might not have been identified or convicted but were party to the crime and to gether constituted the statutory number (Khem Karan Vs. State of UP,AIR 1974 SC 157).

9. Assembly to exercise right to self defence.- Where the object of the accused assembly was to exercise their right to self defence, it could not be held to be unlawful. Therefore, the accused could not be convicted with the aid of section 149.They would be individually liable for any excess of their right to self defence (1979 All Cr. C 231=1983 CrLR (Raj) 280).

It is well settled, where the right of private defence is exceeded, the question of constructive liability under section 149 or section 34 of the Penal Code, does not arise and only that individual can be held liable by whom the right was exceeded (1985 Cr. L.R. 130, 135 MP).

Where persons act to protect their supposed non-existent rights, they cannot claim to be acting in the exercise of their right of private defence and as such would be liable under section 149, because if a plea of self defence set up by all the accused (more than five) fails and it is found that no such right exists, they would constitute an unlawful assembly with the common object of committing the offence constituted by the harm inflicted by them (AIR 1960 Mys 294).

Where two unlawful assemblies fight, the question of private defence is irrelevant. Punishment, according to offence committed, must be meted out, unless it can be shown that the object of one of the assemblies was to repel forcible an criminal aggression (AIR 1929 Pat 705). In this connection it is to be remembered that a free fight means a fight when both parties intend to fight from the very beginning and go out for the purpose and then there is a pitche battle. The fact that equal number of injuries are sustained on either side is not sufficient to show that there was a free fight. Where there is no evidence to justify a finding as to a free fight, the court should look for evidence to see which party was the aggressor an in the absence of reliable evidence to arrive at a finding on this point, the accused are entitled to acquittal (AIR 1933 Lah 808).

Where a sudden mutual fight ensued between the parties and there could, therefore, be no question of involving the aid of section 149 for the purpose of imposing constructive criminal liability on the appellant. The accused could be convicted only for the injuries caused by him by his individual acts (AIR 1973 SC 2505:1976 crLJ 1883; AIR 1976 SC 912).

Where there was no clear cut case of preplanning and premeditation in the affair which seemed to have flared up all of a sudden in which both the parties fell upon and caused injuries to each other. Their conviction under section 148 Penal Code was not sustainable and each would be held responsible for the injuries inflicted by him (1973 Law Notes 554).

Where there was long standing enmity between the parties and on the day of the occurrence, the appellant along with others came variously armed and started giving blows to the complainant and his son, and the complainant then snached a spear from one of the assailants and caused injuries to them, and therefore, two of the appellants brought fire arms and fired at the deceased and the complainant, as a result of which the deceased expired, it was held that the concurrent findings of these facts by both the courts below clearly showed that the appellants were the aggressors and aggressors, even if they receive injuries from the victims, could not have the right of private defence. Hence, they were rightly convicted under sections 302, 307, 323, all read with sections 148 and 149 (AIR 1981 SC 1397=1981 CrLJ 1027).

10. **Charge under section 149, if recourse can be had to section 34.-** The question was whether the accused could be convicted under section 304 (1)/34 of the Penal Code when the charge against them was under section 302 read with

section 149. Held that both sections 34 and 149 Penal Code, deal with constructive liability and it is to be considered whether the accused who have been convicted under section 304(1)/34 have been prejudiced in the absence of a charge under that section. A slight variation in the facts established from the facts alleged in the charge and a conviction for an offence on the facts established should not render it by itself bad in law in view of the provisions of section 236, read along with the illustrations as well as section 237 of the Cr. P.C. (12 DLR 365). Where the facts are not sufficient for a conviction with the aid of section 149, the conviction can be maintained with the aid of section 34 (1986) 2 Crimes 364 (366) SC).

Section 34 can be substituted for section 149 when the facts are such that the accused could have been charged alternatively either with section 302 read with section 149 or section 302 read with section 34 and no prejudice results therefrom and the facts are such that the accused could have been charged alternatively under section 149 or under section 34. Such a situation might arise only when the common intention is co-extensive with the common object and does not go beyond the common object (AIR 1964 SC 204; AIR 1961 SC 1787).

It is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject matter of the charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under section 149 would be the same as if the charge were under section 34, then the failure to charge the accused under section 34 could not result in any prejudice and in such cases the substitution of section 34 for section 149 must be held to be formal matter (AIR 1925 PC 1; 26 CrLJ 197=AIR 1954 SC 204).

Both the sections deal with combination of persons who became punishable as 'sharers in an offence'. They have a certain resemblance and may to some extent overlap. Section 34 applies to a case in which several persons both intend to do an act and in fact do the act; it does not apply to a case where several persons intend to do an act but some one or more of them do an entirely different act; in such a case section 149 may apply provided other requirements are fulfilled. The basis of constructive guilt under section 149 is mere membership of an unlawful assembly; the basis of the offence under section 34 is participation in an act with the common intention of doing that act. So where common intention and common object are the one and same in a given case, both these sections may apply. The alteration of the finding by applying section 149, instead of section 34, is not bad in law (1984 BLD (AD) 324; 36 DLR (AD) 234; AIR 1956 SC 116=1956 CrLJ 291). Similarly, the non-applicability of section 149 is, therefore, no bar in convicting the accused under substantive section read with section 34 if the evidence discloses commission of an offence in furtherance of the common intention of them all (AIR 1991 SC 2214).

Alteration of charge from section 302/149 to that of section 302/34 Penal Code is permissible in the facts and circumstances of the case (41 DLR 373). In cases where the common object becomes equivalent to the common intention and when participation in the assembly is coupled with participation in the crime, then the two elements of both the constructive liabilities under section 149 and under section 34 become the same. Hence in such cases no separate charge need be framed for each of them as laid down in section 218 (old 233) of the Cr. P.C. and the conviction of the accused may be altered from one under section 302 read with section 34 without there being a charge for the latter as provided under section 221 (Old 236 and 237) of the Cr. P.C. (AIR 1957 Pat 52=1957 CrLJ 216). The test of legality in such cases is whether the facts which it was necessary to prove and on

which the evidence was given of the charge upon which the accused was actually tried are the same as the facts upon which he was convicted (AIR 1956 AP 247=1956 CrLJ 1389).

Accused if charged under sections 302/149 P.C. may be convicted under sections 302/34. The liability under these two distinct heads of offences are almost similar involving constructive liability. It is to be noticed that under section 149 the elements of constructive liability consist of common object and participation in the unlawful assembly where as under section 34 the elements are common intention and participationin the crime. Common intention or object in both the sections are common as well as joining the unlawful assembly and of joining or participation in the crime are the elements in both the sections constituting constructive liability. The line of demarcation in these two sections is thread-bare very thin and almost identical overlapping the distinctive features of these two sections. Therefore, the question of prejudice can hardly be of any importance as accused while facing trial more concentrate their attention on the broad and substantive features of the offence than on the thread-bare line of demarcation of the distinction between the charge. Moreover, the facts that Sujan and Khushid and other accused armed with weapons trespassed into Sona mia's land with the common object of taking forcible possession which of failrue, they being inspried with common intention, committed the murder of Sona Mia. Therefore under section 237 applying section 236,Cr. P.C. Sujan and Khurhed must be convicted undr section 302/34 as prosecution witnesses have cogently proved the complicity of these two accused in the crime beyond all shadow of doubt. And the order of conviction may be altered from the one under section 302/149 to that under section 302/34 against these two accused appellants (41 DLR 373).

When charge is under section 302/34, conviction under section 302/149 Penal Code is illegal (AIR 1971 SC 1467). But if the evidence discloses commission of the offence in prosecution of the common object and also in furtherance of common intention of all the accused,then charge under section 149, Penal Code, is no impediment to a conviction by the application of section 34, Penal Code (1978 CrLJ 798 AP; 1969 CrLJ 160). Conviction of two accused persons out of six charged under section 302/149 Penal Code, can be maintained under section 302/34 once their identity and participation is established despite the fact that other four persons are acquitted (AIR 1960 SC 289; AIR 1968 SC 43=1985 CrLJ 43 (Ori).

While it is true that in certain circumstances a conviction for liability under section 34 Penal Code, can be entered even though the charge mentions only section 149, Penal Code, there can be no doubt that the proper procedure is to put the accused person in notice of the precise ground on which liability is cast upon him (AIR 1958 Ker 94; 1985 CrLJ 424).

The question of common object of an unlawful assembly was not considered but conviction was based on common intention. Held, conviction can be sustained by altering the charge from section 34 to section 149 Penal Code (1986) 1 SCJ 588).

11. **Charge and conviction.-** The charge should be framed on the following lines:

" I (Name and designation of Magistrate/Session Judge hereby charged you), (Name of the accused) as follows :-

That you on or about ..... (date) at ..... (time) at ..... (place) were a member of an unlawful assembly, one of the members of which unlawful assembly namely ..... committed in prosecution of the common object of that assembly to wit ..... an offence under section ..... Penal Code (or committed an offence under section ..... Penal Code such as the members of that assembly knew to be likely

to be committed in prosecution of the common object of the said assembly) and thereby you committed an offence under section ..... Penal Code read with section 149, Penal Code, and within my cognizance.

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

To justify conviction of members of unlawful assembly for some common object, act must have been done to accompolish common object (1988 CrLJ 1446 (pat).

Whenever a court convicts any person or persons of an offence with the aid of section 149 a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under section 149 of the Penal Code, the essential ingredient of section 141 of the Penal Code must be established. Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of five or more persons having a common object and the doing of acts by members is in prosecution of the object. The exphasis is on common object (1980 CrLJ 725 (726) Pat).

Section 149 creates a specific and distinct offence. That being the position, a specific charge under this section must also be framed along with the substantive section. An accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, when he is sought to be implicated for he acts not committed by himself but by others in whose company he was (1984 CrLJ 386 Pat).

In order to find whether the accused had been prejudiced, a good test would be to see whether the accused had no notice during the trial of the case as to the common object so as to enable them to meet it in their defence and in cross-examination 1974 KLT 328).

Where there is no charge under section 149 which creates a specific offence, the strong reasons would be required for using it to convict a person under that section in the absence of specific charge (AIR 1955 SC 216).

There can be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefor. The absence of specific charges against a person of offences in respect of which he has been convicted is a very serious lacuna in the proceedings in so far as it concerns him (AIR 1955 SC 419 (422).

The contention that inasmuch as the charge in the present case did not mention that the appellants had knowledge that death was likely to be caused in prosecution of the common object, the charge was illegal and vitiated the trial. Especially in view of the fact that the appellants were defended by counsel in the trial and were in no way prejudiced by not mentioning in the charge that they knew that death would be a likely result of the prosecution of the common object of the assembly (AIR 1956 SC 116 =1956 SCJ 182).

A mere omission to mention in the charge that the accused had the knowledge or the likelihood of the offece being cmmitted as required by the second part of the section, it was held that it was only an irregularity and not an illegality. If the accused is not prejudiced thereby (AIR 1961 SC 803; AIR 1970 SC 359; AIR 1967 SC 587). If there is some element of doubt, charge can be validly framed for a substantive offence read with section 149 Penald Code, in view of sections 236 and 237 Cr. P.C. and conviction and sentene can legally be passed for the substantive offence (9 DLR

(SC) 1). Where an accused is charged for an offence with the aid of section 149, it is not obligatory to charge him under section 143 or under section 147 (AIR 1966 SC 302).

Where the accused were not charged uner section 149, the appellate court would require strong reasons for using that section, even if it was possible to convict under that section in the absence of a specific charge without occasioning a failure of justice (1971 CrLJ 559 Goa).

A charge for substantive offences under sections 302, 324 and 447 is for distinct and separate offences from those under sections 302, 324 and 447, read with section 149. Where there was no direct and individual charge against the accused-appellants for the specific offences under sections 302, 324 and 447, it was held that the absence of specific charge was a serious illegality which had materially prejudiced the accused and the contention that it was only an irregularity which was curable under sections 537/535, Code of criminal Procedure, 1898, could not be accepted (1973 CrLJ 1079 Raj).

Appellant Nos 2-6 cannot be convicted under section 326 of the Penal Code without framing any charge under section 34 or 149 of the Penal Code and without leading any evidence as to their acting in concert or in pursuance of any common object. The prosecution case is that it was Azit who threw the bomb at the order of the Chairman. The charge under the said section was not framed by adding section 34 or 149 of the Penal Code and no evidence was led as to acting in concert or in pursuance of any common object. The appeal was allowed and the conviction and sentence was set aside (Ibrahim Molla v. State 40 DLR (AD) 216 = 1987 BLD (AD) 248).

Where there was a specific charge under section 148 and the common object of the unlawful assembly had also been set out, it was held that the petitioners could not complian of prejudice on the ground that they had no notice of the ingredients of the offence under section 149 (1974 Cul T 428).

Where murder was committed by six accused in furtherance of the common intention of all and they were charged of an offence under section 302 read with this section, it was held that they could be convicted under section 302 read with section 34, as no prejudice was caused by the alteration of the charge (AIR 1968 SC 43; 1986 SCC (Cri.) 191= 1968 CrLJ 1242 (SC).

It is not obligatory to charge a person under section 143 or section 147 when charging him for an offence with the aid to this section. Section 143 and 147 are implied (AIR 1966 SC 302 = 1966 CrLJ 147).

Where the common object of the assembly which was an essential element in the offence was not stated in the charge; it was held that the conviction under section 147 could not be sustained as the accused were prejudiced by the non-mention of the common object. Hence, the question of conviction under section 149 which was dependent on section 147 could not arise (AIR 1954 Mad 785).

It is question to be determined on the facts of each case whether a charge under section 149 overlaps the ground covered by section 34. If the common object which is the subject matter of a charge under section 149 does not necessarily involve a common intention, then the substitution of section 34 for section 149 might result in prejuice to the accused and ought not therefore be permitted. But if the facts and evidence to be adduced for both the charges would be the same then the failure to charge the accused under section 34 woul not result in prejudice and in such cases the substitution of section 34 for section 149 must be held to be a formal matter (AIR 1954 SC 204). Similarly there was no legal bar to the recording

of a conviction under section 302 read with section 149 when the accused were charged under section 302 read with section 34 (AIR 1961 AP 23).

Where the accused are charged with substantive offence read with section 149, they may be convicted of the substantive offence alone provided that individual liability can be fixed on them on the basis of the evidence on the record. The conviction would not be illegal by virtue of sections 236, 237 of the Cr. P.C. (PLD 1956 FC 425; PLD 1956 SC 440).

There can be no conviction under section 148/149. The question of constructive liability under section 149 does not arise for a conviction under section 148, because the very definition of the offence of rioting in section 146 Penal Code involves constructive liability (AIR 1961 Ori 29; AIR 1924 Pat 280).

Where the accused are charged with murder they can be convicted under second part of section 149 of a minor offence covered by the charge even though the charge does not mention that the accused knew that a minor offence was likely to be committed (AIR 1946 Pat 84).

A Court of appeal will not interfere with the order of the lower Court convicting under section 149 and section 302 on the ground of any omission in the charge unless such omission has in fact occasioned a failure of justice (AIR 1915 Lah 418). Where there is a charge under section 295/149 Penal Code without mentioning specifically that the accused were members of an unlawful assembly, the efect if any, in the charge is merely an irregularity not affecting the legality of conviction if the accused is not prejudiced thereby (AIR 1952 All 878).

Where the charge did not refer to any knowlege of likelihood on the part of the accused-respondents of the offence of mruder being committed in prosecution of the common object of the unlawful assembly, it was held that failure to do so did not by itself necessarily and automatically render illegal the conviction based on the conclusion that the members of the unlawful assembly must have known that the offence of mruder was likely to be committed in prosecution of the common object. But as it was also the case that the accused -respondents in the instant case were not examined under section 342, Code of Criminal Procedure, 1898 as regards their knowledge of the likelihood of the murder being committed in prosecution of the common object of the unlawful assembly, it was held that this omission was relevant on the question of prejudice to the accused - respondents, and hence, the state appeal against the acquittal of the four accused - respondents was dismissed (1971 SCC (Cri) 54).

Where the unlawful assembly consisted of 5 named perons and no others and the four persons were given the benefit of doubt, the 5th person who was charged with section 302/34/149 could not be convicted by reading sections 34/149 and 302. But the appellant could be convicted for voluntarily causing grievous hurt (section 326) by altering the charge and convicted (AIR 1976 SC 1084 = 1976 CrLJ 835). Where the common object of the unlawful assembly was to commit theft and assault on the resisters and if some members commit murder all the member of the assembly would not be guilty of murder under section 149 (1966 CrLJ 856).

Where the hearing of a *prima facie* case against the appellants indicated that a charge agianst the appellants for unlawful assembly and rioting could not be framed and the appellants could only be charged for their inividual acts, or if the material warranted it section 34 might be invoked, it was held that the charges framed by the Magistrate must be set aside and the matter remanded to the Magistrate to frame a proper charge (1983 SCC (Cri.) 48).

Where the allegation was that all the accused persons together played cards sitting on a road and also made noise, thereby causing annoyance to the public, it was held that the allegation appeared to be that each one of the accused committed the offence inividually in the course of the same transaction resulting the annoyance to the public. Hence, all the accused could be charged together for the offences committed in the course of the same transaction and it was not necessary that there should be an allegation of a common object of an unlawful assembly or common intention (1985 CrLJ 756 Ker).

Members of an unlawful assembly are not necessarily guilty of the same offence as the principal offender. It has to be determined with reference to the facts what offence the members must have known to be likely to be committed; if such offence is a minor offene then they should be convicted accordingly (AIR 1927 Sind 108). The liability of the individual members must necessarily depend on the intention or knowlege of the members. If the common object of the unlawful assembly is to inflict no more than grievous hurt in circumstances where death was not the likely consequence but some of the members of the assembly deliberately went beyond the common object and killed their victim, the killers would be liable for murder but the remaining memebrs would be constructively liable for inflciting grievous hurt. The wording of section 149 Penal Code when applied, as it must be, to the case of each individual accused appears to be perfectly straightforward. It cannot, in any event, be seriously argued that the causing of death does not fulfil the definition of grievous hurt. Thus even the principal offenders have in such a case also committed grievous hurt. Thus even the principal offenders have in such a case also committed grievous hurt, the common object of the assembly, and therefore, the other members can legitimately be held to have constructively committed grievous hurt. Where the accused are members of an unlawful assembly which starts beating the deceased and the assembly is armed with deadly weapons but the accused are found not guilty of murder, there is no reason why they cannot be held to be constructively liable for the lesser offence of grievous hurt, read with section 148 Penal Code, because they must have in the circumstances of the case, known that a grievous injury was likey to be caused (PLD 1968 SC 372).

It is not necessary that principal offender should be convicted before any other member may be held liable under section 149. Once the court can find that an offence has been committed by some member or members of an unlawful assembly, in prosecution of the common object, then whether the principal offender has been convicted or not, the other members may be constructively convicted of that offence, provided they are found to have had the necessary intention or knowledge (AIR 1947 Pat 27).

It might be useful to add a charge under section 147 or section 148 in such cases to guard against the failure of the charge for an offence read wth secton 149. If a specific charge under section 147 or section 148 had been framed and that charge had failed against the accused persons, then secton 149 could not be invoked against them, as the clear implicaton of the acuittal of the accused under section 148 was either that there was no unlawful assembly or that the employment of force or violence, even if any such force or violence was used, was not in prosecution of the common object of assembly (1976 CrLJ 1563 SC; AIR 1976 SC 2027; AIR 1966 SC 302 = 1966 CrLJ 179).

In all cases where charges are framed under section 147, 148 for substantive offence read with section 149 of the Penal Code, additional, separate charges should be framed against each individual accused for an offence directly committed by him

while being a member of such assembly and it should be carefully taken note of the provisions of sections 221, 233 and 236 of the Cr. P.C. Charge which causes prejudice to the accused due to error or irregularity makes out a case for retrial. It is found on appeal that there was an error or omission or irregularity in the framing of a charge against an accused causing prejudice to the accused in his defence, that would merely be a groun for retrial of the accused after framing a proper charge. Conviction of other accused under sections 148, 324/149 and 326/149 of the Penal code cannot be sustained merely on the basis of omnibus statements of the witnesses that they and several others came armed with weapons like *leja* and a *sarki*. For coming to a definite finding whether each of the accused persons were members of the unlawful assembly and did commit the offence of rioting in prosecution of the aforesaid common object of the assembly. Overt act of each accused and weapon used by each accused have necessarily to be considered (34 DLR 94).

The common object of the unlawful assembly as mentioned in the charge and as found by the court was merely to administer a chastisement to the deceased. The charge did not mention that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object. The deceased was killed by the fatal injury caused by a certain member of the unalwful assembly. It was held by the Supreme Court that the other members of the unlawful assembly who had not caused any fatal injury could not be convicted under section 302 read with section 149 or section 34 (AIR 1956 SC 731; 1982 SCC (Cri)260; 45 DLR 267 (Para 26). Indulgence in overt act by each and every person is not necessary in conviction of all accused (1982) 2 SCJ 280).

An accused cannot be convited under section 302, Penal Code for committing the offence directly, and under section 302 read with section 149 Penal Code, at the same time, for committing the offence constructively. If a man does commit an offence directly there is no question of his committing it constructively, and vice versa (AIR 1955 Assam 226). In the case of rioting resulting in grievous hurt convictions and separate sentences under section 325 are legal where it is shown that the accused actually joined in the assault. Some of these assaults may have resulted in simple hurt, others in grievous hurt, but all the actual assailants are under section 149, liable for the total result (AIR 1924 Ranj 291). Therefore where there is a general riot between processionists and their opponents, it will be more proper and more logical not to record a separate conviction against the accused in respect of individual acts under section 341(AIR 1961 Mys 57).

Where the common object of the assembly was to cause grievous hurt, and death was caused by only one of the members of the assembly for which the other members were not responsible, conviction of the other members under section 326 read with section 149 cannot be held illegal merely because no member of the assembly was proved to have caused grievous hurt to the vicitms. The offence under section 326 is in its relation to the offence of murder a minor offence and the language used in section 149 does not prevent the court from convicting for that minor offence merely because an aggravated offence is also committed (PLD 1968 SC 372; AIR 1960 SC 725; 45 DLR (1993) 267 (para 26). Where two of the accused were armed with daggers and the rest with bangs and one of dagger carrying accused caught hold of the decease when he tried to run, and threafter all of them, chased the deceased and encircled him. Both the dagger carrying accused stabbed the deceased and one other accused stuck the deceased's hand with a bang. All the accused were held to conviction under section 326/149 but the dagger carrying

accused were liable to conviction under section 302/34 Penal Code (1968 PCrLJ (Dhaka) 645).

Where some accused used pistols whereas other carried only sotas, and the injuries caused with blunt weapons were confusions and were simple in nature. The accused armed with sotas would be individually liable. They were not convicted under section 302/149 (NLR 1984 Cr. 362).

It is settled law that where a number of persons go armed with deadly weapons to attack a person or a party, it may be assumed as a matter of common sense that their common intention is at least to cause grievous hurt. If in the course of the commission of that offence death is caused the persons so attacking will be guilty of an offence under section 302, Penal Code, and the person who caused the fatal injury need not be found out for convicting all of them (AIR 1933 All 582). Therefore where lathis or axes are used for assaulting one's enemies and death is caused, all the accused may be convicted under section 302/149 (AIR 1958 All 348).

In State of Haryana Vs. Prabhu (AIR 1979 SC 1019 (1020), there was neither any charge of any common intention of committing the murder of anybody nor on the facts of the case such an inference was at all possible. It was clear that the common object of the assembly was merely to give a beating to the members of the complainant party, the main target being Mohan Singh. There was no common object to commit the murder of deceased Kalu. All the members of the mob were armed with lathis. The members of the mob used their lathis in assaulting Kalu, Mohan Singh and others. But the nature of the injuries clearly show that neither the common object was to kill nor is it possible to infer that any member of the mob had the knowledge that death was likely to be caused in prosecution of the common object of assault. It was held that the High Court did not commit any error in converting the conviction from one under section 302 read with section 149 to setion 325 read with section 149, Penal Code.

Conviction being under section 302, no question of acquittal under section 302/149 arose. The trial court having found the appellant guilty for the specific offence of murder under section 302 of the Penal code the alternative charge framed against the appellant needed no consideration. It was also not necessary to record any finding with respect to that charge and as such there was no question of acquittal of the appellant of the said charge. High Court held the charge under section 302/149, proved and a charge on specific offence under section 302 not proved and altered conviction under section 302 to one under section 302/149. High Court competent to do it (28 DLR (SC) 170; REf. 1 BSCD 240).

If a charge is framed under section 302 with the aid of section 34 or 149 the conviction and sentence can be made under section 302 alone. Where it is found that each of the accused is individually guilty of murder under section 302 notwithstanding that the charge preferred against them in respect of the murder is one of the constructive liability, i.e. under section 302 read with section 34 or 149 Penal Code. If on evidence the court is satisfied that each of the accused appellants is individually liable for murder, it can convict and sentence them straight under section 302 Penal Code (25 DLR 232).

Where the four appellants, along with a large number of perons, attacked the deceased with lathis but only four appellants were found to have taken part in the beating in which twelve injuries were inflicted on the deceased, out of which ten were on the nonvital parts of the body, and the remaining two injuries, which were

on the vital part of the body proved fatal but it was not known as to who of the four appellants was responsible for them, and it was further established that the common intention of the appellants was merely to give the decesed a sound beating; it was held that the appellants could not be convicted under section 302 read with section 149, Penal Code. The appellants were punishable only under section 325 read with section 34 Penal Code (AIR 1939 Oudh 254; AIR 1939 Rang 273; 40 CrLJ 871).

Where in a case of murders committed by a large number of accused, the witness lodging the FIR had given a fairly detailed account of the occurrence and mentioned the names of the witnesses and also the names of the deceased persons and then he proceeded to give a long list of names of the accused and it was generally stated that all of them were exhorting and surrounded the witnesses and the members of the prosecution party and attacked them but to some extent specific overt acts were attributed to nine accused only and mentioned therein that those accused were armed with deadly weapons and were seen assaulting certain deceased and others but in his deposition he improved his version and stated that in addition to those nine accused, five more persons also attacked the deceased and others; in view of the variation it was safe to convict only such of the accused who were consistently mentioned as having participated in the attack from the stage of the earliest report. It was highly unsafe to apply section 149 and make everyone of the accused constructive liable (Sherej and others Vs. State AIR 1991 SC 2246).

12. Punishment.- Where the common object of the unlawful assembly was found to be only the giving of beating to certain persons and the highest offence which members of such assembly knew to be likely to be committed was grievous hurt in absence of evidence of any special intention or knowledge (apart from the general object or knowledge attributable to all members of assembly) two of the members of such assembly could not be convicted of murder under section 302 read with section 34 Penal Code. Unless there be intention or knowledge of one of the kinds specified in section 299 Penal Code no conviction for culpable homicide can be had (5 DLR (FC) 44).

Where a number of accused participated in beating a man to death under circumstances which amount to murder under section 302/149 of the Penal Code, the conviction should be under some lesser section than 302. Section 149 does not create a new offence but provides for vicarious liability for offences committed by others in furtherance of the common object. Under this section the liability of the other members except those who assaulted the deceased for the offence committed during the continuance of the occurrence rests upon the fact whether they knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may be reasonably inferred from the nature of the assembly, arms or behavior at or before the scene of occurrence (19 DLR 927).

Where the accused are clearly guilty of a more serious offence and their common object to commit it is established, the court should convict the accused of that offence alone and not of the minor offnces of that offence. Thus where all the accused act in concert and lie in ambush with the common object of killing the deceased, all of them are constructively liable for murder notwithstanding the fact, that some of them did not take leading part in the commission of murder (1968 SCMR 719).

"Member of an unlawful assembly may have a community of object up to a certain point, beyond which they may differ in their object, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of section 149 of the Penal Code may be different on different members of the same unlawful assembly (AIR 1965 Punj 90 (93).

Where on a careful appraisal of the entire evidence on record, the court comes to the unhesitating conclusion that the apellants formed themselves into an unlawful assembly with the common object of committing the murder of the deceased all the appellants must be convicted under section 302/149, Penal Code, even though it cannot be said which appellant is responsible for the fatal blow (1975 CrLJ 564 (567 Ori).

There may be cases where the part of each accused in brutally murdering the deceased may vary, one of the accused taking minor part and another taking a major part though their common object is to commit murder. In such a case, perhaps there may be a good ground for differentiation in the infliction of punishment on the several accused (AIR 1954 AP 46; AIR 1953 SC 364).

Where all the four apellants along with two others were members of an unlawful assembly, each one of them being armed with a deadly weapon, but the evidence showed that excepting one who fired shots from a gun causing injuries to the victim others had not taken part in any overt action at the time of the occurrence, it was held that the conviction of all of them under section 307 read with section 149 was proper but under the circumstances of the case, the fact that the other appellants had not used their respective weapons during the assault was a mitigating factor and hence, the sentence passed against them was reduced (1982 CrLJ 199 SC; AIR 1982 SC 59 = 1982 SCC (Cri) 694).

It is not however, the law that whenever section 149 comes into paly the sentence apssed on a member of an unlawful assembly against whom an overt act is proved should be more severe than the one passed on other members of the unlawful assembly (1972) 2 KLJ 13,24).

The matter of sentence has not been dealth within this section nor indeed it would seem to fall within the scope of the unambiguous language in which the section is worded. Therefore the discretion vested in court in the matter of sentence for different offences may be exercised in case of conviction under this section (PLJ 1979 SC 365). There ought to be a difference in the severity of sentence to be awarded to the members of unlawful assembly who take part in the actual killing and those who do not (AIR 1931 Cal 606). Where in a case of rioting the accused were convicted under sections 148 and 335/149 but the court found that two of the accused did not take any active part in the occurrence and only stood by. One of them was aged 70 years and the other 17/18 years. The sentence of the two accused was reduced to imprisonment already undergone (1968 PCrLJ 371). A member of the assembly who was not actually concerned with the act, which caused death, may be appropriately punished with the lesser sentence of transportation for life. The question of sentence must depend on the circumstances of each case. Death sentence is appropriate for those members, who inflicted injuries that caused death

(AIR 1944 F.C. 35). But leniency in matter of sentence to some accused is no ground for reducing sentence of death passed against one accused who was responsible for a brutal and premeditated attack on the deceased (AIR 1957 SC 474).

For conviction under section 302 read with section 149 any sentence less than imprisonment for the life which is the minimum for an offence under section 302 is illegal (AIR 1953 Oudh 190). As a mere proposition of law, it would be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person is found to have committed the murder himself. Whether or not sentences of death should be imposed in persons who are found to be guilty, not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which has to be decided on the facts and circumstances of each case (AIR 1965 SC 202).

Where the accused make a concerted attack on the deceased and have the common object of killing him, death sentence is the only appropriate sentence to be passed on all of them except an accused who is young and under the influence of the other accused (AIR 1946 Lah 229). But were there is a conflict of evidence and it is not clear who fired the fatal shots, death sentence may be reduced to life imprisonment (PLJ 1979 SC 365).

Where in a criminal trial against accused who were alleged to be members of unlawful assembly with common object of setting houses on fire and killing 4 persons out of whom two were charred to death and two were missing, it was proved that the persons who were gathered were members of unlawful assembly and the facts of presence of eye-witnesses, of burning of houses and two persons and of sufficient motive behind occurrence were proved, however, the specific overt acts attributed to accused perons who actively participated in setting the fire and thrown some victims into the fire was not established and they were also not proved to be armed, it was held that the object of unlawful assembly could not held to be to commit murder because the two persons were charred to death due to result of setting fire to those houses and other two persons found missing could not be held to be murdered in absence of evidence, however, the common object of the unlawful assembly could be at least to set the fire and consequently the accused were liable to the convicted under section 436 read with section 149 instead of section 302 read with section 149 and their sentences for life imprisonment were liable to be set aside and 5 years, R.I. should be imposed (AIR 1992 SC 485).

An accused who is a member of an unlawful assembly is not necessarily guilty of the graver offence committed by any member of the unlawful assembly but he could be convicted of a lesser offence provided it is found that he was a member of the unlawful assembly and that such lesser offence was likely to be committed in prosecution of the common object of the assembly. Where the accused were members of an unlawful assembly which started beating the deceased and the assembly was armed with deadly weapons, but accused were found not guilty of muder, it was held that the accused must have known that a grievous injury was likely to be caused and they could be constructively held guilty of the offence of causing grievous hurt read with section 149 (AIR 1978 SC 1769; 1979 CrLJ 892 SC).

150. **Hiring or conniving at hiring of persons to join unlawful assembly.**-Whoever hires or engages, or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

151. **Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.**-Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation.-If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

152. **Assaulting or obstructing public servant when suppressing riot, etc.**-Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as auch public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to theree years or with fine, or with both.

153. **Wantonly giving provocation with intent to cause riot if rioting be committed; if not committed.**-Whoever maliganantly, or wantaonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of riotng be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months or with fine, or with both.

[1][153A. **Promoting enmity between classes.**-Whoever by wrds, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promotes feelings of enmity or hatred betwen different classes of [2][the citizens of [3][Bangladesh]], shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Explantion.-It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing or have a tendency to produce, feelings of enmity or hatred between different classes of [2][the citizens of [3][Bangladesh]].

1 This section was added by the Indian Penal Code Amendment Act, 1898 (Act IV of 1898), s. 5.

2 The words within square brackets were substituted for the words "Her Majesty's subjects" by A. O., 1961 (w. e. F. 23-3-56).

3 The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973 Second Sch. (w. e. f. 26th March, 1971).

[4][153B. **Inducing students etc., to take part in political activity.**-Whoever by words, either spoken, or written or by sings, or by visible representations, or othersise, induce or attempts to induce any student, or any class of studens, or any institution interested in or connected with students, to take part in any political activity [5][which disturbs or undermines, or is likely to disturb or undermine, the public order] shall be punised whith imprisonment which may extend to two years or with fine, or with both.

154. **Owner or occupier ofland on which an unlawful assembly is held.**-Whenover any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exeeeding one thousand taka, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not , in the case of his or their having reason to believe that it was about ot be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

155. **Liability of person for whose benefit riot is committed.**-Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accpted or derived any benefit therefrom , such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

156. **Liability of agant of owner or ocupier for whose benefit riot is committed.**-Whenever a riot is committed for the benefit or onbehalf of any person who it the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject or any dispute which gave rise to the riot, or who has accepted or derivd any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

4 Section 153B was inserted by the Pakistan penal Code (Second Amendment) Ordinance, 1962 (Ord. LXX of 1962), s. 2.

5 The words within square brackets were inserted by Act XX of 1965 s. 2.

157. **Harbouring person hired for an unlawful assembly.**- Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any person, knowing that such person have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term whcih may extend to six months, or with fine, or with both.

158. **Being hired. to take part in an unlawful assembly or riot; or to go armed.**-Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assis in doing any of the acts specified in section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

159. **Affray.**-When two or more persons, by fighting in a punblic place, disturb thepublic peace, they are said to 'commit an afftray".

160. **Punishment for commiting affray.**-Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred taka, or with both.

CHAPTER IX

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS

161. Publice servant taking gratification other than legal remuneration in respect of an official act.-Whoever, being or expecting to be a public servant, accept, or obtains, or agrees to accepts, or attempts to obtaim form any person, for himself or form any other person, any gratification whatever, other then legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, *[with the Government or Legislature], or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explaintions.-"Expecting to be a public servant." If a person not expecting to be in office obtains a gratification by deciving others into a belief that he is about to be in office, and that he will then serve them, may be guilty of cheating, but he is not guilty of the offence defined in this section.

*. The words "with the Central or any Provincial Government or Legislature" were first substituted for the words "with the Legislative of Executive G. of I., or with the Govt. of any Presidency, or with any Lieutenant-Governor" and than the word "Government"was substituted for the wores "Central or any Provincial Government" by Act VIII of 1973 Second Schedule (w. e. f. 26th March 1971).

"Gratification." The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.

"Legal remuneration" The words "legal remuneration" are not restricted to remuneraton whcih a public servant can lawfully demand, but include all remuneration which he is permitted by the [1][authority by which he is employed], to accept.

"A motive or reward for doing." A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations

(a) A, a munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a rewad to A for eciding a cause in favour of Z. A has committed the offence difined in this section.

(b) A, holding the office of [2][consul] at the Court of a [3][foreign] Power, accepts a lakh of [4][taka] from the Minister of that Power. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular sevice to that Power with the [5][Governmentof Banglaesh]. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. A has committed the offence defined in this section.

(c) A, a public sevant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

Synopsis

1. Scope and application.
2. Section 161 distinguished from section 5 of Prevention of Corruption Act 1947.
3. Public servant.
4. Gratification.
5. Official act.
6. Evidence and proof.
7. Evidence of decoy or trap witness.
8. Testimony of accomplice.
9. Appreciation of testimony in trap case.
10. Accused persons to be competent witness.
11. Presumption under section 4 of prevention of corruption Act, 1947.
12. Sanction.
13. Charge.
14. Conviction and sentence.

1. **Scope and application.-** Demand for illegal gratification is not an essential ingredient of the offence punishable under section 161 of the Penal Code (37 DLR 278). There is no authority for the proposition that making demand for illegal gratification is an essential ingredient of the offence punishable under section 161 of the Penal Code. A plain reading of section 161 of the Penal Code makes it clear that what is important is acceptance of any gratifiction, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act for showing or forbearing to show, favour or disfavour to any person by a public servant in the exercise of his public functions. Conscious acceptance of any such gratification makes

1. Substituted by the Criminal Law Amendment Act, 1953 (Act XXXVII of 1953), s. 2, for "Government, which he serves".
2. Substituted by A. O., 1961, Art. 2 and Sch., for "Resident" (with effect from the 23rd March, 1956).
3. Subs, ibid., for "subsidiary" (with effect from the 23rd March, 1956).
4. The word "Taka" was substituted for the word "Rupees" by Act VIII of 1973 (with effect from the 26th March, 1971).
5. The original words "British Government" have successively been amended by A. O., 1961 (w. e. f. 23-3-56) and Act VIII of 1973 (w. e. f. 26-3-71) to read as above.

a public servant liable to punishment under section 161 of the Penal Code (20 DLR 587; 45 DLR 626). Demand for illegal gratification and its actual receipt are separate and distinct offences although forming part of a continuous process (21 DLR 1969 (SC) 182). there must be a demand of bribe and also acceptance of amount by the accused (State of UP V. ram asrey; 1990 (1) crimes 610 (SC).

"Official Act" within the meaning of the section includes both bonafide and malafide acts. Bribe taker receving money by holding out threat of malafide act, comes within the mischief of section 161, where bribe obtained through threats bribe geviver is an 'abettor' inspite of the fact that bribe was paid under threats. Section 165B provides special exemption in favour of such abettor also. Bribe offered to a public servant constituted the offence irrespective of the question whether he himself in a position to do the official act or not. The functus officio doctrine no longer seem to be accepted doctrine. The fact that the public servant is functus officio when money is offered to him as bribe, would not by itself be sufficient to negative the offence under section 161 of the Penal Code, the gist of the offence being that extra legal gratification is obtained as a motive or reward for doing official acts. The nature of the act must, of course, be official and not attributable purely to the private capacity of the bribe taker. Section 161 of the penal Code is not limited to official acts only but applies even if a public servant is requested to render any service with another public servant and that it is not necessary that the pubic servant must in fact be in a position to do the official act. To constitute an offece uner section 161 of the Penal Code, it is sufficient that there is an offer of bribe to a public servant in the belief that he has an authority or power in the exercise of his official functions to show the offence desired favour although the public servant has in reality no such power (13 DLR 219). Impression of the bribe giver that the officer is in position to show official favour is the real test in a charge under section 161. On a charge under section 161 Penal Code the real point is not whether the particular public servant was at that particular time in a position to render the official service sought but whether the accused person was under the impression that he was in a position to show favour in the exercise of his official functions (9 DLR 67; 4 DLR 543).

If an accused is not a public servant within the meanding of this expression in section 161, Penal Code with reference to the work in respect of which he has accepted a bribe, section 161, Penal Code, cannot be attracted (AIR 1970 Guj 97 (103). This section provdes for punishment of a public servant taking a bribe and not of the giver of the bribe. The bribe giver's case is met by section 109 under which he is liable for abetment. Now section 165A provides for his punishment.

When accused is charged and tried for actual receipt of gratification he cannot be convicted for the offence of attempting to obtain a bribe (1961 MPLJ 721).

In a case under section 161, it is not necessary for the prosecution to show how the illegal gratification came to be demanded or obtained so long as it can be clearly established by evidence that it was obtained (20 DLR 587). There is no authority for the proposition that making demand for illegal gratification is an essential ingredient of the offence under section 161 of the Penal Code. Conscious acceptance of any such gratification makes a public servant liable to punishment under section 161 of the Penal Code. It is therefore the duty of the prosecution to prove that there was conscious acceptance of the money by the accused (20 DLR 587).

To constitute an offence under this section it is enough if the public servant who receives the money takes it by holding out that he will render assistance to the

giver 'with any other public servant' and the giver gives that money under that belief. It may be that the receiver of the money is in fact not in a position to render such assistance and is even aware of it. He may not even have intended to do what he holds himself out as capable of oding. He may accordingly be guilty of cheating. Nonetheless he is guilty of the offence under section 161 of the Penal Code. This is clear from the fourth explanation, section 161 Penal Code (AIR 1955 SC 70; 1955 SCJ 153). Thus where a public servant who receives illegal gratification as a motive for doing or procuring an official act whether or not he is capable of doing it or whether or not he intents to do it he is quite cleary wthin the ambit of section 161 of the Penal Code (1955) 1 SCR 965, 967, 968). Whether the public servant was capable of performing the promised act or intened to do such act is not a relevant consideration (AIR 1968 SC 1419).

Three things are necessary to amount to bribe. Receiver of bribe must be a prospective public servant. He must receive or solicit an illegal gratification. It must have been received as a motive or reward for doing an official act which he is empowered to do (AIR 1969 SC 17). Section 161 Penal Code requires that the accused accepting the gratification should (1) be a public servant, (2) accepts it for himself and (3) should accept it as a motive or reward for rendering or attempting to render any service or disservice to any person with any other public servant (AIR 1959 SC 847). It would be an offence for a public servant if he (acting in his official capacity) accepts gratification for holding out hopes that he would render or attempt to render any service to any person (AIR 1955 NUC 2795 Assam).

To constitute an offence under section 161, Penal Code, it is sufficient that there is an offer of a bribe to a public servant in the belief that he has an opportunity or power in the exercise of his official function to show the officer a desired favour, although the public servant has, in reality, no such power. Performance of the act which in the consideration for the bribe is not essential but it is essential that the bribe should be obtained as a motive or reward. similarly, whether the complainant desires the accused to perform by way of consideration of the bribe whether it is actually performed or not at the time of the acceptance of the bribe, is not relevant. What is relevant is that the amount of bribe has been received by corrupt or illegal means by abusing his position as a public servant. Once it is shown the offence is complete. Hence, even if the illegal gratification is received after the official act is done, yet, to will constitute an offence under section 161 of the Penal Code. As far as the wording of section 5(1)(d) of the Prevention of Corruption Act, 1947 are concerned, the same are wider than the wording of section 161. It cannot be said that no offence is committed when the accused had already performed his official act on the date on which he received the gratificcation, either under section 161 of the Penal code, or under section 5(1) (d) r/w secction 5(2) of the Prevention of Corruption act (1993 CrLJ 3796; AIR 1992 SC 604=1992 CrLJ 524 applied).

Dermand for illegal gratification and its actual receipt are separate and distinct offences although forming part of a continuous process (Mohd Sarwar Vs. State (1969) 21 DLR (SC) 182).

Section 161 of the Penal Code, or section 5(1) (a) or 5(1) (b) read with section 5(2) of the Prevention of Corruption Act does not say that the public servant himself must have power or must himself be in a position to perform the act to show favour or disfavour or to render service or disservice for doing. Showing or rendering for which bribe has been paid to him (AIR 1954 Sau 62; AIR 1952 Bom 435). Provision of section 161 of the Penal Code is not confined only to reward for future services which are to be rendered but also for services which might have already been rendered (1968 CrLJ (All) 391). It is not necessary that the act for doing which the

bribe is given should actually be performed or that the public servant should be competent of performing it (1973 CrLJ (Raj) 703).

Bribe for past favour equally an offence. Offence is complete if the bribe giver is led to believe that the act would go against him if he does not give bribe. The bribe or illegal gratification may well be a bribe even if it is paid as a reward for favour shown in the past. Whether the act to be one in consideration of a reward amounts to a favour or not, or an official act or not, is not very relevant, if the person giving the bribe is led to believe that the act would go against him if he did not give the bribe (13 DLR 270).

2. **Section 161 distinguished from section 5 of the Prevention of Corruption Act 1947.**- The trial of an offence under section 161 is now governed by the procedure laid down in the Prevention of Corruption Act 1947 (II of 1947). Section 5 of Preventionof Corruption Act is more extensive than section 161 Penal Code. Abuse of position by a public servant is an offence under section 5 though facts may not satisfy the ingredients of section 161 Penal Code. The appellant been in passport office was convicted under section 5(2), Prevention of Corruption Act (II of 1947), for accepting illegla gratification for handing over a passport to the applicant thereof. It was argued in appeal that handing over of passports was not part of duty of the peon, and therefore, the appellant could not be said to have done any of the things mentioned in section 161, Penal Code. Held, that the appellant could not be exonerated under section 5, Prevention of Corruption Act (II of 1947). Section 5 of the Preventionof Corruption Act, 1947, makes punishable many more reprehensible acts of public servants then those made punishable by section 161 of the Penal Code. Clauses (d) of section 5 of the Act II of 1947 is to the effect that a public servant who by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage, commits an offence of criminal misconduct made punishable by that section and if the ingredients of section 5 are satisfied, it is immertial for a conviction under that section whether the ingredients of section 161 of the Penal Code are satisfied or not (PLD 1955 Lah 540). For the more effective prevention of bribery and corruption, the Prevention of Corruption Act, 1947 (II of 1947) was passed. The provisions of that Act should be consulted as they materially affect the provisions contained in this section. Section 161 does not control the provisions of section 5 of the Prevention of Corruption Act. Attempts to obtain any gratification whatever, other than legal remuneration, by a public servant is as much an offence under those sections as actual acceptance or receipt of a bribe (PLD 1959 SC 1). It is to be noted that section 161 refers to a motive or reward for doing or forbearing to do something, showing favour or disfavour to any person or for inducing such conduct by the exercise of personal influence. It is not necessary for an offence under section 5(1) (d) of the Prevention of Corruption Act to prove all this (AIR 1956 SC 476).

The offence under section 161 is a species of and is included in the offence under section 5(2) of the Prevention of Corruption Act, 1947 (1974 SCMR 199). These two offences can co-exist and the one will not be considered as overlapping the other (AIR 1957 SC 458). The accused may be charged under either or both of the sections although he could not be punished more than once for the same offence (1974 SCMR 199). Where a person was tried and convicted under section 161 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 and was awarded concurrent sentence of 6 months rigorous imprisonment on each count and

in addition a fine of Rs. 50 on each count; it was held that the punishment was illegal inasmuch as it imposed a fine of Rs. 50 under each of the two enactments making a total of Rs. 100 and this involved a duplication of punishment for the same offence (PLD 1961 Lah. 269).

The offence under section 5 of the Prevention of Corruption Act is an offence which is distinct and separate from the offence under section 161 and, the trial for the offence of criminal misconduct under section 5 of the said Act and offences under section 161 Penal Code where the offences form part of the same transaction may be held at the same time, under the provisions of sections 233 to 239 of the Criminal Procedure Code (PLD 1967 Lah 923). When the offences under this section and section 5(2) of Prevention of Corruption Act are distinct and separate offences, the trial of three offences of the same kind committed within one year under this section and three offences under section 5(2) would be barred under section 234(1) of the Code of Criminal Procedure. Where six distinct and separate offences were tried together, the trial was held to be illegal for misjoinder of charges (PLD 1960 Dhaka 412).

3. **Public servant.**- The question as to who is a public servant must be answered with reference to what has been said under section 21. As, according to that definition, not only persons properly designated public servants, but also perons, who are to all appearance public servants, are entitled to the rights and are subject to the liabilities of public servants, persons who are *de facto* public servants may be convicted under this section. Whatever defect there may have been in their appointment. In other words whenever a person has received a bribe professing to act as a public servant, he could not afterwards turn round and plead the illegality of his appointment as defence to his criminality (16 WR 27).

Even a public servant who is on leave, or one who is dealing with a person who lives beyond his jurisdiction continues to be a public servant for the purpose of this section (AIR 1950 All 5). It has been held that a convict warden, while performing his duties as such, or a Railway servant, or an employee of a nationalised Bank, or a telegraph officer shall be deemed to be a public servant within the meaning of this section (AIR 1924 Bom 385; AIR 1957 Ker 134; NLR 1986 Cr. 781; S. 31, Telegraph Act, 1885). But, a local commissioner appointed by a civil Courts is not a public servant (AIR 1961 SC 218). A sweeper employed by a Municipal Corporation on daily wages is not a public servant and Special Judge, Anti-Corruption had no jurisdiction to try him (1985 PCr.LJ 78).

4. **Gratification.**-Gratification would ordinarly mean what is not lawfully earned gratification in its extend sense mean anything which affords satisfaction and pleasure. Its meaning need not be restricted to pecuniary gratification or gratification estimated in money only. Anything which gives pleasure and satisfaction to the receipient and has value is contemplated in the expression. The expression 'gratification' used in this section and the expression 'valuable thing' used in section 165 are not mutually exclusive in their connotations. Acceptance of a valuable thing by a public servant may amount to acceptance of gratification within the meaning of this section (1958) 61 Bom LR 837). The expression 'gratification' must be held to have been used in section 161, in the sense of anything which gives satisfaction to the recipient. *Prima facie*, therefore, voluntary acceptance of an amount of money or a valuable thing by a public servant will amount to acceptance of gratification (AIR 1959 Bom 543). Where the motive is the showing of official favours, even accepting a donation to charity, or a customary payment in the nature of dasturi comes within the mischief of section 171 (AIR 1923 Bom 44; AIR 1947 Nag 109). This is so because the law will get to the core of the matter and see what the nature of the

payment is and if it is illegal gratification or a bribe taken by an officer for doing a favour or abstaining from doing a disfavour it will come within the scope of section 161, Penal Code (AIR 1952 Mad 561).

For conviction under this section, illegal gratification must have been received with one of the intents mentioned in the section (26 Cr.LJ 1367). Where however intention and knowledge are present even agreement to accept or attempt to obtain illegal gratification is enough (AIR 1955 Bom 61). Actual acceptance of illegal gratification is not necessary (AIR 1955 Bom 61). But if the money or other thing is given to a public servant and there is nothing to show that the public servant knowingly accepted it for doing a favour or for omitting to do something the payment will not fall within the ambit of this section (AIR 1956 Cal 116). The burden of proving this fact is on the prosecution. Therefore it is necessary that evidence be led to show that the accused demanded the money paid to him as illegal gratification. Where that was not proved beyond reasonable doubt, conviction of the accused was set aside (1977 PCrLJ 292).

Illegal gratification may refer to acts, and rewards for past work done. A nexus must be established between the performance of the official duty and the demand or receipt of the gratification. Where it is found that it is no establised, an offence is not made out under section 161 (AIR 1956 SC 476). A payment to a public servant before or after the doing of the official act would constitute an offence when the nexus between the illegal gratification and the official act is established (1980 CrLJ 1460; AIR 1953 SC 179).

The words 'obtaining' or 'attempting to obtain' in section 161 Penal Code, can certainly include a threat. Illegal gratification may be obtained by threat, and it would come under section 161 of the Penal Code. The mere fact that it was stated in the complaint that the accused by putting the complainant in fear of injury and of threat to implicate him in a criminal case obtained illegal gratification does not take the offence outside the scope of section 161 Penal Code or section 5(1) (d) of Act (II of 1947) (1978 PCrLJ 29). Attempts to obtain any gratification whatever, oher than legal remuneration, by a public servant is as much an offence under those sections as actual acceptance or receipt of a bribe (PLD 1959 SC 1).

A demand for illegal gratification and its actual receipt, are separate and distinct offences although forming part of a continuing process (PLD 1969 SC 278). In this context it may be noted that a bribe may be asked for as effectually in implict as in explicit terms (2 All 253). Even a mere demand or solicitation by a public servant amounts to an offence under section 161 (PLD 1959 SC 1). Even where the suggestion is not immediately accepted by the person to whom it is made, the offence is complete because no question of locus *potenitentiae* arises in such cases (PLD 1959 SC 1). It can not be said that an officer, if he obtains goods on credit, even if he does not intend to pay, is obtaining a valuable thing without consideration (1971 SCC (Cri) 370). Pecuniary advantage (as also valuable thing) would be included in gratification (AIR 1960 SC 487).

5. **Official act.**-In order to make out a case under section 161 Penal Code, the prosecution has, apart from showing that the accused who was a public servant accepted some gratification, also to prove that the gratification had been received for doing his official act (1976 CrLJ 1230 (1237) All). The official act for the doing of which a public servant accepts or obtains or agrees to accept or attempts to obtain gratification other than legal remuneration, must be an act which in his capacity as a public servant he can do, but need not be an act which the public servant is obliged to do. If the act is done or inteded to be done in his official capacity as distinguished from his purely private capacity, it is not necessary that public servant should be

obliged to do the act. The act or omission for the doing of which gratification is obtained or accepted or attempted to be obtained must be in connection with the official functions of the public servant (1955) 58 Bom LR 355; 1970 CrLJ 679 Guj).

The expression "official act' in section 161 is an act done in relation to the affairs or business of the Department in which the public servant is serving (PLD 1960 SC 50). If a person accepts money as a motive or reward for an act which cannot be said to be an official act, he would not be guilty under section 161 (1971 DLC 87). Receiving a bribe from a vilalger on the understanding that the accused would get him some land on darkhast in his capacity as kamam is no offence as getting darkhast is not the official act of a kamam (AIR 1924 Mad 851). Similarly the receipt by the doctor of money, for his professional services as a private medical practitioner, in excess of the small sums speciied in the relevant rule does not amount to the gaining of pecuniary advantage by 'illegal means'. It may be a breach of Rules inviting sanctions of a departmental character (PLD 1961 SC 224).

To constitute an offence under section 161 of the Penal Code, it is sufficient that there is an offer of bribe to a public servant in the belief that he has authority or power in the exercise of his official functions to show the desired favour although the public servant has in reality no such power. Therefore, a public servant who is *functus officio* at the time when bribe is paid to him would be guilty of an offence under section 161 if he has created a belief in the bribe giver that he can show him official favour (PLD 1962 Dhaka 16). It is to be remebered in this context that a person cannot be said to be functus officio so long as he can do a favour or disfavour even where that would involve his power to reverse his previous decision, provided that he has the power to do so. Where the doctor in charge of a Government hospital has already decided to discharge a patient but that patient is still in the hospital he cannot be regarded *functus officio* as his duties and responsibilities to the patient still remain and an offer of a bribe to him to retain the patient for a longer period is an offence under section 161, and the refusal to give bribe brings the case under illustration (a) of section 116 (AIR 1917 Cal 850). Even if the illegal gratification is reeived after the official act is done, yet, it will constitute an offence under section 61, Penal Code (Manikrao Abaji Thonge V. State of Maharashtra 1993 (2) Crimes 881 Bom).

Section 161 does not require that the public servant himself must have the power or must himself be in a position to perform the act, to show favour or disfavour or to render service or disservice, for doing, showing or rendering which the bribe has been paid to him (1972 PCrLJ 635) It may be that the receiver of money is in fact not in a position to render such assistance. He may not even intend to do what he holds himself out as capable of doing. He may accordingly be guilty of cheating. Nevertheless he is guilt of the offence under section 161 (AIR 1955 SC 70).

6. **Evidence and proof.**- In a case of bribery it was necessary to prove that it was a result of demand that the money was passed on as illegal gratification (State of Himachal Pradesh v. Tej Ram, 1990 CrLJ 995 HP). A charge under the present section is on which is easily and may often be lightly made but is in the very nature of things difficult to establish, as direct evidence in most cases, is either meagre or of a tainted nature. But this, however, cannot be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If, after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however, strong the suspicion raised against the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal (AIR 1952 Ori 267=1952 CrLJ 1593). The

court must be satisfied not only that the circumstances are consistent with the conclusion that the criminal act was committed by the accused but also that the proved facts are such as to be inconsistent with any other national conclusion than that the accused is guilty person (AIR 1952 Ori 267). When the circumstantial evidence as to demand and receipt of illegal gratification is satisfactory and conclusive, the omission of minor details in the petition of complaint or in the evidene of a witness is of no relevance (Rafiqul Islam Vs. The State; (1994) 14 BLD (AD) 248, 249).

The points requring proof are :

1. That the accused at the time of the offence was, or expected to be a public servant. (AIR 1935 Pesh 26(29).

2. That he accepted or retained or agreed to accept, or attempted to obtain from some person a gratification.

3. That such gratification was not a legal remuneration due to him.

4. That he accepted such gratification as a motive or reward, proof of which is essential (39 I.C. (Cal) 805).

(a) doing or forbearing to do an official act, or

(b) showing or forbearing to show favour or disfavour to someone in the exercise of his official functions, or

(c) rendering or attempting to render any service (ILR (1935) Sind 7(9). or disservice to someone, with the legislative or executive government, or with any public servant.

If in a case under this section the prosecution wants to rely on the finding of the *anthracene powder* on the fingers of the left hand of the accused immediately after the alleged bribe was taken. In order to enable a court to draw the inference that what was found on a person was *anthracene powder* the prosectuion must establish that the tests for the detection of *anthracene powder* had been properly made and had yielded positive results. The main test is the omission of light blue fluorescent light under the influence of ultra violent rays. It is, therefore, essential for the prosecution to prove that there was light blue emission of light under the influence of ultra violent light. It is not sufficient for the prosecution to prove that under the ultra violet light witnesses saw stains of white powder or even that under the ultra violet light they saw some sparkling or some shimmering *anthracene powder* can not be detected by the naked eye but only under the influence of ultra violent lampo. The two tests required to be satisfied by the prosecution to prove the presence of *anthracene power* are, therefore : (1) that no powder was detected with the naked eye; and (2) that when ultra violent light was focussed, there was omission of light blue fluoreacent light. If evidence proved positive results for both these tests, then it would be right to infer that *anthracene powder* was present (AIR 1961 Guj 1 (2).

Cases of bribery like all other criminal cases, are subjected to the rule that the accused cannot be convicted unless the court is satisfied concerning his guilt beyond reasonable doubt. Where, however, the accused person in a bribery case pleads and produces evidence of good character, which the court regards as satisfactory, and if it appears to the court that a person possessing such a character would not be likely to act, in the circumstances proved to have existed at the time, in the manner alleged by the prosecution, such improbability must be taken into account in determining the question whether or not there is reasonable doubt as to the guilt of such accused person (48 CrLJ 882; AIR 1947 Lah 410).

The rcovery of currency notes from the person of the accused is an important link in proving the case in a prosecution for an offence under section 161 and section 5(2) of the Prevention of Corruption Act, and if the recovery becomes doubtful, no conviction can be maintained (AIR 1958 All 334; 1957 ALJ 934). In cases of bribery, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable (AIR 1979 SC 1408). It is not necessary that there should be evidence of indpendent eye witnesses to the taking of the bribe. It is sufficient even though it is merely circumstantial evidence of connection of the person taking bribe with the crime 1960 CrLJ 934; AIR 1960 Mys 111). In the absence of any independent corroboration of the demand of bribe by a public servant and non-examination of official recovery witness, the prosecution case for demand of bribe by a public servant is not free from doubt (Delip Singh V. The Sdtate of Punjab 1988 (2) Crimes 554(P&H).

The evidence required to be led by the prosecution for proving the demand, if the acceptance is proved, would of a very slight character. Quite offence than not, the acceptance spells 'demand' because no public officer can dream of accepting any money from a stranger without there being some pre-exisiting cause for the same and such cause would amount to demand. The plain reading of section 4 of the Prevention of Corruption act, 1947, is that not only the proof of the fact that the purpose of the acceptance is dispensed with, but even the proof of the making of the demand is dispensed with. The very acceptance bears upon itself the stamp of illegal gratification . No one accepts illegal gratification as a motive or reward without there being a nexus between the acceptance and the purpose. The demand is implicit in this entire affairs. (1989 CrLJ 2268 (2275) Bom).

Where it is proved that a gratification has been accepted, the presumption at once arises under section 4 of the Prevention of Corruption act which shifts the onus upon the accused to prove that such acceptance was not as a motive or reward for performing an official act. The presumption, however, is not one which is required to be rebutted by evidence establishing the defence of the accused beyond resonable doubt (1959 CrLJ 1921; AIR 1959 Bom 543). In a trap case onus lies on prosecution to prove basic fact of demand and acceptance of illegal gratification by public servant. Basic fact having once been proved onus then shifts to accused to explain as to how he became passessed of tainted money and where this fact was not proved beyond reasonable doubt question of shifting of onus to accused did not arise (PLD 1983 Lah 514).

Where a person is charged with criminal misconduct and it is seen that he is in possession of property or income which could not have been amassed or earned by the official remuneration which he had obtained, then the court is satisfied to come to the conclusion that the amessing of such wealth was due ot bribery or corruption and the person is guilty of the offence of criminal misconduct. Such a presumption cannot be drawn in the case of a prosecution under sections 161, 165 and 409 of the Penal Code (AIR 1957 SC 458=1957 CrLJ 575=1957 SCJ 289).

When Magistrate asked accused to submit himself for search, he ran into another room and threw the currency notes outside the window which were the same that had been given to complainant. Accused had failed to explain such conduct and even to admit throwing currency notes outside the window. Defence in cross-examination could not create any doubt regarding this aspect of the case. Rading party even if in such circumstances had not witnessed the more cchanging hands would not make material difference due to the conduct of accused. Presumption could safely be drawn that accused had thrown the money outside the window as the

same was received by him illegally. Statement of raiding Magistrate corroborated by other evidence inspired confidence and could safely be relied upon. Prosecution, thus had proved its case against accused. Conviction of accused was maintained in circumstances (Muhammad Amir Khan Vs. State 1990 PCrLJ 1904).

Where it is proved that the accused had accepted money as gratification other than legal remuneration, a presumption arises that the amount was received as motive or reward as is mentioned in section 161 unless rebutted by the accused. The contention that the money was taken for sending the licence by post was also not sustainable in view of the fact that delivery of the licence was the duty of the accused and sending licence by post has nothing but part of his duty (AIR 1967 Bom 1; 1967 CrLJ 21).

If the prosecution proves the acceptance of the amount by the accused and the amount does not represent legal remuneration in any form or of any kind, the accused must establish that the amount was not accepted by him as motive or reward as is mentioned in section 161 of the Penal Code. The presumption must be raised under section 4(1) of the Act that the appellant accepted the amount as a motive or reward for doing an official Act (AIR 1974 SC 773= 1974 CrLJ 509). Presumption under section 4 of the Prevdention of Corruption Act arises as soon as it is shown that the accused had received the stated amount and such amount was not the legal remuneration. It is not necessary that before presumption arises prosecution must prove that money was paid as a bribe (AIR 1968 SC 1292; 1968 CrLJ 1484).

Where the notes were recovered from the accused and the explanation given was disbelieved, it was held that conviction under section 161 was justified (1973 CrLR (SC) 788; AIR 1974 SC 226). Where witnesses fully supported prosecution case. Defence evidence failed to rebut prosecution evidence. Non-production of Magistrate as witness would not be fatal to prosecution (1985 PCrLJ 1926).

The evidence of persons giving illegal gratification under coercion and fear of being harassed is not required to be corroborated, as they are not accomplices (1969 CrLJ 262; AIR 1969 SC 17).

Where the trap party recovered the currency notes it was held that the recovery memo signed by the accused amounted to a confession by the accused while in police custody in view of presumption under section 4, Prevention of Corruption Act, and that the memo could not form the basis for conviction. However, it was further held, it could be considered to test the regularity and propriety of the recovery proceedings (1968 CrLJ 391 All).

If the accused person makes a statement in presence of a police officer or a Magistrate before the case is registered and investigation commences they will be competent witnesses to the commission of the offence and the statement made by the accused in their presence will notwithstanding the provisions of section 164 Cr.P.C. be admissible in evidence. Statement of the government servant recorded at the time of recovery of the bribe money from him by a Magistrate will not attract the provisions of section 164 Cr.P.C. The trap evidence was invoked in the sub-continent for a very long time and no one challenged its legality. There is a well known adage that a Judge must bear all the laws of the country on the sleeve of his role (21 DLR (SC) 182).

Where in a trape case, the Judge magnified every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution evidence, then it would be very antithesis of a correct judicial approach to the evidence of witnesses in a trap case. Indeed, if such a harsh touch stone is prescribed to prove such a case it will be difficult for the prosecution to establish any case at all (AIR 1984 SC 63).

Where the complainant is corrborated by reliable evidence the accused should be convicted (1987 PcrLJ 38). Where ocular testimony was amply corroborated and prosecution case was established both on point of demand of bribe and seizure of currency notes from petitioner conviction was maintained (1982 SCMR 54; 1985 PcrLJ 827). Where these evidence of decoy witness was supported by evidence of two other witnesses and the prosecution proved currency notes recovered from co-accused were the currency notes supplied to decoy witness for the purpose of making payment of alleged bribe to the appellant, conviction can not be set aside (1989 SCMR 3).

Where the accused was charged under section 161 and the very basis of the charge was different from what had been proved at the trial in such a case the presumption under section 4(1) of the Prevention of Corruption Act was not available as the accused could not be said to have been prejudiced. The initial burden of proof on the prosecution having not been discharged, the question of presumption under section 4(1) of the Act did not arise (1984 CrLJ 1392). Mere recovery of money by itself can not prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money (AIR 1979 SC 1408, (1409, 1410).

Where some prosecution witnesses have contradicted their earlier statements under section 164 Cr. P.C. and the contradiction suggest that the defence version might be true and there is no evidence that any scientific test was applied to prove that the accused had handled the currency notes it was held that those infirmities cast a legitimate doubt on the truth of the prosecution story. Therefore it is not possible to maintain the conviction (1977 CrLJ 439 (441, 442 SC).

The complainant was an accomplice and his evidence required independent corroboration. The panch wanted to fell in line with the prosecution case, therefore, if the defence version was probable it would be said safely that the prosectuion did not establish its case beyond reasonable doubt. Under those circumstances it was held that the defence version put by the accused was probable and as the defence version was probable it threw great doubt and the result was that the prosecution version could not be accepted and if the prosecution version could not be accepted could not be suggested that the prosecution proved its case (1982 CrLJ 1314, 1316, 1317).

Where a trap is laid for a public servant, it is desirable that the marked currency notes which are used for the prupose of trap, are treated with phenophthalein powder so that handling of such marked currency notes by the public servant can be detected by chemical process and the court does not have to depend on oral evidence which is some times of a dubious character for the purpose on deciding the fate of the public servant. Where no attempt was made to use chemical for detection of currecy notes and witness had previous enmity with the accused, it was held that the prosecution had failed to establish the charge against the accused (1978 CrLJ 1396 (1402) Ori).

Where the illegal gratificationis paid to the wife of the accused as desired by him and she tried to destroy the currency notes, the Supreme Court held that the accused himself accepted the illegal gratification (AIR 1980 SC 1737=1980 CrLJ 1256). Where the recovery of notes from the pocket of the accused was not disputed by him, it was incumbent on the accused to explain that circumstance (1974) 1 CrLJ 312, (313).

Indeed, for weighing evidence there can be no specific canon. No generalisation is possible in such matters. Each case has its own features and each

witness has own peculiarities. The under noted officer with an unblemished record, rather an outstanding record of 19 years service such an officer would be least disposed to countenance pimping within his territorial jurisdiction. He must therefore have been an eye shore to the witness who were pimps. It could not, therefore, be said that these witnesses had no motive whatever falsely implicate the police officer (AIR 1976 SC 294, 302). Conclusive evidence is required to establish a charge of bribery against a public servant .of his having committed an offence in the discharge of his public duties (AIR 1976 SC 625). Suspicion alone cannot be the basis of conviction (1974 CrLJ 1044 SC). If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised aginst the accused, every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal (1944) FCR 262(271)=1981 CrLJ (NOC) 63 (AP); 1964 PCrLJ 343; 7 DLR 457). Conviction is possible only if every reasonable possibility of innocence has been excluded (1985 SCMR 141).

A single infirmity in statement of a witness, capable of creating doubt in a reasonable mind was sufficient to give benefit of the doubt to accused. Raiding Magistrate claimed to have seen accused receiving bribe money and also hearing talk between them while sitting in adjoining room whereas complainant clearly stated that a curtain was hanging in front of door between two rooms. Contradiction between statements of such prosecution witnesses could not be termed as minor and rendered acceptance of alleged bribe money by accused highly doubtful. Accused was given benefit of doubt and acquitted (1985 PCrLJ 2687).

Where there are two versions of incidence, one given by prosecution and other put forward by accused, benefit of doubt, had to be given to accused (1986 PCrLJ 473). Where an explanation given by the accused is corroborated by the evidence of two prosecution witnesses, the court can not ignore that evidence and convict the accused. He should be given benefit of doubt (1969 PcrLJ 1265).

Where statements of complainant and prosecution witnesses were contradictory and did not insprie confidence whereas statement of defence witness was straight forward and convincing and it fully supported the statement of accused. Reasonable doubt was created in prosecution case. Conviction was set aside (1986 PCrLJ 755;1984 PCdrLJ 1293).

Where except for one prosecution witness against whom accused alleged enmity no other prosecution witnesses categorically stated that accused demanded illegal gratification. Raiding Magistrate clearly stated that he did not hear talk between complainant and accused at the time of passing of tainted money. Statement of accused under section 342, Cr. P.C. that he received the money in good faith for payment to a third person could not be ignored. It was held that prosecution failed to establish its case beyond reasonable doubt (1983 PCrLJ 2088 Kar).

Where material portion of statement of accused, recorded by Magistrate, just after raid, was not put to the accused when examined under section 342 Cr. P.C. court was held to have failed to examine accused properly. Conviction and sentence was set aside and case remanded for retrial from stage of recording statement of accused under section 342 Cr. P.C. (1985 PCrLJ 903;1985 PCrLJ 524).

The accused has failed to prove the defence taken by him and in view of the overwhelming evidence adduced by the prosecution, and panch witnesses it was clearly proved beyond resonable doubt that there was a demand for a birbe and the bribe was received. Therefore, the accused was convicted (AIR 1983 SC 353=1983 CrLJ 688).

Where complainant and witnesses harboured enmity, grouse and grudge against accused and motivation existed for false involvement of the accused. Evidence of such person can not be treated to be disinterested persons. Corroboration of their evidence must be sought from an independent source and circumstances brought on record (1984 PCrLJ 2095; PLD 1983 Lah 514).

As matter of law, it is not correct to say that the evidence of trap witness can not be accepted without corroboration. Each case depends on its circumstances (AIR 1969 SC 17; AIR 1958 SC 500). There is no general rule to assess the evidence of the trap witness and each case has to be judged on its own merits. Where the SDO sent a requisition to the S.D.O. Telephone, to send two of his assistants to act as witnessess, and they were members of the raiding party not voluntarily but as directed if nothing is shown against them there is no reason why their evidence should be discarded merely because they help the raiding party (1977 CrLJ 1586(1589). The evidence of a trap witness is required to be corroborated in material particulars implicating the accused by other accepted evidence. The corroboration must be by independent testimony confirming in some material particulars not only that the crime was committed but also that the appellant committed it. It is not necessary to have corroboration of all the circumstances of the case or every detail of the crime. It would be sufficient if there is corroboration as to the material circumstances of the crime and of the identity of the accused in relation to the crime (AIR 1961 SC 1762=(1961) 2 CrLJ 828).

The evidence of interested and partisan witnesses who are concerned in the success of the trap must be tested in the same way as that of any other interested witness. In a proper case the court may look for independent corroboration before convicting the accused perons (1972 SCD 1040; AIR 1973 SC 498). The role of a shadow witness in a trap case is very material and conviction may be sustainable on the testimony of an independent and reliable shadow witness only in the circumstances of a given case. A constable of Anti-corruption organisation acting as a shadow witness, being interested in the success of trap can not be termed as an absolutely independent witness and conviction can not be based on his sole testimony (1991) 3 CrLJ 11).

This fact that a person acts as a decoy is not sufficient to reject his testimony. When it is supported in every particular by the other witness (AIR 1958 All 481). Merely because witness relating to trap in a bribery case are petty clerks, their evidence cannot be rejected as wholly unreliable more so when they do satisfy the test of witnesses idenpendent police influence (AIR 1982 SC 1511).

Though a trap witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeds. He can at least be equalted with a partisan witness and it would not be admissible to rely upon such evidence without corroboration (AIR 1961 SC 1762). There is a distinction between case of legitimate and those of illegitimate trap in offering bribes and in cases of illegitimate trap a person offering bribe has been considered to be an accomplice requiring corroboration in support of his evidence whereas in case of legitimate trap such person can not be regarded as an accomplice and in law his evidence does not require to be corroborated by other evidence. But as a rule of prudence such evidence requires to be carefully scrutinised before it can be accepted as true (AIR 1968 Goa 63=1968 CrLJ 925).

No doubt the bribe-givers are the principal witnesses on whose testimony conviction of the accused rests, yet they are not incompetent witnesses and unless they are found to be participant criminals in the offence their testimony cannot be thrown out (1968 PCrLJ 316 Lah). The evidence of the complainant should be

scanned with much caution and the court must be satisfied that he is a witness of truth, specially when no other person was present at the time when he paid the alleged illegal gratification. The vcalue of his testimony would, therefore, depend on diverse facts such as the nature of his evidence; to what extent and in what manner he is interested; the probability and improbability of his story and how he had fared in the cross examination etc. In other words courts must consider whether the facts and circumstances render it probable that his story is true and it is reasonably safe to act upon it (PLD 1963 SC 38). It must be noted that an accomplice is one who was a participant of the second degree or abettor in the metter of commission of crime and did not extend any aid to the prosecution for its discovery till after its commission. A bribe giver, is an accomplice only when he gives it with the intention of gaining some undue official favour, but not when he gives it in order to aid the detection of a crime. He has not the necessary *mens rea* (KLR 1984 Cr. C 101;PLD 1984 Lah 494; AIR 1951 Ori 297). In this case the court may, having regard to the antecedent or character of the person concerned refuse to act on his uncorroborated testimony but that relates to appreciation of evidence and is not governed by any rule like the one which applies to an accomplice (PLD 1963 Lah 250; AIR 1954 SC 322).

Whether or not a Panch witness in a criminal case is a partisan witness would always depend upon the circumstances of each case. If a panch witness occupying a respectable and disinterested position voluntarily helps the investigation by acting as a panch and his evidence appears to the court to be wholly satisfacotry, it may not perhpas be open for the accused to contend that the said evidence must necessary and as a matter of law be accepted (AIR 1956 Bom 426;AIR 1979 SC 449=1974 CrLJ 346). The general denunciation of investigating officers as a suspect specified also ill merit acceptance. The demanding degree of proof traditionally required in a criminal case and the devaluation suffered by a witness who is naturally involved in the fruits of his investigating efforts, suggest the legitimate search for corroboration from an independent or unfaltering source, human or circumstantial to make judicial certitude double sure. Not that this approach costs any perjorative reaction on the police officers integrity but that the hazard of holding men guilty on interested, even if honest evidence, many impair confidence in the system of justice (1974) 1 SC WR 396; AIR 1974 SC 989=1974 CrLJ 784).

The true position is that a decoy need not be corroborated but the weight to be attached to his evidence will depend on his character, his standing, his position, the circumstances under which he became a decoy and how he has fared in the witness-box. The consideration in the light of which his evidence is to be tested will natrually vary from case to case (1965) Gujj LR 958). Conviction can be based on the evidence of a trap witness when the witness is independent and otherwise reliable (AIR 1976 SC 449=1976 CrLJ 625). When the evidence of a trap witness receives corroboration from the bribe giver, it is acceptable (AIR 1974 SC 989).

There may be a case in which a bribe is going to be paid in the normal course of business and on information being received by police a trap is arranged for watching this normal course of transaction. No legitimate objection for laying such trap can be made but there may be another case where the accused was not demanding a bribe but the police or magistrate deliberately tempted him to take bribe. In the second type of cases the testimony of such decoy and trap witness can not be relied upon without independent corroboration (AIR 1956 SC 643; AIR 1958 All 334; AIR 1960 Punj 641).

In a particular case if it is found that a trap witness can not be implicitly relied upon then corroboration is necessary; but it will be wrong to say that no conviction

can be based on the uncorroborated testimony of a trap witness. The court may be justified in acting upon the uncorroborated testimony of a trap witness, if the court is satisfied from the facts and circumstances of the case that the witness is witness of truth (AIR 1979 SC 400=1979 CrLJ 329). But in case of a trap witness, who is interested in the success of a trap, his evidence must be tested in the same way as that of other intersted witnesses and in a proper case the court may look for indepedent and trustworthy corroboration (AIR 1973 SC 498=1972 CrLJ 1293).

Police officials cannot be discredited in trap case merely because they are police officials, nor can other witnesses be rejected because on some other occasions they were witness for the prosecution (AIR 1974 SC 155=1974 CrLJ 526).

In a case the trial court refused to believe a trap witness as he was a person of diabolic character. The Indian Supreme Court held that to magnify every minor detail or omission to throw a doubt or falsify the prosectuion case is the very antethesis of a correct judicial approach to the evidence of a witness in a trap case. To provide such a harsh touchstone, to prove a case would make it difficult for the prosectuion to establish any case at all (AIR 1984 SC 63).

Interested and partisan witnesses are concerned in the success of the trap (AIR 1973 SC 498). But every witness of the raiding party cannot be doubbed as an accomplice or an interested witness in absence of the materials justifying such an inference. If the trap witness is otherwise reliable and independent, his association in the prearranged raid cannot make him an accomplice or a partisan witness authomatically. In absence of anything to warrant a contrary conclusion, conviction is not untenable merely because it is based on the testimony of such a witness (AIR 1976 SC 449=1976 CrLJ 346). If, in a case under section 161, Penal Code, read with section 5(2) of the Prevention of Corruption Act, the appellant has admitted recovery of the amount from his pocket it is incumbent on him to explain that circumstances, where on account of the infirmaties, his explanation was rightly disbelieved the court may not look for independent corroboration before convicting the accused person on the evidence of the witness who have participated in the trap (AIR 1974 SC 226, 227).

8. **Testimony of accomplice.**- A person who pays bribe is an accomplice of a person who receives the bribe, but the position is different from that of one dacoit deposing regarding a dacoity against his fellow dacoits (PLD 1957 Lah 903). Where the witness falls under the category of accomplice by reason of being bribe givers, independent corroboration may be looked for under the rule of prudence hardened into a rule of law, that it is not safe to convict a prisoner on the uncorroborated testimony of an accomplice (AIR 1959 All 149=1959 CrLJ 268). The testimony of a bribe giver must be corroborated in material particulars (1981 CrLJ (NOC) 203). because his evidence is put on the footing of the evidence of an accomplice (1982 CrLJ 1314 Guj).

Bribe giver or trap witnesses are not accomplices. Their statements must be scrutinised with caution. In the facts and circumstances of a case, court may accept the evidence of police or partisan witnesses who laid the trap without any corroboration (AIR 1980 SC 873=1980 SCC (Cr) 458). Where the testimony of the complainant and the panch witness with regard to demand of money are at odds with each other, the complainants testimony remains uncorroborated and hence can not be relied on (AIR 1979 SC 1191; 1974 CrLJ 936 SC=1980 SCC (Cr) 121). The evidence of past givers of bribe would require careful scrutiny before its acceptance for conviction under section 161, Penal Code (Lokanath Vs. State of Orissa 1988 (1) Crimes 498 (Ori).

Now it is a rule established by the practice of the courts, that, though a conviction on the uncorroborated testimony of an accomplice is not illegal, it is neverthless improper (5 WR 80 FB; AIR 1948 Lah 27). This rule then necessitates some degree of corroboration of the testimony of an accomplice to warrant a conviction for an offence under this section. The payer of a bribe may or may not be an abettor; but he is in every case an accomplice for the purpose of this rule (ILR 14 Bom 115; AIR 1952 Mad 561). His evidence, consequently, requires corroboration, but the degree of corroboration forthcoming must necessarily vary in each case. Therefore, the courts have considered the degree of corroboration required to justify a conviction under this chapter. For this purpose the courts consider whether the payer was or was not a free agent in offering the bribe and it has been held that the degree of corroboration required is not in each case the same. In other words, a person coerced into the payment requires less corroboration to his testimony than one who was entirely voluntary accomplice (ILR 33 Cal 649; AIR 1935 Bom 230). A distinction must also be drawn between a person who is threatened and becomes an accomplice and a person who voluntarily takes part in a crime. In the former case corroboration necessary to establish the credit of such a person would be very much less than in the latter case (7 DLR 457; PLD 1960 Dhaka 727;AIR 1929 Bom 296).

In the case of bribe giving under threats whether the evidence of the bribe giver accomplice is safe to be acted upon, depends on circumstances. In the first place, one must be satisfied that the story of threats is itself reliable and not the out come of a conspiracy to involve a strict officer in trouble or in motivated by some other personal matice (1970 SCC (Cri) 505=1970 CrLJ 526 SC). If on being so satisfied, the court considers that the sole testimony of the accomplice is safe to be acted upon a conviction can be based thereon. In such a case even if corroboration is considered desirable, a less strict standard of corroborative evidence may be accepted,as for instance, reliable evidence of previous statements and the like (1952) Cut 104; 1979 SCC (Cri) 656);1984 SCC (Cri) 46).

Where the witnesses have poor moral fibre and have to their discredit a heavy load of bad antecedents and have a possible motive to harm the accused who was an abstacle in the way of their immoral activities, it would be hazardous to accept their testimony in the absence of corroboration on crucial point from independent sources (AIR 1976 SC 294=1970 Cr 295).

It not be laid down as a rule of law that without independent corroboration the evidence of partisan witneses can under no circumstances be relied on as sufficient to sustain conviction of the accused.After all, the rule regarding independent coroboration is only a rule of prudence. If in any particular case the evidence of partisan witnesses is seen to be thoroughly reliable and trustworthy there will be nothing wrong in the court in acting upon such evidence and entering conviction against the accused (AIR 1957 Ker 134; ILR 1957 Ker 559). The rule of the court which requires corroboration of the evidence of an accomplice, if it applies at all, applies with very little force to a case of bribery or receipt of illegal gratification under section 161 Penal Code (AIR 1948 Nag 342; 49 CrLJ 529).

A bribe giver is an accomplice only when he gives bribe with the intention of gaining some undue official favour . One who gives bribe in order to aid the detection of a crime is not an accomplice but is a spy or a decoy witness. He has not the necessary *mens rea* (1949) Cut 585). A distinction has to be drawn between an accomplice and decoy witness, the former being a person who joins another with the intention of aiding the commission of an offence and the latter who is instrumental in provoking the commission of the offence with the object of discovering the offence and detecting the offender. An accomplice is an associate in crime. Mere

aiding in the detection of crime by becoming an instrument of detection without any intention to commit the crime and without any intention to make a gain out of the perpetration of the crime, cannot make the person so aiding an associate in crime (1953 CrLJ 986).

9. **Appreciation of testimony in trap case.-** In appreciating oral evidence the question in each case is whether the witness is a truthful witness. Where the witness is found untruthful on material facts that is the end of the matter. Where the witness is found partly truthful the court may take the precaution of corroboration but a court is not entitled to reject the evidence of a witness merely becasue they are government servants who in the course of their duties or even otherwise might have been requested to assist the investigating agencies. If their association with investigating agencies is unusual, frequent, or designed their may be occasion to view their evidence with suspicion. But in cases where officers in the course of their duties generally asist the investigating agencies their evidence should not be viewed with suspicion . For example, in rural areas the Headman, patel or patwari are generally called to help the investigating agencies as panch witnesses and such help should not render their testimony unreliable (1985 CrLJ 1357 SC). Evidence of a Magistrate as trap witness has to be judged by the same standard as the evidence of any partisan or any other interested witness. The correct rule is, if any of the witnesses are accomplices who are *particeps criminis* in respect of the actual crime charged, their evidence must be treated as the evidence of accomplices is treated. If they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap their evidence must be tested in the same way as other interested evidence is tested by the application of diverse consideration which must vary from case to case, and in a proper case, the court may even look for independent corroboration before convicting the accused person (AIR 1973 SC 498;1984 CrLJ (NOC) 21 Ori).

It is evident that two basic principles of appreciation of evidence in cases of denial were not in the mind of the Special Judge. First principle is that evidence of interested and partisan witnesses who are concerned in success of the trap must be tested in the same way as that of any other interested witness. In a proper case the court may look for independent corroboration before convicting the accused persons. In this connection reference can be made to the case of Ram Prakash Arara Vs. State of Punjab (AIR 1973 SC 498). The second principle of appreciation of evidence in such cases is that there can be no doubt that evidence in such cases should be corroborated in material particulars, after introduction of section 165-A, Penal Code, making the person who offers bribe guilty of abatement of bribery. The complainant cannot be placed on any better footing than that of accomplices and corroboration in material particulars connecting the accused with the crime has to be insisted upon (1979 (4) SCC 526; 1989 SC Cr. R 290, 293). Where the Magistrate who conducted the raid was in no doubt about the correctness of the prosecution case nor was he in any doubt about the reality which had taken place and which was witnessed by him, Supreme Cout declined interference in the conviction and sentence of the accused (Muhammad Aslam V. State PLD 1992 SC 254).

Where a Magistrate who organised and conducted the raid stated that he witnessed the passing of tainted money and heard the conversation, it was difficult to disbelive him in the absence of any strong matrial to the contrary (1983 PCrLJ 1387 Lah). Where tainted money passed on to accused was secured by Magistrate. Complainant supported prosecution but did not identify accused in court due to weak eye sight. Magistrate, Inspector and Mashir fully supported prosecution case. Accused did not deny his arrest at time of raid. No enmity or *malafide* was alleged

against witnesses, conviction was upheld (PLD 1987 Kar 389).But where conviction of accused was based on solitary evidence of the raiding magistrate. Complainant did not support prosecution case while officials participating as members of raiding party were not examined by prosecution. Conversation between complainant and accused as heard by raiding magistrate did not give a complete picture to make out the offence with which accused was charged beyond any doubt. Conviction and sentence were set aside (1981 PcrLJ 1086).

Where in a trap case, the Judge magnifies every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution evidence, this was held to be very antithesis of a correct judicial approach to the evidence of witnesses in a trap case. Indeed, if such a harsh touchstone is prescribed to prove such a case, it will be difficult for the prosecution to establish any case at all (AIR 1984 SC 63=1984 CrLJ 4). Where the notes were recovered from the accused and the explanation given was disbelived, it was held that conviction under section 161 Penal Code was justified (AIR 1974 SC 226=1974 CrLJ 312). In a trap case if the recovery of signed note was not made from person of accused but was made from his drawer, much more cleaning evidence is required by prosecution to prove acceptance of illegal gratification by accused (Har Bharosey Lal V State of UP 1988 (2) Crimes 137 All).

Where witnesses make two inconsistent statements either at one stage or at two stages the testimony of such witnesses become unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses. Thus where the witnesses were disbelieved with regard to one of the accused the conviction of the other accused cannot be ordered on the basis of the testimony of the same witnesses (AIR 1979 SC 1408=1980 SCC (Cri) 154).

A police officer was as good a witness as any other citizen but courts have to look for independent evidence in connection with recovery of incriminating articles from possession of accused (PLD 1984 Pesh 107). Police officials can not be discredited in a trap case merely because they are police officials, nor can other witnesses be rejected because on some other occasion they have been witnesses for the prosecution in the past (AIR 1974 SC 989). Convition can be based on the evidence of a trap witness when the witness is independent and otherwise reliable (AIR 1976 SC 449=1976 CrLJ 625).

Independent and respectable witnesses should be invited to witness the trap (AIR 1976 SC 91). The accused, a factory inspector, was convicted of having accepted bribe from a factory owner. The basis of the conviction was the testimony of two matbirs, one of whom was a bank clerk and the other a school teacher. It was contended that as the motbirs were petty clerk it would be unwise and dangerous to place implicit reliance on their testimony to convict the government servant.The Indian Supreme court rejected this contention and said that "truth is neither the monopoly nor the preserve of the affluent or of highly placed persons. In a country where renunciation is worshipped and the grandeur and wild display of wealth frowned upon, it would be travesty of truth if persons coming from humble origina and belonging to office-wise, wealth-wise lower strata of society are to be disbelieved or rejected as unworthy of belief solely on the ground of their humble position in society" (1984) 1 Crimes 20(25); AIR 1982 SC 1511=1983 CrLJ 1). The court also rejected the contention that the motbirs by virtue of their service would be under the police influence. The court said that if it is considered that all institutions which recieves grants from the government and are, therefore, government Departments,

and have to be treated as being under the polcie influence, then the net will have to be spread so wide that it will not exclude any one as independent of polcie influence (Ibid).

Where the witnesses have poor moral fibre and have to their discredit a heavy load of bad antecedents and have a possible motive to harm the accused who was an obstacle in the way of their immoral activities, it would be hazardous to accept their testimony, in the absence of corroboration on crucial point from independent sources (1976 CrLJ 295 SC; AIR 1976 SC 294).

Where a case mainly rests on the bribe givers evidence it should be scanned with much caution and the court must be satisfied that he is a witness of truth, specially when no other person was present at the time when he paid the alleged illegal gratification. The value of such testimony would, therefore, depend on diverse factors such as the nature of his evidence; to what extent and in what manner he is interested; the probability and improbability of his story and how he has fared in the cross examination, etc. In other words, the court must consider whether the facts and circumstances render it probable that history is true and it is reasonably safe to act upon it (15 DLR (SC) 7).

Accused admitted recovery of tainted currency notes from him, but had pleaded that complainant had returned his disputed amount towards loan obtained by him from accused. Since Magistrate and Circle Officer did not her talk preceding the passing of tainted currency notes, statement of complainant alone remained in field uon which no implicit reliance could be placed. Possibility of defence version that complainant had returned him disputed amount towards loan obtained by him from accused, could not be excluded. Prosecution having failed to prove its case beyond reasonable doubt against accused, giving benefit of doubt to accused, he was acquitted of the charge (Bashir Ahmad V State 1992 PCrLJ 795).

Recovery from the accused of marked coins amounts to corroboration of evidence of an offence under this section (AIR 1936 Nag 245). Where evidence fully supported prosecution version and recovery of tainted money from person of accused raised strong probability of his guilt particularly when he failed to explain recovery of money from him, his conviction was maintained (1981 PCrLJ 1340). But mere recovery of tainted currency notes from accused would not prove commission of offence under section 161 Penal Code. When the conversation between accused and complainant which preceded passing of tainted money was not heard by Raiding Magistrate and other members of the raid party. Complainant who was solitary witness of demand and acceptance of tainted currency notes as illegal gratification was not produced by prosecution. The accused was given benefit of the doubt and acquitted (1985 PCrLJ 87).

Mere recovery of money was not sufficient to make it illegal gratification. Prosecution has to prove that it was illegal gratification (1984 PCrLJ 2774). The responsibility to prove the offence under section 161, Penal Code is on the prosecution and the mere recovery of money does not exclude the possibility that the accused was an innocent recipient of the same (1969 PCrLJ 1265). Where Special Judge convicted accused on statements of police Inspector and Raiding Magistrate. Statements accepted at their face value, did not prove that money was passed on as illegal gratification and not as compensation for labour. Whether money was in fact given by complainant to accused as bribe was doubtful benefit of the doubt was given to accused (1985 PCrLJ 1951).

Where the accused person did not dispute the recovery of the initialled currency notes from his pocket and the explanation offered by him was disbelived on

account of infirmities, the conviction on the basis of uncorroborated prosecution evidence consisting only of the witness who had participated in the trap was not illegal (1974 CrLJ 312 SC; AIR 1973 SC 498). Where tainted currency notes were received by appellant within the view of magistrate who was an independent witness. The currency notes were recovered from physical possession of appellant. Appellant in his statement made immediately after the raid did not deny receipt of tainted money. But subsequently instead of giving any explanation altogether denied recovery of tainted money. His conviction was upheld (KLR 1985 CrC 245 Lah=1985 PCrLJ 245).

Recovery of marked notes from the accused should be corroborated in material particulars by disinterested and independent witness. Procured witness for the purpose of watching bribe giving and bribe taking not proper course for proving prosecution story (35 DLR 257). If the accused immediately after his confrontration gives an explanation which appears reasonable and not inconsistant with the defence case then he is entitled to benefit of doubt (20 DLR 230).Magistrate and the police inspector had not heard the talk preceding the passing on of the currency notes to the accused. Implicit reliance on the uncorroborated testimony of the compolainant who was a decoy witness could not be placed, particularly when reasonable possibility of the correctness of the statement made by accused was very much there. Accused was acquitted on benefit of doubt in circumstances (Lad Khan V. State 1992 PCrLJ 1484).

10. **Accused person to be competent witness.**- Under section 7, prevention of Corruption Act, 1947, any person chargeable with an offence under section 161 or section 165 or section 165-A is a competent witness for the defence and may give evidence on oath in disproof of the charge made against him or any person charged with him at the same trial. .

The accused is not required to prove his defence meticulously. He is only required to give a reasonable explanation of the circumstances against him (1984) 1 Crimes 864). An accused is not required to prove his case with the same rigor as is required to the prosecution (1989 CrLJ 89 MP). It is not obligatory on the part of a court trying a case under this section or section 165 to inform the accused that he can appear as a witness for himself. It is for the accused himself to know what his rights are and to seek to exercise them; the courts duty is to see that he has every reasonable opportunity of exercising them and nothing more (1954) 1 All 379 FB).

The accused can not be called as a witness except on his own request. The fact that the court did not inform the accused of his right to give evidence on oath does not prejudice him (1955 NUC 1295). This section never contemplated that the court should give a warning or offer a kind of remember to the accused about the right or privilege conferred upon him by this section (AIR 1953 (All) 110; AIR 1954 (All) 204).

It is not a requirement of law that a prosecution for an offence under section 5(1) (e) of the Act II of 1947 must be preceded by a proceeding under section 4 of Act 1957. The accused can examine himself as a witness, as provided in section 7 of Act II of 1947 and give whatever explanation he has to satisfy the court that the offence under section 5(1) (e) is not attracted in this case (45 DLR (AD) 48 para 13).

11. **Presumption under section 4 of Prevention of Corruption Act, 1947.**- Section 4 of Prevention of Corruption Act, 1947, says that, where in any trial of offences punishable under section 161 Penal Code, it is proved that an accused person has accepted or obtained for himself any gratification other than legal remuneration or any valuable thing from any person, *it shall be poresumed unless the*

contrary is proved that he accepted or obtained it as a motive or reward as is mentioned in section 161. The use of the words 'shall be presumed' shows that the presumption is one of law and not of fact as section 4 of the Prevention of Corruption Act, 1947, is in *pari materia* with the Evidence Act, 1872, and the words ' shall be presumed' must bear the same meaning as in the latter Act. as it is a presumption of law, it is obligatory for the court to raise this presumption in every offence under section 161 Penal Code, unlike presumptions of fact, presumptions of law constitute a branch of jurisprudence (AIR 1958 SC 61(65)= 1978SCR 580).

Whereas under section 114 of the Evidence Act it is open to the court to draw or not to draw a presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the court to draw such presumption, under sub-section (1) of section 4, Prevention of Corruption Act, however, if a certain fact is proved that is, where any gratification (other than legal remuneration) or valuable thing is proved to have been received by an accused person the court is required to draw a presumption that the person received that thing as a motive of reward such as is mentioned in section 161, Penal Code (AIR 1964 SC 575(580);1984 CrLJ 1495).

In Dhanvantral Balwantrai Desai V.State of Maharashtra (AIR 1964 SC 575), it was observed :

"Where any gratification (other than legal gratification) or any valuable thing is proved to have been received by an accused person the court is required to draw a presumption that the person received that thing as a motive of reward such as is mentioned in section 161 of Penal Code. Therefore, the court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as legal remuneraton it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under section 114 Evidence Ac and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words unless the contrary is proved which occur in this provision make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.

On proof of receipt of gratification the statutory presumption under section 4(1) of the Prevention of Corruption Act, is attracted in full force and the burden shifts on to the accused to show that he had not accepted this money as a motive or reward such as is mentioned in section 161 of the Penal Code. It is clear that the accused has to rebut the presumption arising against him under section 4(1) of the Prevention of Corruption Act. It is true that the burden which rests on an accused to displae this presumption is not as onerous as that cast on the prosecution to prove its case. Nevertheless, this burden on the accused is to be discharged by bringing or record evidence, circumstantial or direct, which established with reasonable probability, that the money was accepted by the accused, other than as a motive or reward such as is referred to in section 161 (1976 CrLJ 1189; AIR 1976 SC 1497)..

Court has to take into consideration presumption provided in section 4 of Prevention of Corruption Act, at the stage when a charge is framed. It is incorrect to

hold that the presumption would be applicable once a charge is framed (1986) 2 SCJ 495).

The words 'unless the contrary is proved' mean that the presumption raised by section 4 has to be rebutted by proof and not by mere explanation which may be merely plausible. The required proof need not be such as is expected for sustaining a criminal conviction; it need only to establish a high degree of probability (AIR 1973 SC 28). The presumption against the accused under section 4 of the Prevention of Corruption Act, 1947 is not to be drawn until the explanation offered by the accused is considered and found unsatisfactory. Where the accused offers a reasonable explanation which is acceptable and which raise a doubt as to the truth of the prosecution case the presumption can not be drawn. But if the court feels justified in drawing a presumption against the accused after due consideration of the explanation then the burden is on the accused to displace the presumption of criminal misconduct. The burden of proof on the accused in such cases is less than that on the prosecution in that it is sufficient for the accused to make out the truth of his defence in all reasonable probability though not clearly beyond doubt (PLD 1958 Kar 21).

The moment money is shown to have passed on to the accused through a decoy witness a presumption arises under section 4 that money was received as illegal gratificcation. The presumption is, however, not absolute but rebuttable (1973 PCrLJ 911).

In order to raise a presumption under section 4(1), Prevention of Corruption Act, what the prosecution has to prove is that the accused person has received 'gratification other than legal remuneration' and when it is shown that he has received a certain sum of money which was not a legal remuneration, then the condition prescribed by this section is satisfied and the presumption thereunder must be raised (1985 PCrLJ 827). It follows that it must be established beyond doubt that the accused had accepted or obtained or agreed to accept or attempted to obtain for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person (PLD 1954 Sind 126). Once it is shown that money has been paid to the accused by the complainant, it is not necessary that there should be another witness also who may have heard the talk that preceded the recovery of the tainte money from the appellant. It would be sufficient if the circumstances clearly show that the amount that has been recovered from the accused is the amount receive by him as bribe. In such cases the presumption under section 4 of the Prevention of Corruption Act will arise. On such presumption arising, the burden shifts to the accused. No doubt the burden is not as heavy as the burden on the prosecution and that is because while the prosecution has to prove a case beyond reasonable doubt, all that an accused has to do is to cast a doubt on the story of the prosecution (1987 PCrLJ 208). But the doubt must be reasonable. Where the accused stated that money found in his possession was advanced to him as a loan by the informer, but there was nothing on the record to show that there was any enmity between the accused and the informer, and the plea was rejected (1981 SCMR 871).

Where facts regarding delivery of tainted currency notes to accused, putting the same into his pocket and when surprised by raid party throwing money on ground was duly proved by independent and reliable witnesses. Accused, however, made a bare denial and failed to show that money delivered to him was not bribe money. Conviction maintained (1986 PCrLJ 729). Where recovery of tainted currency notes was not explained by accused who denied recovery. Defence evidence was not found strong enough to rebut prosecution evidence, accused was rightly convicted by

trial court (1986 PCrLJ 935). Where statements of complainant, rading Magistrate and Sub-Inspector of Police were consistent on the point of acceptance and recovery of tainted money from possession of accused. Accused also failed to rebut presumption that tainted money received by him from complainant as illegal gratification was not in fact as such. Conviction and sentence were maintained (1986 PCrLJ 672).

It is well settled that the onus on the accused is not as heavy as it is on the prosecution. The accused is entitled to benefit of doubt if his version may reasonably be true though he might have failed to establish its truth (1967) 33 Cut LT 1088, 1090, (1091). If the explanation of the accused may be so convincing as to falsify the prosecution case and in which case the accused would be entitled to an acquittal or the explanation may be held to be so reasonably true that it will pro tanto throw reasonable doubt on the prosecution version and in which case also the accused would be entitled to an acquittal. But of course if the explanation given by the accused is on the face of it improbable, inadequate or unconvincing or contradictory, or a manifest after though no court would come to the conclusion that the explanation would not render the prosecution case stronger. In short, it is for the prosecution to establish the guilt of the accused, and not for the accused ot establish his innocence (AIR 1943 PC 211; AIR 1958 Mad 368 (376).

In criminal law the onus of establishing all the ingredients, which would make a criminal offence, lies always on the prosecution, and this burden never shifts upon the accused. On the contrary, that even in a case where an accused has failed to prove circumstances, which would entitled him to claim an exception, he may otherwise successed in shaking the prosecution case, and that court would thus be called upon to consider evidence and circumstances of the case and to give the accused the benefit of any doubt which he may raise against the prosecution case in his attempt to prove circumstances upon which he might have claimed an exception to criminal liability (15 DLR 615; 1935 AC 462; AIR 1941 All 402; 5 DLR 107 (FC); 5 DLR 133 (FC). If the court feels justified in drawing a presumption against the accused after due consideration of the explanation, then the burden is on the accused to displace the presumption of criminal misconduct. The burden of proof on the accused in such cases is lies that on the prosecution, in that it is sufficient for the accused to make out the truth of his defence in all reasonable probability though not clearly beyond doubt (PLD 1964 SC 482).

The presumption may be rebutted by the accused not only by any oral testimony of witnesses called on behalf of the accused but also by a statement of the accused under section 342 Cr. P.C. and by any document produced on behalf of the defence or by surrounding circumstances. When the notes recovered from the accused were 10 and 5 rupee notes and he stated that he had asked the complainant for change of a 100 rupee note and obtained those notes in which were found some notes signed by the magistrate. The court accepted the statement as rebuttal of the presumption under section 4 of the Prevention of Corruption Act, 1947 (PLD 1962 Dhaka 270). Where it is an admitted fact that the tainted money was recovered from the petitioner, the onus shifts upon him to explain how he had received it, and the courts are justified in closely analysing the defence plea raised by the accused (1977 SCMR 503). It is to be noted that only the exaplanation given by the accused at the time of his arrest is admissible. An explanation given at the trial later on is not admissible in evidence (1985 PCrLJ 2513).

Where no explanation for the tainted money is given at the time of the raid, and the explanation at the trial does not inspire confidence. Deliberate concessions are shown by the witnesses. Their evidence cannot be relied upon and accused may be

convicted (1975 PCrLJ 906). But if the accused immediately after his confrontation gives an explanation which appears to be reasonable an, at least, not inconsistent with the defence case then he is entitled to the benefit of the doubt, not as of grace but as of right (PLD 1964 SC 482). Where there was a reasonable possibility of defence version being true. Testimony of complainant that tainted currency notes were given to accused as illegal gratification was uncorroborated. Prosecution was held to have failed to prove its case beyond reasonable doubt. Accused was given benefit of the doubt and acquitted (1985 PCrLJ 1270).

Where accused just after the raid made a statement wherein he stated that he did not know as to why money was paid to him. Such piece of evidence which was relevant and important for just decision of the case was not put to accused when examined under section 342, Criminal Procedure Code. Conviction and sentence were set aside and case remanded to trial court for retrial from stage of recording statement of accused under section 342, Criminal Procedure Code (1985 PCrLJ 2735). If the explanation given by the accused is reasonably probable, the presumption raised aginst him can be said to be rebutted (AIR 1960 SC 548). On mere recovery of certian money from the person of an accused without the proof of its payment by or on behalf of some person to whom official favour was to be shown the presumption can not arise. Where not only the story of demand of bribe by appellant from the complainant is not proved but even the story of payment of the money by the complainant is not established beyond reasonable doubt, it was held that that being so the rule of presumption engrafted in section 4 could not be made use for convicting the appellant (AIR 1975 SC 1432 (1436); 1985 (2) CrL.C. 229).

The initial burden of proving that the accused acepted or obtained the amount other than legal remuneration is upon the porosecution. It is only when this initial burden is successfully dis charged by the prosecution then the burden of proving of the defence shifts upon the accused and a presumption would arise under section 4(1) of the Prevention of Corruption Act (1972 CrLJ 381). If receipt of money has been admitted by the accused the onus lies on him to rebut the presumption raised by section 4 of the Prevention of Corruption Act (AIR 1973 SC 913 = 1973 CrLJ 902).

The presumption may be rebutted by the accused not only by any oral testimony of witness called on behalf of the accused but also by a statement under section 342 Cr. P.C. and by any document produced on behalf of the defence of the accused or by surrounding circumstances (13 DLR 758 = PLD; 1962 Dhaka 270 AIR 1951 Cal 524).

It is not necessary that passing of money shall be proved by direct evidence. It may also be proved by circumstantial evidence (1980 SCC (Cr.) 458). All that the porosecution has to prove is that the accused person received the gratification other than legal remuneration and when it is shown that he has received certain sum of money which was not a legal remuneration than the condition prescribed by this section is satisfied and the presumption thereunder must be raised (AIR 1973 SC 28 = 1973 CrLJ 169). Presumption that gratification was received for criminal purpose is to be made on the basis of adequate evidence (PLD 1964 SC 428). Before the presumption is made, it must be proved that the accused had accepted the gratification for any favour shown or promised to be shown by the accused (8 DLR 562).

12. **Sanction.**- Under section 197, Cr.P.C. sanction of government is necessary for prosecution of Judges, Magistrates and public servants not removable from their office with the sanction of the government.

Section 6 of the Prevention of Corruption Act 1947, prohibits the court from taking cognizance of an offence punishalbe under section 161 Penal Code, except

with the previous sanction of the authorities mentioned in that section. If in spite of this prohibition, the court takes cognizance of the offence in the absence of the sanction and if the proper sanction is subsequently obtained, while the proceedings are not yet over, the irregularity may be cured under section 465(1) Cr. P.C. But if the whole trial is completed in the absence of a proper sanction then the trial is vitiated as having taken place in contravention of section 6 of the Act (AIR 1953 Sau 130 (132); 1984 (1) Crimes 568 (SC).

A bare reading of section 6 of the Prevention of Corruption Act 1947, would indicate that it aims at preventing harassment and vaxatious prosecution of a public servant. It assumes that an honest public servant would not be in a position to oblige every one and may, therefore, incure displeasure of many of them. This displeasure may even result in his vaxatious and malicious prosecution for offence relating to discharge of his official duties.

The legislature, therefore, thought of providing a reasonable protection to public servants in the discharge of their official functions so that they continue performing their duties and obligations undeterred by vexatious and unnecessary porosecution. In spite of it, the intention is to safeguard the innocent and not to provide a shield for the guilty. That sufficiently explains the reason for inserting the aforesaid provision in the Act. It should, therefore, be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case, sanctioned the prosecution, and therefore, unless the matter can be proved by other evidence, in the sanction itself the fact should be refered to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case. This clearly indicated that the sanction was not an empty or automatic formality but was intended to be a serious exercise with a view to provide necessary protection (1986 (1) CrLJ 469 (474) MP).

The porovisions as laid down under section 6 of the Prevntion of corruption Act, 1947, put a bar in taking cognizance of the offence punishable under section 161 of the Penal code for prosecution under this charge. It requires an order of sanction. Grant of sanction is a condition precedent (1980 BLJ 216, (217).

The purpose of section 197 appears to be to define a sphere in which departmental or administrative law should be applicable at the option of Government to the conduct of public servants. The limits of the applicability of such administrative law are to be set in each case by the ordinary criminal Courts, on the basis of their opinion as to whether the action in question was performed by the offending official while acting or purporting to act in the discharge of his official duty (PLD 1960 SC 358) The question whether an accused who is a public servant, would be protected under this section is not a pure question of law but a mixed question of fact and law and has to be decided after investigation and cannot be short circuite by summarily throwing out the complaint (AIR 1952 Mad 667). The offences complained of are not to be determined by the lebels used. The offence are set out in the facts alleged, and it is for the court to apply appropriate sections in determining whether sanction is or is not necessary (AIR 1947 Sind 60).

The provisions of section 197, Cr. P.C. being in the nature of an exception to the general rule enacted in section 190 of the Code, an accused who relies on the provisions of this section as a bar to his prosecution has to establish all the facts which bring into play the exceptional provisions (AIR 1952 Nag 12). If the

Magistrate feels the case, the Magistrate would be justified in calling for proof of such facts as would enable him to be satisfied that he could not proceed without sanction (PLD 1960 SC 358). The evidence recorded is admissible for the ancillary purpose of considering whether or not the case falls under section 197, Cr.P.C. (PLD 1958 SC 21).

Where accused was tried as public servant for having allegedly accepted illegal gratification but sanction for prosecution was not obtained. Assumption of jurisdiction by the trial court was without lawful authority (1986 PCrLJ 847). It is incumbent on the prosecution to prove that a valid sanction has been granted by the sanctioning authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways either : (1) by producing the original sanction which itself contains the facts constituting the offence and the ground of satisfaction, and (2) by adducing evidence aliunde to show that the facts placed before the sanctioning authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered *void ab initio* (1980 SC Cr. R 21).

Sanction under section 6 of the Prevention of corruption Act 1947, is a pre-requisite for an offence under section 161 Penal Code (AIR 1952 Ori 220). Trial without sanction is a mullity and it does not bar a subsequent trial after obtaining sanction (AIR 1957 SC 494). Want of sanction can be cured by subsequent obtaining of sanction before the conclusion of the trial (AIR 1953 Sau 139). Sanction to prosecute a government servant before a charge sheet is submitted is a pre-condition. Sanction can be obtained after submission of charge sheet but before the trial commences (32 DLR (SC) 100).

The sanction for prosecution is not a mere formality and to clothe the sanction with legality it is essential that the prosecution should establish that the facts constituting the offence, for which the sanction was granted, had been considered by the authority before sanctioning the prosecution. No particular form of sanction is either prescribed by section 6(1) of the Prevention of Corruption Act or is enjoined by any of the judicial pronouncements. Where there was convincing evidence of the fact that all the materials collected during the investigation had been sent to the authority requested for sanctioning the prosecution of the two accused, and the sanction letter recited that the authority had gone through the case records and was satisfied that a *prima facie* case was made out against the accused though he had not outlined the facts constituting the offence, it was held that all the requirements of section 6(1) of the prevention of Corruption Act, as enterpreted in AIR 1958 SC 124, were complied with and there was valid sanction for the prosecution of the accused (1971 CrLJ 786 (Trip); 1982 CrLJ 272 Ori).

The document authorising sanction should reveal, on the face of it, the facts of the case which the sanctioning authority applied its mind. If such is not the case it is open to the prosecution to adduce extraneous evidence to show that the facts of the case had been placed before the sanctioning authority, and if there is infirmity in the sanction, the prosecution must fail (1977 CrLJ 925, (931, 932) Knt). There should be evidence either from the order granting the sanction or other documentary evidence placed before the court or even oral evidence that the facts were placed before the officer from whom sanction was sought. Where the sanction refers to the particular offences for which sanction is being accorded, and also the name of the person; but apart from these two matters, there is nothing to indicate that the facts which are said to have given rise to the offence were placed before the officer. The mere heading in the sanction that it was with reference to the 'acceptance of illegal

gratification' is not sufficient compliance with the requirements of the law (AIR 1951 Mad 255).

After the passing of the Prevention of Corruption act, 1947, no court can take cognizance of an offence under this section without the sanction of competent authority (1950) All 670). Only the court has to be satisfied of the existence of the sanction, and that too before taking cognizance. Once the prosecution satisfied the court and it took cognizance, the prosecution could not be required,, and is not required by any statutory provision, to satisfy the court or the accused again (1954 CrLJ 459). Where the investigating officer made a statement in his examination in chief that the sanction obtained was a 'sanction of the competent authority' and this was not challenged in cross examination, the sanction could not be allowed to be challenged as invalid in special appeal (AIR 1974 SC 765 = 1974 CrLJ 660).

If a public servant has ceased to hold that office which he is alleged to have abused or misused on the date of taking cognizance of the offence but he holds an entirely different office against which no such allegation subsists then the sanction of the authority competent to remove him from the latter office is not required (1984 CrLJ 613 (SC). Sanction is not necessary in the case for prosecuting the accused petitioner as he ceased to be a public servant when the court took cognizance and consequently the charge was framed (H. M. Ershad v. state 45 DLR (AD) 48; 1992 BLD 116 = 45 DLR 533).

No sanction would be necessary for prosecution of a public servant who has ceased to be a public servant and the court was taking cognizance of an offence which had been committed by him when he was public servant (17 DLR (SC) 26 followed in 28 DLR 452).

The provisions of sub-section (5) of the section 6 of Criminal Law Amendment Act 1958, must be narrowly construed and not given the wider meaning so as to include even those who at the time when the court takes cognizance of the offence allegedly committed by them have ceased to be public servant (PLD 1976 SC 23).

Sub-section (5) of section 6 of the Criminal Law Amendment Act, 1958 lays down that previous sanction of the appropriate government shall be required for the prosecution of a public servant for an offence under this Act and such sanction shall be sufficient for the prosecution of a public servant for an offence triable under this Act. If no sanction is filed the special Judge shall address a letter to the government concerned for this purpose but if sanction is neither received nor refused within 60 days of receipt of letter by the government such sanction shall be deemed to have been duly accorded.

If no court can take cognizance of the offences in question without a legal sanction, it is obvious that no court can be said to be a court of competent jurisdiction to try those offences and that any trial in the absence of such sanction must be null and void (AIR 1957 SC 494 (496). Sanction held to be defective and an invalid sanction cannot confer jurisdiction upon the court to try the case (1954 crLJ 1656(1660).

13. Charge.- The charge should run thus :-

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

That you ..... being a public servant in the ..... Department directly accepted from..... [(State the name of the giver) if received for another, add for another party, namely.....] a gratification other than legal remuneration, as a motive for doing or forbearing to do an official act, and thereby committed an offence

punishable under section 161 of the Penal Code and within the cognizance of this court.

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

The charge under this section should specify the nature of the office held by the accused by virtue of which he was a poublic servant, and the name of the person from whom the bribe was taken (1984 crLJ 1495), and of the public servant who had to be influenced in the exercise of his official functions (3 WR (Cri.) 69).

Where the complainant confined his accusation to the offences of forgery and cheating though the allegations actually made out an offence under section 161, Penal Code and section 5(2), Prevention of Corruption Act which were exclusively triable by a Special Judge under section 7(1) criminal Law Amendment Act, the Magistrate had no jurisdiction to entertain the complaint (1981 crLJ 635 All).

Where a person is a public servant in the very office where the appointment is to be made and takes money in order to get the appointment made, there is no further question of the hcarge or evidence indicating who was the other public servant with whom the service would be rendered (AIR 1964 SC 492).

In a case where the illegal gratification is alleged to have been received by the accused as a public servant for influencing some superior officer to do an act, the charge framed against such accused under this section need not specify the particualr superior officer sought to be so influenced (1955 CrLJ 249). If the other public servant who is to be approached for rendering service or dis-service is not specified in the charge, the trial would not be bad. This would only be a defect curable under section 537 Cr. P.C. 1898 (AIR 1964 SC 492 = (1963) 2 SCWR 464).

The offence punishable under section 161 of the Penal Code and section 5(2) read with section 5(1) (d) of the Prevention of Corruption Act are not one and the same. For establishing an offence under section 5(1) (d) the prosecution should clearly prove the prohbited means employed and also establish that pecuniary advantage was obtained and not merely accepted. In section 161 however evidence of mere acceptance suffices. Therefore it woudl be improper in all cases where an offence under section 161 Penal Code, apepars to have been committed to charge mechanically also for an offence under section 5(1)(d) of the Corruption act (1985 CrLJ 1567 Mad).

An accused person cannot be tried at on trial for more than three offences committed within the space of one year. Consequenlty, where a bribe was collected from certain inhabitants of a villalge by subscription, and handed over to the receipient in a lum sum, the latter could not be charged under section 161 with the receipt of the whole sum so collected, but only in respect of any three separate items forming part of the total collection (12 DLR 100; 12 DLR 90). But where in pursuance of the same purpose the bribe is paid in two instalments on two different days, the offence committed is one, and there can not be two convictions on account of two separate payments (5 CWN 332).

Once on facts a *prima facie* case is made out against the accused, charge should be framed (1986) 2 SCJ 425). Court has to take into consideraiton presumption provided in section 4 of the Act at the stage when a charge is framed. It is incorrect to hold that the presumption would be applicable once a charge is framed (1986) 2 SCJ 425).

Where the sanctioning authority is himself the complainant a separate order of sanction is not necessary for prosecuting the accused (1968 PcrLJ 316).

14. Conviction and sentence.- The sentence imposed on a person convicted of an offence must be commensurate with the gravity of the offence and must amount to punishment (29 DLR SC 211 = AIR 1933 All 513 = 34 CrLJ 623). Once a public servant is found to be guilty of accepting or obtaining illegal gratification, he deserves no soft corner or indulgence from courts of law (1958 Raj LW 596).

Cases of bribery are difficult to establish, but where they are so established, substantial sentence of substantive imprisonment must be passed in order to check corruption in an effective manner. Where the case was proved aginst the accused, the considerations that the accused would be dismissed, and that it would entail the forfeiture of certain service benefits are altogether irrelevant for the purpose of awarding a proper sentence (1953) RLW 51). Retirement of a public servant held not a ground for taking a lenient view on his offence (AIR 1985 SC 1092; 1985 CrLJ 1357).

There seems to be no justification for treating an abettor leniently, especially when the abettor is not a simple minded villeger but a Marwari merchant of Cuttack Town who wanted to take advantage of his previous acquaintanceship with the sub-inspector. For such an offender a sentenece of fine is merely a flea- bite and a substantive sentence of imprisonment alone would serve as a real deterrent (AIR 1952 Ori 180= 1952 CrLj 941). A sentence of mere fine for an offence of accepting illegal gratification is rediculous. The accused should be made to undergo a sentence of rigorous imprisonment (AIR 1954 Sau 62 (64).

Where a plea was taken in the case of an income tax officer that he may be awarded less than the minimum sentece, the supreme Court of India rejected the prayer and said that it was not a case of a petty clerk or peon accepting small amount as a bribe for doing a small favour. a lenient view cannot be taken of the conduct of Income tax officer who accepts a large amount as a bribe for causing loss to public revenue (1985 CrLJ 1357; ;AIR 1985 SC 1092 (1095, 1096) = 1985 SCC (cri) 30).

If a public servant entrusted with the duty to carry out investigation, say, a sub-inspector of a police station, demands heavy bribe of Rs. 3000, such conduct must be seriouly depreciated and deserved no clemency. A sentence of one year R.I. and a fine of Rs. 2000 was upheldd (1979 CrlJ 1120 (SC) = 1980 SCC (cri) 131).

For a public servant to be guilty of corruption is a very serious matter and the courts would not look upon it with undue leniency (1958 Raj LW 596; AIR 1960 SC 961 = 1960 CrLJ 1380). The offence of bribery or abetment of bribery rarely come to light and where such an offence is proved beyond all reasonable doubt, the perpetrators thereof must be visited with deterrent punishment and specially so where a bribe giver is not pressed to do so but he is out to corrupt a public officer in the discharge of his official duties to join his selfish ends (1957 CrLJ 96).

Leniency in the matter of Sentence.-While setting aside the order of acquittal passed by the High Court Division, the Appellate Division took a lenient view in the matter of sentence and reduced it to the period already undergone on the ground that the Respondent faced two trials and he had to take two appeals until he was acquitted by the impugned judgment (The State Vs. Abdul Muttaleb Khan; (1994) 14 BLD (AD) 12).

"Justice should be tampered with mercy. In a modern society purpose of imposing sentence on a person found guilty of an offence is not only deterrent but also reformative. A long period of sentence such as imprisonment for life debases a person. When law does not provide for imposition of minimum sentence of imprisonment and discretion is left with the court it is for the court to decide the quantum of sentence of imprisonment in consideration of the facts and circumstances of the case and interest of justice. In our view an educated youngman like the appellant should be allowed to purge his guilt and be rehabilitated in society as a useful citizen by reducing his sentecne of imprisonment for life and ends of justice will be met if the appellant is sentenced to suffer simple imprisonment for six years apart from the sentence of fine" (45 DLR 243 (para 18).

Where trial of the accused had continued for seventeen long years and the appellant had suffered both financilly and mentally, and had also undergone sentence of about 100 days, it was contended that in these circumstances the minimum sentecne of one year R I may not be awarded and he should be spared the agony of further imprisonment in his old age. The contention was accepted and the sentence was reduced to that already undergone (1984 (2) Crimes 875). A similar order was passed where the accused was a cripple and had spent two months in jail and suffered the mental agony of fighting the case for five years. It was held that in the interest of justice it would not be proper to send back the appellant to jail (1979 UJ (SC) 37 = 1979 (Cri) 925).

Where the mental agony was caused to the accused due to delay of the police in filing the charge sheet, a reduction of the sentence was held justified (AIR 1960 Trip 8). Where the accused had been dismissed and had foreifted his right to pension, the court reduced the fine and maintained the sentence of imprisonment till the rising of the court (AIR 1955 Him Pra 51 = 1955 CrLJ 1585). In another case supreme Court of India took into consideration that the case had started 18 years ago and hence it was not proper to send the accused to jail for a long period and sentenced him to six months imprisonment with fine (1983 (1) Crimes 985). In view of the fact that about six years have passed from the date of the incident and this is the first time the accused has committed an offence, sentence was redecced to the Periad already undergone by the accused (AIR 1987 SC 1441 = 1987 CrLJ 1180). In another case looking to the fact that the incident occurred some 13 years back, as an of merey, the Court redecced the substantive sentence of R. I. for $1\frac{1}{2}$ years to R. I. for a period of one year on each count (1988 (25) All Cr. C. 72 (73) SC).

While maintaining the conviction under section 161 and section 5(2) Prevention of Corruption act, there is no necessary to impose separate sentence (AIR 1954 Sau 62). Separate sentences for the conviction under section 161 and section 5(2) of the Prevention of corruption Act, are illegal (8 DLR (SC) 135; AIR 1954 Sau 121; AIR 1960 Mad 27).

Separate punishment is legal under section 161 Penal Code and under section 5(2) of Prevention of corruption Act as the offence under those two sections are distinct and different (1990 BCR 56).

Where the amount of the alleged gratification was only Rs. 3/- the amount was such a trival one that it was hardly to have been accepted by the accused as illegal gratification (8 DLR 562).

162. Taking gratiffication, in order, by corrupt or illegal means, to influence public servant.-Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

163. Taking gratification, for exercise of personal influence with public servant.- Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person [with the Government or Legislature], or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration

An advocate who receives a fee for arguing a case before a judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust, -are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

164. Punishment for abetment by public servant of offences defined in section 162 or 163.- Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

165. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant.- Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate.

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official function, of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with [1][imprisonment of either description for a term which may extend to three years], or with fine, or with both.

Illustrations

(a) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty [2][taka] a month, the house being such that, if the bargain were made in good faith, A would be required to pay two bundred 1[taka], a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a case pending A's Court, Government Promissory notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

[3][**165A. Punishment for abetment of offences defined in sections 161 and 165.**– Whoever abets any offence punishable under section 161 or section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided for the offence.]

[4][**165B. Certain abettors excepted.**–A person shall be deemed not to abet an offence punishable under section 161 or section 165 if he is induced, compelled, coerced, or intimidated to offer or give any such gratification as is referred to in section 161 for any of the purposes mentioned therein, or any valuable thing without consideration, or for an inadequate consideration, to any such public servant as is referred to in section 165.]

166. Public servant disobeying law with intent to cause injury to any person.–Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

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1. Subs. by the Criminal Law Amdt. Act, 1953 (XXXVII of 1953), s, 2, for "simple imprisonment for a term which may extend to two years".
2. Subs. by Act VIII of 1973, s. 3 and 2nd Sch., for "rupees".
3. 'Section 165A was inserted by the Criminal Law Amdt. Act. 1953 (XXXVII of 1953).
4. 'Section 165B was inserted by the Pakistan Penal Code (Amdt.) Ordinance 1962 (LIX of 1962), s.2.

Illustration

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

167. Public servant framing an incorrect document with intent to cause injury.– Whoever, being a public servant, and being, as such pubic servant, charged with the preparation or translation of any document frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause 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 three years, or with fine, or with both.

168. Public servant unlawfully engaging in trade.–Whoever, being a public servant, and being legally bound as such public, servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.

169. Public servant unlawfully buying or bidding for property.– Whoever, being a public servant and being legally bound as such public servant not to purchase or bid or certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

170. Personating a public servant.– Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

171. Wearing garb or carrying token used by public servant with fraudulent intent.– Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servant, 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 [1][taka], or with both.

1. Subs. by Act VIII of 1973, s. 3 & 2nd Sch., for "rupees" (with effect from 26-3-71).

[2]CHAPTER IXA

OF OFFENCES RELATING TO ELECTIONS

171A. "Candidates" "Electoral right" defined.–For the purposes of this Chapter–

(a) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat; provided that he is subsequently nominated as a candidate at such election;

(b) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.

171B. Bribery.– (1) Whoever–

(i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or

(ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right,

commits the offence of bribery:

provided that a declaration of public policy or a promise of public action shall not be an offence under this section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted to gratification as a reward.

171C. Under influence at elections.– (1) Whoever voluntarily interfers or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever–

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

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2. Chapter IXA was inserted by the Elections Offences and Inquiries Act, 1920 (XXXIX of 1920), s. 2

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this section.

171D. Personation at elections.–Whoever at an election applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election or a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election.

171E. Punishment for bribery.–Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation.– 'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

171F. Punishment for undue influence or personation at an election.– Whoever commits the offence of undue influence of personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

171G. False statement in connection with an election.– Whoever with intent to affect the result of an election makes or published any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the prsonal character or conduct of any candidate shall be punished with fine.

171H. Illegal payments in connection with an election.- Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred [1][taka]:

Provided that if any person having incurred any such expenses not exceeding the amount of ten [1][taka] without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidade.

171I. Failure to keep election accounts.– Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred [1][taka].

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