**Of-Hurt**

319. **Hurt.**-Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

320. **Grievous hurt.**-The following kinds of hurt only are designated as "grievous":-

First.-Emasculation.

Secondly.-Permanent privation of the sight of either eye.

Thirdly.-Permanent privation of the hearing of either ear.

Fourhtly.-Privation of any member or joint.

Fifthly.-Destruction or permanent impairing of the powers of any member or joint.

Sixthly.-Permanent disfiguration of the head or face.

Seventhly.-Fracture or dislocation of a bone or tooth.

Eighthly.-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

321. **Voluntarily causing hurt.**-Whoever does any act with the intention of thereby causing hurt to any person or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

322. **Voluntarily causing grievous hurt.**-Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

**Explanation.**-A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

**Illustration**

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

323. **Punishment for voluntarily causing hurt.**-Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [1][taka] or with both.

**Synopsis**

1. Evidence and proof.
2. Constructive liability.
3. Conviction.
4. Puishment.
5. Charge

1 Substituted by Act VIII of 1973, s. 3 and 2nd Sch. (with effect from 25-3-1973), for "rupees".

1. **Evidence and proof.-** Unless the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the acccused, no conviction under section 323 can be arrived at simply on the ground that enmity and fight have been proved and that serious injuries have been caused in the fight (1921 Lah 214=22 CrLJ 797 Lah). The petitioners and others have been convicted under section 323, Penal Code also besides being convicted under section 147 but there is no finding whatsoever as to whether the present two petitioners caused any hurt to P.Ws 2 and 3. Where there are a number of accused and the offence alleged is one of assault it is imperative to record a finding as against individual accused. There being no such finding in the present case, the conviction of the petitioners under section 323, Penal Code on the basis of a lump finding that the prosecution has been able to prove its case against the accused is not sustainable in law and the conviction under secction 323, Penal Code is thus liable to be set aside (Badu Mian Vs. The State 1985 BLD 65 (Para - 6).

Where the narration of events shows that the existence of the case against the applicants is clear cut abuse of the process of the Court which has been filed to cause harassment to the applicants, who have been dragged in the Court only with a view to pressurize them in the matter for which a civil suit has already been filed. The proceedings may be quashed by the High Court under inherent powers (PLJ 1981 Cr C 241=1981 PCrLJ 614 Kar).

Where the accused gave only one blow with his open hand on the neek of deceased, causing fracture of vertabrea and unconsciousness and the blow was not followed up by other beatings and no weapons were used, the offence was under section 323 as no intention or knowledge to cause grievous hurt was established even though death had resulted (1960 CrLJ 827). Where the injuries were caused by the accused to the complainant's party in the course of a fight which took place on the land of the accused where the party of the complainant had entered and the accused had a right of private defence of property it was held that the accused could not be convicted under this section or under section 326 (Munsar Ali (1964 CrLJ 213).

No right of self-defence arises when the common object of an assembly is to rescue buffaloes illegally attached in execution of a decree and to beat if there was any resistance to their taking away the buffaloes; in such a case, therefore, the beating is punishable under this section (Tika Ram Vs. State, AIR 1960 All 453(455)=1959 ALJ 781=1960 CrLJ 1040). Where the prosecution witness had seized the cattle in his capacity as a watchman appointed by the villagers including the owner of the land into which the cattle were said to have trespassed and the accused-petitioner 1 to 6 had committed assault on him in attempting to rescue the cattle, it was held that in such circumstances even assuming that the prosecution witness was mistaken about his right to seize the cattle his action would not amount to an offence of theft and the remedy of the owner was only to take action under section 20 of the Cattle Trespass act, 1871. No right to use force to rescue the cattle was available to the owner. Hence, the conviction of the accused - petitioners 1 to 6 under section 323 would stand (Prasanna Kumar Samal Vs. Anand Chandra Swain 1970 CrLJ 62 Ori).

Where a person who was unlawfully arrested and detained under an illegal warrant was rescued forcibly by a group of persons was, while rescuing the detained person from unlawful custody caused some hurt or injury to the person of the detaining authority; it was held that the rescuers could not be held guilty for causing hurt (Didar Kha Vs. State, AIR 1965 Cal 368(369). Where the only part attributed by the prosecution witnesses to the first two apellants was that they had assaulted the

comlainant with kicks and fists but the medical evidence did not show any such injuries, the benefit of doubt was extended to them and their conviction under section 323/34 aside (Mitter Sen 1976 SCC (Cri) 190).

An injury was caused by three accused, who assaulted with lathis. It was not possible to determine as to who had caused the injury. All the three accused were entitled to the benefit of doubt (Bharat Singh 1979 CrLJ (NOC) 156(All). Where the injury could be attributed only to one of several accused and the evidence did not establish which of them caused that injury, the conviction of the accused under section 323 could not be maintained (Kandan Vs. State, 1959 Raj LW 35).

Opinion of doctor about nature of hurt, whether it is simople or grievous, is not final. It cannot take the place of a verdict which, as on every other fact in issue, has to be rendered by Court (NLR 1988 SCJ 105-PLD 1988 SC 86=PLJ 1988 SC 6). Where eye-witnesses have received injuries in the incident their presence at the spot cannot be doubted. But at the same time mere presence of injuries on their persons would not raise any presumption that whatever they are telling is the whole truth (PLD 1984 Lah 309 DB).

Where a sudden flare up lead to a free fight in which the accused alleged that he also had received injuries. But the eye-witnesses were completely silent about injuries on body of accused and gave no explanation at all in that behalf. It was legitimate to believe that such injuries were received by accused during the same transaction (PLD 1984 Lah 309 DB).

Where occurrence took place partly inside a bus with a number of passengers travelling therein and partly on open yet none of them were examined as a witness. Conviction of accused having been based upon testimony of inimical and interested witnesses was not legally sustainable. Conviction and sentence were set aside (1985 PCrLJ 2424=1982 PCrLJ 187).

2. **Constructive liability.**- Two of the appellants were empty handed and not carrying any arms. The third appellant undoubtedly had a knife but he was not brandishing it. It was in his pocket and there was no reason to believe that the appellants knew about it. Anothr appellant was alleged to be carrying a danda, but his participation was not accepted by the High Court as established beyond reasonable doubt. If that be so, it was indeed difficult to see how any common intention could have been attributed to the appellants to cause simple hurt. The only part attributed by the prosecution witnesses to the appellants was that they assaulted the victim with kicks and fists. But this was not at all brone out by the medical evidence on record. It was, therefore, extremely doubtful whether the appellants gave any such blows. The conviction of the appellants for the offence under section 323 read with section 34 could not be sustained (Mitter Sen 1976 CrLJ 857 SC).

Where the only part attributed by the prosecution witnesses to the appellants was that they assaulted with kicks and fists but this was not at all borne out by the medical evidence on record the Supreme Court held that it was extremely doubtful whether the appellants gave any kicks and fist blows to the injured. The conviction of the appellants for the offence under section 323 read with section 34 could not in the circumstances be sustained (Mitter Sen Vs. State of Uttar Pradesh, 1969 CrLJ 857(860) (SC)=AIR 1969 SC 1156).

When the person said to have been beaten did not appear in the witness box and his injuries were not proved the conviction under section 323/34, Penal Code should be set aside (Shyam Niranjan Dubey Vs. State of Uttar Pradesh AIR 1974 SC 541 (543). Where accused inflicted sota blow on prosecution witness in furtherance of common intention with two co-accused, their conviction and sentence under section 323/34, Penal Code was maintained (1988 SCMR 601).

Where there was a free fight between the two sides and it was not possible to say with any certainty that the accused were the agressors the Supreme Court held that 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 of which there is no evidence. The conviction of appellants under section 323 of the Penal Code, founded against each of them on the basis of section 149 of the Code is not therefore sustainable (Iwhwar Singh Vs. State of Uttar Pradesh, 1976 CrLJ 1883 (1887) (SC) = AIR 1976 SC 2423 = 1976 CrLR 357 (SC).

Where both parites are injured in a free fight they do not come out with the true story and try to minimise their own part in the incident. In such case the Court is competent to draw inference flowing from evidence and circumstances about origin of occurrence. Each person, participating in such fight would, therefore, be responsible for his own individual act (PLD 1984 Lah 309 (DB). Therefore some of the accused may be convicted under this section while others under section 325 (1987 PCrLJ 2013).

Where a person abets another by instigating him to give a beating to the deceased, and a blow given in consequence of such abetment causes death, the accused may be convicted of an offence under section 304, Part I, but the abettor can be convicted only under section 323/109, Penal Code (AIR 1962 Madh Pra 91).

3. **Conviction.**- Where hurt is caused indirectly but it is the natural and probable cause of the act of the accused, conviction should be under section 323, Penal Code. The accused, who had a quarrel with his debtor over non-discharge of a lone pelted brickbats at his house knowing that there were occupants in it, and hurt one of them and the latter remained under medical treatment for ten days. It was held, that the accused should be convicted under section 323 and not under section 336, as the hurt caused was the natural and probable consequence of his act (AIR 1916 Low Bur 89 = 17 CrLJ 465).

Where the evidence against the accused is only that of beating the deceased or of causing minor injury, he can be convicted only under section 323 even when death is caused (1981 SCMR 597). Where a person entervened during beating of the deceased and received blows, the offence will fall under section 323 (1970 CrLJ 1544). Where only simple injuries are found on a person the possibility of these being self-inflicted or self-suffered cannot be altogether excluded but this possibility must be considered in the light of the number, the nature and the location of the injuries found and the circumstances of the case (1971 SCMR 326).

Where a piece of wood missed its mark and hit a boy of seven and resulting in the boys death, the offence was held to fall under this section and not under section 304-A (1964 Raj LW 617) Where the accused gave blows and kicked the deceased simply to give him a threat which resulted in his death, the accused was held guilty under section 323 in the absence of an intention to cause death or grivious hurt (AIR 1920 Cal 401 = 21 CrLJ 666). The fact that some of the accused have been acquitted does not entitle the other accused persons to acquittal unless their cases are entirely based on the same evidence. Where no overt act is attributed to two of the accused persons they may be aquitted while others who have caused injuries may be convicted under this section (1988 SCMR 601).

4. **Punishment.**- The act for which an accused person must be punished is the hurt which he intended to cause, or might be reasonably held likely to cause, by the act done, and not an unfortunate and entirely unforeseen result of that act (Kelly (1897) PR No. 11 of 1897).

The incident having taken palce eight years ago, the conviction of the accused under section 323 would not be justified simply for his having given some slaps to the victim and the victim had not received any visible injury from those slaps (Parvesh Vs. State, 1982 CrLJ 1821 All).

The nature of injuries sustained by the complainant were simple and more or less superficial. The sentence of 9 months imprisonment imposed by the High Court erred on the side of severity. While upholding the confliction of the accused under section 323, his sentence was reduced to the period already served, which was about a month and a half (Raman Kalia 1979 CrLJ 1074 (SC).Where incident was a result of a sudden flare up between two obstinate youths over a trivial debt of Rs. 6. There was nothing to show that accused made any concerted attack on complainant party. Sentence of 1 years' R.I. was reduced to 5 months R.I. already undergone by accused (1984 PCrLJ 2568).

Where accused responsible for their individual acts of causing simple injury to deceased remained in jail for abou over a year. Sentence already undergone would meet the ends of justice (1985 PCrLJ 1295 DB). It is by no means uncommon for an offence punishable under section 323, to require and get, a much heavier sentence than one punishable under section 325 (AIR 1927 Nag 49 = 27 CrLJ 1229).

Where accused had remained in jail for more than two months as an under trial and after conviction. Sentence of imprisonment was reduced to that already undergone (1987 PCrLJ 2013).

Where accused remained in jail as an under trial prisoner as well as convict for a sufficient long time. Sentence was reduced to that already undergone by him (PLD 1986 Lah 154 = NLR 1986 Cr 208 = 1986 Law Notes 187 (DB).

The sentence may be reduced to one already undergone on the ground that if the accused had been tried in the ordinary course by a third class Magistrate, their term of imprisonment would not have exceeded one month and that they had already undergone imprisonment for 24 days (1937 Mad WN 743). Where the entire incident was not a one-sided affair and the complainant party had also contributed to it, a sentence of fine only was sufficient (PLD 1981 SC 394 = PLD 1981 SC 127 = NLR 1981 Cr 261). Where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent for the Court to impose seperate and accumulative sentence (Bateshar (1915) 37 All 628).

Accused-appellants had been held guilty of an offence under section 323, which is not an offence of a serious nature. No useful purpose would be served by sending them to jail. Modern criminal jurisprudence recognizes that no one is a born criminal and that a good many crimes are the product of socio-economic milieu. The present trend in the field of penology is that effort should be made to bring about correction and reformation of the individual offenders and not to resort to retributive justice. The two accused-appellants were given the benefit of the Probation of Offenders Act (Rajoo 1977 CrLJ 837 (Raj; Rajbir 1985 CrLJ 1495 (SC).

5. **Charge.**- The charge should run thus :

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

That you, on or about the ..... day of ..... at ..... voluntarily caused hurt to A B, and thereby committed an offence punishable under section 323 ofthe Penal Code, and within my cognizance.

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

324. **Voluntarily causing hurt by dangerous weapons or means.**- Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisoment of either description for a term which may extend to three years, or with fine, or with both.

**Synopsis**

1. Scope and application.
2. Instrument likely to cause death.
3. Death caused by supervening disease.
4. Evidence and proof.
5. Conviction.
6. Sentence.
7. Charge.

1. **Scope and application.**- This section deals with the case of causing voluntary hurt by means of an instrument which, used as a weapon of offence, will cause death (AIR 1937 Rang 8=38 CrLJ 299). The instrument must be one which is likely to cause death. It is something inherent in the instrument itself which renders death probable. An ordinary stick may not be lethal but may become one if iron bound and sufficiently thick. Spear inuries are likely to be fatal (AIR 1963 Assam 151).

For a simple injury caused by teeth, section 324 was held to apply (AIR 1970 Pat 322; 1970 CrLJ 1235). The offence under this section was permitted to be compounded at appellate stage (Bhim Singh Vs. State AIR 1974 SCC 1744=1974 CrLJ 1285). Where the injured and the accused who all belonged to student community have amicably settled their dispute and the Court was assured that happy relationship will be established in the student community for these reasons the Court granted permission to compound the offencce (Bhupendra Singh Vs. State of MP AIR 1981 SC 12 40(1241) = 1981 CrLJ 751).

Where there are several simple injuries barring one not on the any vital part of the body providing no imminent danger to the life of the injured, it does not amount to an offence under section 307 but under section 324 (Madan Lal Vs. State of H.P. 1990 CrLJ 310 = (1989) 2 Crimes 373).

The object of section 324 is to make simple hurt more grave and liable to a more severe punishment where it has the 'differentia' of one of the modes of infliction described in the section. It is not necessary that the manner of use of any weapon must be such as is likely to cause death (7 Mad HCR (App) 11). But the section does not cover the case of attempts to murder even where the injuries caused are not serious. Thus where use of dangerous weapons coupled with evidence regarding motive make it clear that had the victim received fatal injuries, the accused would have been guilty of murder, conviction under section 307 was proper (1969 SCMR 798).

2. **Instrument likely to cause death.**- To bring an offence under section 324 the instrument must be one, which is not 'liable', but which is 'likely' to cause death; the instrument used must be such of which one can predict that the probable result of its use will be, by virtue of its very nature, death. It must be inherent in the nature of the instrument used that death is likely to ensue (AIR 1937 Rang 8 = 38 CrLJ 299 (DB).

Where injury is caused with a sharp-edged weapon,the offence falls under section 324 even when the injury is not serious and whether more serious injuries

than those caused could have been caused or not is wholly immaterial (1971 SCMR 25; PLD 1986 Lah 154). Although a spear thrust in the chest is likely to have fatal results if the spear penetrates sufficiently deep, yet where, having regard to the nature of the injury, viz. that the thrust caused a punctured wound which only extended to the pleural cavity and did not cause injury to the pleural or to the lungs or to any other vital organ, it is doubtful whether the hurt could be said to be of that category which has the effect of endangering life; the proper section, which applies to the case is this section and not section 326 (Md. Misir Ali Vs. State (1963) 2 CrLJ 255; Shiv Singh Vs. State 1975 CrLJ 704 All).

Where accused caused simple injuries with sharp-edged and firearm weapons. His conviction under section 324 was maintained (1988 PCrLJ 1135=PLJ 1988 Cr. C 425 DB).

Where one of the accused was armed with a hatchet and he used it only once causing simple injuries which showed that he had no intention to cause death. The conviction of the appellants was altered from section 307 read with section 34 to one under section 324 read with section 34 of the Penal Code (1971 PCrLJ 25 Lah). Club and a wooden reaper can be said to be deadly weapons so they are likely to cause death if used as weapons. Where there was evidence that accused persons assaulted the injured with a club and a wooden reaper on his head and the injured sustained bleeding injuries on his head, it was held that the conviction for an offence punishable under section 324, Penal Code was proper (Habeeb Khan Vs. State of Karantaka, 1981 CrLJ 562 (563).

In another case it was held that simple injury caused with a dang would be punishable under section 324 and not under section 323 (1985 PCrLJ 1227=1985 CrLJ 227). Where several injuries had been caused by accused with a dang, he was convicted under section 324 and awarded six months, R.I. (1985 PCrLJ 2734=NLR 1985 Cr 31). Where the deceased was assaulted with a bhalla on the chest by the first appellant and one of his sons who intervened was given a blow by the second appellant and the trial Court convicted the first appellant under section 302 and the second appellant under section 326, but the medical evidence showed that the son of the deceased had not sustained any fracture of a serious nature, on appeal, it was held that the charge under section 326 against the second appellant must necessarily fail but that she could not escape conviction under section 324 (Kailah Prasad Kanodia Vs. State 1981 SCC (Cri) 285).

Where a quarrel took place between the complainant and the accused each one possessing a pistol and the accused fired a shot, one of which hit the complainant but the injury was not grievous it was held that the offence fell under section 324 (Thakur Das Vs. State 1960 CrLJ 1080).

3. **Death by supervening disease.-** Where death is caused not as a direct result of a simple injury caused with a dangerous weapon, nor is the disease a direct result of the injury caused, the offence would be one under section 324 and not any grave offence. Where a simple injury was caused to the deceased which healed in the hospital but before the fever had completely gone he left the hospital against medical advice. He died subsequently of abscess in the head wound. The accused was held guilty under section 324 (AIR 1941 Rang 141 (DB).

A inflicted a single stap on B's chest and ran away. B was taken to hospital but died after being treated as an inpatient for 32 days. The wound had not injured any vital organ. A surgical opening was made during the treatment to facilitate drainage from pleural cavity and death was due to syncope from septic absorption possibly from both those wounds. A competent medical witness after examining the injury

was not in a position to state whether the wound was one which in the ordinary course of nature would cause death of the victim. The accused was convicted under Part II of section 304, Penal Code. It was held, that it was too much to attribute knowledge to the accused that the injury he was inflicting would bring about death. As the possibility of septic absorption from a surgical opening resulting in B's death could not be ruled out, it couldnot be held that B's death was definitely traceable to the injury inflicted by the accused. A had voluntarily caused hurt to the deceased with a knife, which was a dangerous weapon, and the proper section under which the accused could be convicted was section 324 (ILR 1955 Trav Co 23). Where the accused remained an indoor patient in a hospital for 22 days after the occurrence and according to medical evidence death occured due to fical toxonia and paritonia caused by operation in abdomen, necessitated by two small perforations in ilium and rectum not caused by pellets. There was nothing definite that three entrance pellet wounds on the buttock of the deceased either resulted in his death or into any grievous injury. Conviction under section 302, Penal Code was altered into one under section 324, Penal Code (1981 PCrLJ 403 (DB) (Kar).

4. **Evidence and proof.**- It is not the duty of the prosecution to establish the intention for any act, if the act is itself is proved (1978 CrLJ 1303 (Ori). A man is presumed to have intended the natural and probable consequences of his act. The presumption does not extend to consequences which have not occurred. Thus in hurt cases there is no reason to presume that anything beyond the injury actually inflicted had been intended (1978 PCrLJ 745).

Where the weapon used by the accused fell within one of the categories mentioned in the section but no grievous hurt, was caused, the offence committed fell under section 324 and not section 326 (PLD 1961 Lah 506).

Where evidence is merely that a bone has been cut and there is nothing whatever to indicate the extent of the cut, whether deep or a mere scratch upon the surface and if it is impossible to infer from that evidence alone that grievous hurt has been caused the accused can only be convicted under this section and not under section 326 (1970 PCrLJ 674; AIR 1942 Pat 376 = 43 CrLJ 511 DB).

There can be no conviction under this section even in the absence of a wound certificate or the opinion of a medical officer where the oral evidence is safe and reliable in proving the nature of the weapon used (State Vs. Haridasan 1978 CrLJ 1204 Ker). Where the accused shot at the legs of his opponents, so that two persons were hit with pallets from the same shot. One of them received grievous injuries whereas the other received simple injuries. The accused was convicted under section 326 and section 324 relating to two injuries respectively (1981 PCrLJ 517).

Where accused inflicted repeated daggar blows to victim on his neck, a very delicate part of body, case fell under section 307, Penal Code (PLD 1983 SC 32). It is settled principle that the positive evidence in a case is that of the eye witness who had seen and narrated the occurrence. The evidence of a medical man or an expert is merely an opinion which only leads corroboration to the direct evidence. If there are other evidence to prove the offence medical evidence is not indispenssible (Mofazzel Vs. The State 1987 BLD 406).

Where the accused inflicts injuries on the accused in a vital region with a sharpedged weapon even when no vital organ is cut, the accused may be guilty of an offence under section 304 provided that the requisite intention or knowledge mentioned in section 300 can be made out. If that can not be done, the accused may be convicted under section 324 only (AIR 1965 SC 843).

When the prosecution witnesses deliberately give a false account as to the onset of the quarrel and do not put forth correctly the genesis of the happening which remains erratic, prosecution cannot avail itself of its own blatant error and the benefit must go to the accused (State Vs. Muhammad Khushed 1971 CrLJ 1555 (SC); Babu Singh Vs. State 1979 CrLJ (NOC) 36 (Raj). Prosecution proved the occurrence at the time and place if had occurred. Accuseds took the plea that the place of occurrence was the disputed plot nos. 848 and 849 and invoked the principle of right to the disputed lands. High Court Division elaborately discussed the evidence and found that there is neither any oral nor any documentary evidence that there was any mark of violence in the filed in the disputed lands. Conviction was upheld but the sentence were modified to serve the ends of justice. Appeal dismissed (Haider Ali Vs. The State, 1984 BCR 438 (AD).

5. **Conviction.** - Where the accused did not have a common intention to cause death and they inflicted blows on the decaesed in a sudden quarrel, each accused is liable for the injury caused by him. Therefore the accused who caused a fatal injury would be liable for murder while those who caused simple injuries with dangerous weapons would be guilty under section 324 (AIR 1946 Mad 83 (DB); 1957 CrLJ 270 (All). A lacerated wound caused by a pharsa not using a sharp edge. Conviction under section 324 was held proper (Jai Narain Mishra Vs. State. AIR 1972 SC 1764). Where out of five accused three were acquitted and therefore section 149, Penal Code could not be applied to the remaining two. The accused who had caused only simple injuries could not be convicted of an offence under section 326 alongwith the principal accused who caused grievous hurt. The former can only be convicted under section 324 Penal Code (1969 SCMR 724=1969 PCrLJ 1426).

It clearly appears that neither party was in actual possession of the land but both the parties were trying to establish their possession by criminal force. In such a situation neither of them is entitled to protection of law. In such cases the participants will be liable individually for their respective acts. In view of the peculiar facts and circumstances of the case, the sentence of the appellants should be reduced (Kamar Ali Vs. The State, 1987 BCR (AD) 71).

Out of three accused, one of the accused gave fatal blow on head of deceased. However, injuries given by other accused, with spear on knee and arm of deceased were simple. First accused liable to be convicted under section 304, Part I. However, conviction of second accused under section 304, Part I, was not proper when section 34 has not been applied. Second accused liable to be convicted under section 324 only. Conviction of third accused giving simple blows upheld under section 323 (AIR 1992 SC 1629).

Where it is not definitely known which of the accused gave the fatal blow, all the accused can only be convicted of an offence under section 324 and not under section 302 (ILR (1952) 2 Raj 258 (DB).

Where medical evidence disclosed no serious injury on any vital part and the Doctor admitted absence of fracture of serious nature, the conviction under section 326 was altered to one under section 324, Penal Code (Kailash Prashad Vs. State AIR 1980 SC 106 = 1980 CrLJ 190).

In the instant case merely knocking a man down by a blow would not meant for sure that the accused intended or knew that it would be likely to cause grievous hurt as it would not be the case with the majority. In a border line case between sectons 323 and 325 of the Penal Code, the accused would be entitled to the benefit of doubt and be convicted under section 323 of the Penal Code and not under section 325. That being the position, the accused should not have been convicted and sentenced

under secton 325 of the Penal Code but under section 323 of the Penal Code, in the view of the murder, he is foud guilty under sectioh 323 of the Penal Code and his conviction is thus, altered from one under sedition 325 to one under section 323 of the Penal Code (Amar Kumar Nag Vs. The State (1989) 41 DLR 135 (para 12).

P.W. 1 is a very important witness and gave a long list of the assailants in his Ejahar. Had Ramjan participated in the assault on his son, there was hardly any reason why he would be omitted by him in his ejahar. Both Tayeb Ali and Ramjan Ali were members of the unlawful assembly which committed rioting in prosecution of their common object in assaulting Bazlur Rahman and reaping his paddy. But their participation in the assault upon Bazlur Rahman is doubtful, and as such, their conviction for the murder is not sustainable in law. Both of them have been convicted for rioting under section 148, Penal Code; Tayeb Ali has been further convicted under section 324 for causing hurts to P.W. 1. These convictions and sentences are based on good evidence. In the result, the appeal is allowed in part, that is, appellant Tayeb Ali and Ramjan Ali are acquitted from the charge under section 302/149 but their convictions and sentence under other sections namely section 148, in the case of Ramjan Ali section 324 and section 148 in the case of Tayeb Ali, are maintained (Tayeb Ali Vs. The State (1989) 41 DLR (AD) 147 (para 12) = 1989 BLD (AD) 110).

**Medical opinion for conviction under.** - Neither P.C. nor Cr. P.C. nor Evidence Act insists that there should be the opinion of a medical officer as a condition precedent to conviction a person for an offence under section 324 of the Penal Code, which stresses more the nature of weapon than or the from or gravity of injury. The evidence of medical officer is not indispensable for conviction per Janki Amma, J. (State of Kerala Vs. Hari Dasan, 1978 Ker LT 70).

6. **Sentence.**- The question of sentence on conviction under section 324 deends upon the facts of each case. The Court may in one case inflict three years' R.I. (AIR 1950 Mys 228). Where the assault was made with a view to prevent the victim from appearing as a witness in the Court in another case, the motive was to interfere with the administration of justice and the release of the accused on probation would be proper (1979 CrLJ (NOC) 38 (All). Where accused caused a simple injury to a prosecution witness. Conviction under section 324/34,Penal Code was maintained but sentence of imprisonment was reduced to period already undergone (1986 PCrLJ 1310 (DB).

Where accused who was armed with a hatchet caused simple injuries in a sudden quarrel over a land dispute. Co-accused who were armed with guns were acquitted by trial Court. Sentence was reduced to that already undergone (1984 PCrLJ 2426). Where serious injury was caused in abdomen with a razor, there was justification for reducing the sentence of R.I. for one year (Abadhray Vs. State, AIR 1979 SC 1703).

Where only an offence under section 324, Penal Code is made out against the petitioner and there is a compromise arrived at between the parties and further the petitioner has already undergone in imprisonment for a period of about one month, it is a fit case to reduce the sentence of the petitioners to that already undergone (Tirath Ram Vs. State of Haryana 1988 (1) Crimes 84 (P&H).

Where parties assembled for some compromise. But a fight took place without any premeditation all of a sudden. accused and three witnesses were injured during the occurrence. Grievous injury caused did not damage any vital part. Sentence of four year's imprisonment was considered harsh and was reduced to 3 years (1988 PCrLJ 1115). Serious injury tearing a portion of the abdonmen by a razor would not call for any reduction of sentence of the accused (Abadhraj Dukhram Pande, 1979 CrLJ 1388 (SC).

Where the offence under this section was committed by college students. It was held that whether more serious injuries than those caused could have been caused or not is wholly immaterial. However, if the students have acted like ordinary criminals, they would not be entitled to special treatment (1971 SCMR 25 See also Bhupendra Singh Vs. State of MP AIR 1981 SC 1240 (1241)=1981 CrLJ 751).

Where the accused was first offender and had acted on the spur of the moment, it was held that the benefit of probation could be given to the accused but since he had already surrendered to his sentence was reduced ot the period already undergone (Saradhakar Sahu Vs. State 1985 CrLJ 1591 (Ori). Where the accused has suffered the agony of a long-drawn trial, he may be shown leniency in the matter of sentence. Where the case was pending aginst the petitioners for the last sixteen years. On account of inordinate delay in the disposal of the case, the sentence of the petitioners was reduced to sentence of imprisonment already undergone (1986 PCrLJ 251; NLR 1981 CrLJ 637 (Lah).

Where the accused who was found guilty of an offence under section 324, had already suffered a sentence for over 2 months and his appeal was heard after about 2 years and 4 months, the sentence already undergone and fine of Rs. 500, was sufficient to meet the ends of justice (1970 PCrLJ 1078). Where accused remaining behind bars for more than two years. He was sentenced to imprisonment already undergone by them (1986 PCrLJ 2351=NLR 1986 AC 179).

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

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

That you, on or about the ..... day of..... at ..... voluntarily caused hurt to XY by means of ..... which is an instrument for shoting (or stabbing etc.) and thereby committed an offence punishable under section 324 of the Penal Code, and within my cognizance.

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

325. **Punishment for voluntarily causing grievous hurt.**-Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Synopsis**

1. Scope and applicability.
2. Intention and knowledge.
3. Death caused by injury.
4. Right of private defence.
5. Evidence and proof.
6. Constructive liability.
7. Charge.
8. Sentence.

1. **Scope and applicability.**- The essential ingredients of an offence of voluntary causing of grievous hurt are three in number : (1) grievous hurt as described in section 320 must first be caused. If the hurt actually caused is simple, a person cannot be held guilty of voluntarily causing grievous hurt, even if it was in his contemplation; (2) the offender intended, or knew himself to be likely to cause, grievous hurt; there must be complete correspondence between the result and the intention or the knowledge of the accused; (3) the hurt was caused voluntarily. In other words, the causing of grievous hurt was either in contemplation or was the likely result of the act done (AIR 1963 HP 18). Where accused cut off ear of a female from its root, their conviction and sentence under section 325/34, Penal Code was fully justified (1987 SCMR 101). After a man has been struck on the head and a fracture is caused, to surround and beat him with lathis is to cause hurt which

endangers life within section 320, accused may be convicted under this section (AIR 1928 Pat 46).

Where one accused had put a turban around the neck of the deceased. From medical evidnecce, it appeared that he did not strangulate the deceased as no ligature mark was found on the neck while the other accused had felled the deceased by holding his legs. There was a dislocation of the sixth cervical vertebrae. The deceased remained alive for a period of about eight months after the occurrence. He remained bed,ridden and on that accout, necrotic ulcers had been formed on the body, which contributed towards the death. From these circumstances, it was quite obvious that the appellants had not the intention of causing death nor had he the intention of causing such bodily injury as was likely to cause death. Their conviction was altered from section 302 to section 325, Penal Code (PLD 1981 Lah 143).From a reading of the judgment, in the instant case it appears that the learned Court below after examining the testimony of the witness came to a finding that the prosecution had been able to prove beyond all reasonable doubts that the accused Amar Kumar Nag @ Ratu Nag caused grievous hurt to the complainant, and as the evidence does not show that it was cuased by any instrument of shooting, stabbing or cutting or any instrument used as a weapon of offence found that the accused could not be said to have caused grievous hurt by any instrument of stabbing, punishable under section 326 of the Peanl Code but as he had cuased grievous hurt he would be found guilty udner section 325 of the Penal Code and hence liable to be convicted not under section 326 but under section 325 of the Penal Code (Amar Kumar Nag @ Ratu Vs. The state (1989) 41 DLR 134 (para 7).

An act which is not likely to cause death amounts to grievous hurt even when death is cuased by it (AIR 1955 Tri. 9). Where the accused caused disfiguration of the nose of a woman in order to steal her nose ring. The woman died of the injury although it was not likely to cause death. The accused was held guilty under section 325 as the hurt would ordinarily result in permanent disfiguration of the face (1944 Mad LJ 281). Where the accused an adolescent offender, inflicted injuries, which were not fatal, on the deceased; who was his friend, for a petty reason, and it was found that the deceased had died from a wound caused by a fall while running away from the accused, and the accused threw away the dead body of the deceased into a well, the accused was held guilty under section 325 and not under section 302, Penal Code (AIR 1949 Nag 649;1950 CrLJ 896). When one of the injuries is fracture of mandible (inferior jaw) caused in the incident either by blow of fist or throw of chair by the accused, it is sufficient to come to the conclusion that the accused has caused grievous hurt to the injured and is guilty of an offence under secton 325 of the Penal Code (State of Maharashtra vs. Babukhan 1989 (3) Crimes 349 Bom).

There must be evidence to show not only that the assaulted person had remained under treatment in a hospital for more than 20 days but also that the injured person was in severe bodily pain for that period or was unable to carry on his ordinary avocation (AIR 1931 Lah 280). Even where doctor described all of 21 injuries to deceased individually as simple. Appellants would be guilty under section 325 as nature, number and location of injuries, although they were not likely to end in death, were cumulatively such as would cause victim severe bodily pain or deprive him of capacity to follow his ordinary pursuits for twenty days within the meaning of section 320 (NLR 1988 SCJ 105).

2. **Intention and knowledge.-** Before any one could be convicted of causing grievous hurt, it must be proved that there was an intentin on his part to cause grievous hurt or at best knowledge that it would be caused (PLD 1981 Lah 143). For

grievous hurt there must exist an intention to cause such a hurt or knowledge that such an action would be the natural and probable consequences causing grievous hurt, otherwise the hurt would be a simple one and in fact an assault by a blow on the face is not always inconsistent with the intention to cause simple hurt only and if the act of causing and the manner of the hurt was such that simple hurt could reasonable be thought likely to be ensured from it, then, although the grievous hurt may unexpectedly be caused, the accused would be convicted for a simple hurt, grievous hurt having not been contemplated. In all such cases, the answer really depend upon the injury caused and the manner in which the blow was administered (Amar Kumar Nag @ Ratu Vs. The State (1989) 41 DLR 135, para 11). The intention is to be gathered from the nature of the weapon used and the parts of the body where the injuries are inflicted. Where the appellant did not inflict any injury on any vital part of the body of the victim, and had the handle of the axe in committing the assault, his conviction was altered from section 307 to section 325 and he was sentenced to two years rigorous imprisonment (Kumar Majhi 1981 CrLJ 12787 (Ori). But a violent blow inflicted upon the body would indicate an intention of causing grievous hurt (Narayan Pasi (1875) 24 WR (Cr) 24; Kalika Singh 1981 CrLJ 639 (All); Mohinder Singh 1985 SCC (Cri) 488). Where in a fight several accused persons attacked the deceased with lathis and killed him, and it was proved that the common intention of the accused was not cause death or such injury as was likely to cause death but only to cause grievous hurt, and the evidence left a doubt as to which of the accused struck the fatal blow; all the accused were guilty of an offence under section 325 and not under section 304 (AIR 1918 All 209).

Where the knowledge that th einjury caused by the co-accused U would cause death could not be attributed to the accused M and there was also common intention to cause the death of the deceased, which U was convicted under section 302, the conviction of M was altered from secton 302/34 to one under section 325 (Mohinder Singh 1975 CrLJ 1320 (SC); Ashok Laxman Sohani 1977 CrLJ 829 (SC). Where accused had no intention to kill complainant but to beat and disgrace her. Complainant, according to medical evidence, suffered fractures of her left patella and left fibula which were grievous in nature. Provision of section 325/149, would be attracted and not section 307/149 (1988 SCMR 594). Where the accused carried hatchets but in causing injuries to the complainant they desisted from using sharp dedged sides of the hatchets and none of the injuries were inflicted on vital parts of the body. The circumstances, indicated that the accused had no intention to kill the complainant and their conviction under section 307/149 was altered to that under section 325/149 (1968 PCrLJ 1095). Where both the petitioners were armed with lathis and at best they only wanted to cause grievous hurt and it was not their intention to murder any one. The High Court, after appraisal of the evidence available on the record, found that offence committed was one under section 325/34 and not one under section 307/34 (NLR 1981 CrLJ 356).

Where the accused threw stones at their victim and killed him, it was held that as the accused picked up stones heavy enough to cause grievous injuries they must be held to have had at least the intention to cause grievous hurt (PLD 1951 Azadd J&K 15). Similarly where the accused threw a stone on the face of the complainant, with force sufficient to cut his upper lip and knocked out six teeth, he must be presumed to have intended to cause such injury that he should be convicted under section 325 (AIR 1942 Mad 550). But where the blow or injury is not such as to show by itself that the accused had the intention or knowledge to cause death, the accused would be held guilty of an offence under section 325 only if requisite intention or knowledge can be proved (1936 Mad WN 522).

A man striking another with a rod might ahve no intention of causing grievous hurt and it might be said that he would have no knowledge that he was likely to cause grievous hurt. In such a case if grievous hurt was caused owing to a fall after the blow, the person guilty of assault might well not be liable for causing grievous hurt. On the other hand, if the nature of the blow was such that one could attribute to the person committing the assault knowledge that he was likely as a result of the blow to cause grievous hurt then conviction under section 325 might be sustained (AIR 1952 Cal 481).The sticks which are alleged to have been used in the crime are not very heavy sticks. Accused - 1 gave only one blow on the head of the deceased and after he fell down no blow was given by accused. 1 to the deceased. From the nature of the weapon, i.e. stick and the single blow given by accused 1 on the head of deceased neither intention to cause his death nor knowledge that the injury to be caused thereby would result into the death can be imputed to accused 1. Therefore, the offence, committed by him does not fall within the provisions of section 302, Penal Code. Accused gave a forcible stick blow in the head of deceased and thereby caused grievous hurt to him without intending or knowing that thereby he would cause his death and therefore the offence would fall squarely under section 325, Penal Code, and is liable to be convicted for the same (State of Maharashtra vs. Suresh Bhalchandral Gavade, 1989 CrLJ 1709 (1714) Bom).

A person is said voluntarily to cause grievous hurt when he not only causes such hurt but intends and knows himself likely to cause it. It cannot be held that merely by knocking an old man down the accused intended or knew himself likely to cause grievous hurt and he cannot be convicted under section 325 (40 Pun LR 562). Even where death was caused but it was doubtful whether the accused had either intended or knew it to be likely that he would cause grievous hurt. The case appeared to be on the border line between sections 323 and 325, Penal Code. The accused was entitled to the benefit of the doubt and he should be convicted of an offence under section 323, Penal Code (1969 PCrLJ 1132). Where only one kick on abdomen of deceased was given and the medical evidence did not support the view that appellant had knowledge of or intended to cause grievous hurt. Conviction was altered from section 325 to section 323 (1984 PCrLJ 1343). Even if the accused did not have an intention to cause grievous hurt at the begining of the incident, it may develop subsequently in the course of events. In that case he would be liable to conviction under section 325 (1981 SCMR 308).

In the case of a sudden fight in the heat of passion upon a sudden quarrel no undue advantage was taken. There was a quite long drawn out fight with passions considereably raised and yet without any intention to kill and it was impossible to say who gave the fatal blow which broke the rib and pierced the lung of the deceased. It was difficult to say that in inflicting any of the injuries found on the body of the deceased the accused were really saddled with the knowledge that, by so doing, they were likely to cause the death of deceased much less that there was an imminent danger of his death being caused, the accused should properly be convicted under section 325 and not under section 304 (AIR 1942 All 400; 44 CrLJ 110).

Where the accused dealt one blow on chest of victim on the spur of the moment and after on sudden quarrel not by a cutting or stabbing instrument on the chest, but by a blunt weapon which caused fracture of one rib. While the accused would certainly expect the natural consequences of his act to be the fracture of a rib and could, therefore, be said to have volunarily caused grievous hurt, death had been caused by an extraordinary intervening circumstances because a fractured rib caused rupture of the spleen and death occurred owing to rupture of the spleen (1984 CrLJ 833 (Ori).

Where there was some altercation between the parties and in all probability hot words, possible even abuses were exchanged, some kind of resort to violence between the parties was also imminent; it was held, that the blow to the deceased given by the accused in the circumstances, did not constitute an offence under section 302 or even under section 304. Intention to cause grievous injury under section 325 alone could be imputed to him. (1969 PcrLJ 1473; AIR 1960 Punj 214 (DB).

3. **Death caused by injury.**- Where the accused caused injury on the deceased for a petty reason and the deceased died of the injury due to a fall while running away and the accused threw the body into a well the accused was rightly convicted under section 325 and not under section 302 (AIR 1949 Mad 748=51 CrLJ 896). Where in a sudden fight in the heat of passion while there was no intention to kill, death resulted by a broken rib piercing the lung and it was not clear as to who dealt the fatal blow to the deceased, the offence committed was one under section 325 and not under section 304 (Nathoo vs. State of Allahabad AIR 1942 All 400 = 44 CrLJ 110). Where the deceased had injury on the leg causing a fracture and some more on the head, and the death resulted due to haemorrhage, it cannot be an offence, under section 325 but under section 304, Part III (AIR 1982 SC 1182).

Where the accused aimed a lathi at a certain person but the blow fell upon a woman and a child who intervened unexpectedly and the blow if had fallen on the person aimed at could only have caused grievous hurt the accused was convicted under section 325 Penal Code and not under section 304 (Raghubir vs. State of Allahabad AIR 1957 All 132).

When the accused knew that he would be smashing his victim's skull by his blow, he must as well have known that he was likely to cause the death of his victim. He ought therefore, to be convicted for culpable homicide and not merely for grievous hurt (AIR 1930 Bom 483). Where a prisoner hit the Superintendent of Jail with a shoe and to punish him the officer inserted a wooden article in the rectum of the prisoner which caused his death, the accused was held to have known that his act was likely to cause death, and he was convicted of an offence under section 304, Part II and not under section 325 (AIR 1932 Lah 199).

Where the accused intending to give a beating to his nephew for his misbehaviour administered a lathi blow on his head and the injury was reported by the doctor as dangerous to life and it subsequently resulted in actual death; on the part of the accused neither was there any notice nor intention to kill the deceased. But he cannot urge that he had no knowledge that such an injury was likely to cause death. Conviction under section 302 was altered to that under section 304, Part II (PLD 1970 Lah 757). When the accused had dealt only one blow on the spur of the moment and after a sudden quarrel not by a cutting or stabbing instument but by a blunt instrument on the chest which caused fracture of one rib causing rupture of the spleen and death occurred owing to that, the acucsed was held guilty under this section and not section 304-A (Lokanath Behera Vs. State1984 CrLJ 833 (Ori).

Where the accused could not have known that they were inflicting such injury as would be likely to cause death and intention of causing death or of causing such bodily injury as was likely to cause death was not even imputed to them and injuries were not directly responsible for the death, but death was only an indirect conseqnece of the injuries. It was held, that the accused cannot be convicted under section 334, but the conviction should be under section 325 (AIR 1928 Oudh 36). Where in a sudden fight, without a preconcerted plan the parties exchanged blows with blunt weapons and the deceased died of grievous head injuries. The offence falls under section 325/34 and not under section 304, Part I (1968 SCMR 18).

Where the medical evidence shows that blows were struck with such force on the chest that the tenth rib was fractured and as a result of this injury which has been described by the doctor as being sufficient in the ordinary course of nature to cause death, the victim actually died. The accused was convicted under section 325, Penal Code (1971 SCMR 378).Where the victim had received two lacerated wounds on his scalp with a lathi but they were simple in nature, it ws held that the accused were guilty of an offence pounishable under section 325/34 and not section 302 (state Vs. Misri Lal 1982 CrLJ 1420 All).

Where the deceased was belaboured with lathis for his refusal to retrun their cattle which he was taking tot he cattle pound. There was no injury on any vital part which showed that there was no intention to cause death, the accused were convicted under section 325 (AIR 1932 Oudh 279). Where the accused cut nostrils of a woman to remove jewels and she died subsequently. He was convicted under section 325 and not under section 320 because the injury was not on a vital part and neither intention nor knowledge to cause death was present (ILR 1945 Mad 73).

Where there is nothing to show that death was the direct result of the injury inflicted by the accused, he cannot be convicted for murder or culpable homicide. Where the accused, seven in number, attacked the deceased with the intention of beating him after an exchange of hot words, and caused two incised wounds of trivial character, and three contused wounds sufficient to stun the victim, and he subsequently died. There was no medical evidence to prove that death was due to the injuries. It was held that the accused were guilty under section 325 read with section 149, and not under section 304 (PLD 1951 AJ&K 32).

Where medical evidence does not conclusively prove that the injury suffered by the deceased was the direct cause of his death. The deceased lived for some three months. after the receipt of the injury, the accused was convicted under section 325 (PLD 1951 AJ&K 32) Where the lathi blow given to the deceased was not likely to cause death but due to neglect in treatment, meningitis set in and death occurred after three weeks, the accused was held guilty under section 325 and not under section 304 as the injury was not such as would in the natural course result in death (AIR 1935 Oudh 446). No definite opinion could be given that it was the injuries which resulted in his death, and indeed out of the inuries mentioned none was in the opinion of the doctor sufficient individually or in combination with any other to cause death in the ordinary course of nature. In these circumstances the offence in regard to the deceased was not one of culpable homicide but one of grievous hurt. Since no weapon answering to the description mentioned in section 326, Penal Code was alleged to ahve been used in the causing of the injuries which were grievous, the offence would fall under section 325 (1975 PCrLJ 338).

Where accused gave only fist flows to the accused and medical evidence did not prove that offence committed by the accused would fall within ambit of section 325 Penal Code on the contrary the doctor who attended deceased deposed that although the deceased was advised X ray yet he left, so that the injury received by him could not be properly treated. Offence under section 325 Penal Code was altered to one under section 323, Penal Code (1983 PCrLJ 1302). It is borne out from the evidence that even prior to the occurrence, there was a quarrel between the deceased on the one side and the appellant and his associates on the other relating to the purchase of cinema tickets and selling them in the black market, Supreme Court held that, appellant also woudl be guilty of the same offence as the case of that accused except 'K' the appellant is liable to be convicted only under section 323 read with section 149, Penal Code (Jawahar Vs. State of U.P. AIR 1991 SC 273).

Where the evidence pointed towards the likelihood of sudden altercation between the two parties and the two accused reacting individually to such a situation in developing a common intention to cause grievous hurt but could not be said to have intended to kill the deceased, their conviction was altered from section 304 read with section 34 to section 325 read with section 34 (Balwan Singh Vs. State of Haryana, 1990 CrLJ (NOC) 76 (P&H) (DB). Where the accused had a definite motive to cause the death of the deceased but the accused had not come armed with any formidable weapon and used sotas and stones to cause the injuries and from the facts and circumstances of the case including the number and nature of the injuries the absence of any definite medical opinion, the weapon used and the salient features of the prosecution case, it was quite apparent that the intention of the accused was only to cause grievous injuries and not the death of the deceased (Haji Lal Din Vs. State 1977 CrLJ 538 (J&K).

4. **Right of private defence.**- The question whether the accused has a right of private defence or not must be decided on the facts of each case. Where there were three persons on the side of the appellants and only two on the side of the deceased. It was held, that no presumption could be made that the appellants were acting in exercise of the right of private defence. They committed an offence under section 325 and not under section 304 (AIR 1922 Lah 394). Where injuries on person of complainant were more serious than those on person of accused but there was nothing on record to show as to who commenced aggression. Benefit of doubt regarding their presence at the time of occurrence was extended to two of the accused on the same evidence. The remaining accused was also entitled to acquittal on benefit of the doubt (PLD 1983 Pesh 81).

Where the accused are legally in possession of property, they have a right to defend their property agianst all trespassers, and they may use such force as is necessary to resist the trespass. Where both sides to a dispute regarding the cutting of sugarcane crop charged the other as aggressor, the party which was legally in possession was held to have the right of private defence (AIR 1953 Pesh 81). Where the complainant's party trespased on the lands of the accused in small numbers and were driven away. Then they returned in larger numbers and were again driven away by the party of the accused,and a number of men of the complainant's party suffered injuries, some suffering grievous hurt; it was held that the accused were acting in the exercise of their right of private defence of property and that the accused did not exceed it (AIR 1933 All 896).

5. **Evidence and proof.**- Evidence of the prosecution witnesses cannot be rejected on the ground that they were interested and had made improvements in their statements. Hardly does one come across a case where witnesses do not make improvements in their evidnee. In factional fights it is generally the interested witnesses who come forward and unconnected witnesses are reluctant to give evidence. In the instant case the Sessions Judge was not right in rejecting the evidence of the prosecution witnesses (State Vs. Des Raj, 1979 CrLJ 558(563).

In a case under section 325 read with section 34, Penal Code, the complainant deposed that he was assaulted by the two appellants at Nagda Railway station as a result of whcih he lost his molar tooth. The evidence of the complainant in this respect was accepted by the trial court as well as the High court. It was held that nothing cogent was brought to the notice of the Supreme Court as would justify interference with the appriaisement of that evidence (Dharamvir Vs. State of Madhya Pradesh, AIR 1974 SC 1156 (1158). Accused admitting his presence at place of occurrence which is his own field. Does not corroborate evidence that he took part in beating the complainant (1969) PCrLJ 934; 1969 SCMR 354)

There is clear evidence of rioting leading to causing of grievous hurt. Even if it is difficult to find out who exactly are the persons to cause hurt but since there was rioting and the convicted accused persons have participated and evidence has been accepted the accused should be convicted only under section 325/149. (Jharu and others Vs. State of Madhya Pradesh, AIR 1991 SC 517). The complainant and his party enclosed the entire land by thorny bushes and closed the accusess to the well so as to infringe the customary right of the appellant of drawing water from the well. At this stage appellant variously armed arrived at the scene of occurrence to assert this bona fide claim of right. It was held that as the main object of the appellants was to demolish the obstruction caused by the complainant on the pathway, leading to the well, they could not be said to be inspired by any unlawful object, if, however, in achieving this object some of the accused assaulted the members of the prosecution party they would be guilty of the individually overt acts committed by them including those of 323, 325 and 435 (Hathi Singh Vs. State of Rajashthan, 1979 CrLR (SC) 398 (401).

There was no reliable evidence on the record to prove whether the fatal blow on the head was caused by N or R. The other fatal blow did not fall on any vital part of the body and, in the absence of evidence to establish that their common intention was to cause death, it appeared that the accused had the common intention of causing grievous injury with the lathi and khunt. It was held that they could be covicted of an offence under section 325 read with section 34, P.C. and not section 302 read with section 34, Penal Code (1976 CrLR (SC) 128= 1976 CrlJ 1154 = AIR 1976 SC 1537 = 1976 SCC (CR) 227).

There was a free fight between two groups resulting in death of one person. Fatal injury could not be attributed to any one. Accused also receiving number of injuries. Conviction under sections 324, 325 was proper. However sentences of accused persons were reduced (1993 CrLJ 2857 SC). Prosecution version in the instant case as to the number of lathis inflicted did not match with the medical evidence. It was not possible to ascertain which of the accused had quarrelled with the complainant and caused him hurt. No witness of the inhabited locality was examined in the case. Presence of PW 6 at the occurrence was found doubtful. Held, the benefit of doubt should go to the accused (1985) 1 Crimes 985 (Del).

Where for the purpose of proving the charge of causing grievous hurt against the accused, the prosecution relies upon the strength of direct evidence of the eye-witnesses, the presence or absence of motive on the part of the accused to commit the crime is not material. The matter then would depend upon the assessment of the evidence of the witnesses (1984 CrLJ (NOC) 127 All).

Where there is no evidence to indicate as to which of the accused persons actually caused the grievous hurt none of them could be convicted under this section. It may be presumed from the conduct of several persons striking another with lathis that each of them intended to cause grievous hurt but such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused unless it is further shown that the accused actually cuased grievous hurt (Deepa 1947 All 678 dissenting from Bishwanath Vs. State 1945 ALJ 531).

In the course of a disturbance, two injuries were caused to a person, one of them grievous, and it was not possible to say which of the accused caused that injury. It was held that neither of them could be convicted under this section and both of them should be convicted only under section 323 (41 CrLJ 923 = AIR 1940 Mad 586 = 1940 MWN 538). Where the accused gave a single lathi blow to the deceased whereupon he fell from his bicycle and died and the accused concealed his body. He

as convicted under section 325 and 201, Penal Code and sentenced to 7 years R.I. (PLJ 1979 CrC 44).

Where the evidence of the eye-witnessess relied upon by the prosecution does not inspire confidence regarding the place of occurrence and the manner in which the occurrence took place and a strong doudbt persists about its correctness, the benefit of doubt must go to the accused 1984 CrLJ (NOC) 127 All).

**Medical evidence.**- The opinion of the doctor about the nature of injury is not inding on the court (Sarwan Singh Vs. State, AIR 1978 SC 1525). Medical evidence can bardly be relied upoon to falsify the evidence of eye witnesses because of the fact medical evidence is guided by various factors based on guess and certain calculation (AIR 1979 SC 1194).

The prosecution is not bound to explain the superficial injuries on the person of the accused not caused at the time of occurrence (AIR 1979 SC 1010).

6. **Constructive liability.**- It is difficult to apply section 34 where the person injured came to the scene of occurrence when the blows were being exchanged. In that situation only the accused, who is stated to have caused a grievous injury to her, can be held guilty of an offence under section 325. Others, therefore, must be acquitted of the offence of causing grievous hurt (1969) 1 SCC 64). An act which is not intended to cause death amounts to grievous hurt even though death may be caused thereby. Thus where the common intention of the accused and his accomplice was to teach lesson to the deceased, following an altercation with him, and one of the two dang blows delivered by the accused proved fatal, the conviction under section 302/34 was altered to one under section 325/34 (PLD 1965 Lah 378).

If the broad circumstances of the case go to show that the common intention of the accused was to cuse grievous injury to the victim and if it is not possible on the material on record to find out as to which one of the accused gave the fatal blow, there is no escape from the conclusion that each one of the four accused can only be guilty of the offence under section 325 read with section 34, Penal Code (Shri Kishan Vs. State of Uttar Pradesh, AIR 1972 SC 2056 (2058).

Where a person is attacked by a number of persons not exceeding four and grievous hurt is caused and it is not clear who among them inflicted the injury, all of them can be convicted under this section read with section 34 provided common intention to cause grievous hurt is established (1950 All LJ 884=50 CrLJ 151; AIR 1976 SC 1557 = 1976 CrLJ 1154).

Where the intention of the assailants was to cause grievous hurt but is resulted in the death of the victim, and it was not certain who among the assailants inflicted the injury, conviction of all the assailants under this section read with section 34 ws proper (Ramlal V. State AIR 1972 SC 2462 = 1973 CrLJ 17).Where there is no evidence of any intention on the part of the appellants either to cause death of the deceased or causes such injuries of which the appellants could have the knowledge that it was likely to cause death although it cannot be doubted that the appellants had the common inention to cause grievous hurt to the deceased by lathis. It was held that the conviction under section 325/34 could be justified instead of under secction 302 or 304(1) (Mad Isak Md. V. State of Maharashtra, 1979 CrLJ 1092 (1092).

Where two persons were charged and convicted of an offence of causing grievous hurt, but hurt was cuased by a blow inflicted by only one of them, the conviction of the other for grievous hurt is illegal without a finding that he had common intention with the other of causing grievous hurt (1984 PCrLJ 2954).

Where there is no reliable evidence on the record to prove whether the fatal blow on the head was cuased by one or the other of the two appellants, and the other blows did not fall on any vital part of the body, it was held that in the absence of evidence to establish that their common intention was to cause death, it appears that the appellants had the common intention of causing grievous injury with the lathi and the hurt. They could therefore be convicted of an offence under section 325 read with section 34, Penal Code and act section 302 read with section 34, Penal Code (1976 CrLJ 1154(1158) SC= AIR 1976 SC 1537= 1976 CrLR 128 SC).

Where the common object of the assembly all members being armed with lathis, was merely to give a beating to the members of the complainant party, the main target being one M and there was no common object to commit the murder of the deceased and the nature of the injuries clearly showed that neither the common object was to kill or was 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, the High Court was justified in convicting the accused under section 325/149 and not section 302/149 (State Vs. Prabhu 1979 CrLJ 892 (SC). There is clear evidence of rioting leading to causing of grevious hurt. However, there was no evidence to point out person who had caused hurt. Accused persons convicted under section 325/149 and not under section 302/149 (AIR 1991 SC 517).

Where the intention of the accused was to give the deceased a beating with lathis, but one of them actually committed murder. The other in reality abetted an offence under section 325, Penal Code and were guilty under section 325 read with section 109, because though the act of murder committed by one of them was done wth the aid of others. Yet it could not be said that it was a probable consequence of the abetment on their part (1969 SCMR 278). Where the common object of an unlawful assembly was to abducted and murder S and grievous hurt was caused to G by some of them. It was held, that as the injuries were not inflicted in pursuance of the common object, others could not be held constructively liable for an offence under section 325 (1988 SC 601).

The omission to mention section 34 of the Penal Code in the charge cannot affect the case unless prejudice is shown to have resulted in consequence thereof. Although there is a difference in common object and common intention, they both deal with combination of persons who become punishable as shares in an offence and a charge under section 149, Penal Code, is no impediment to a conviction by the application of section 34, if the evidence discloses the commission of the offence in furtherance of the common intention of all (Katimal Brahma Vs. State (1961) 1 CrLJ 625 (627); B.N. Srikantiah Vs. State, AIR 1958 SC 672).

7. **Charge.**- The charge should run thus :

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

"That on or about the ..... day of..... at ..... you voluntarily caused grievous hurt to A B and thereby committed an offence punishable under section 325 of the Penal Code, and within my cognizance.

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

Where the accused is charged under section 325/149, he an be convicted under section 325, even if there is no charge for the substantive offence under section 325 (AIR 1949 Oudh 78=1948 OWN 219=50 CrLJ 586).

Though the accused persons were originally charged under section 325 and at a latter stage a charge under section 149, Penal Code was added, having regard to

the circumstances and evidnece in the case there was no illegality in the matter of conviction of the acucsed under section 325 read with section 34, Penal Code (1961) 1 CrLJ 625).

8. **Sentence.**- The imposition of sentence is always a matter of discretion and unless this Court finds that the discretion has been exercised arbitrarily or capriciously or on unsound principles or that the Sessions Court or the High Court has not taken into account any relevant factors in imposing the sentence, the Supreme Court would not be justified in reducing the sentence, merely because it feels that a lesser sentence might well have been imposed (Surendra Vs. Stat of Uttar Pradesh, 1977 CrLJ 351(351) SC).

Accused was sentenced to R.I. for 4 months and fine of Rs. 500. It was held that in view of the circumstances of case and consideration that it might be first offence of accused sentence of fine ought to be set aside (1983 CrLJ (NOC) 21 Cal). For an offence of nose cutting under grave and sudden provocation resulting from the victims conduct an imprisonment for three years was held adequate (Modi Ram Vs. State AIR 1972 SC 2438=1972 CrLJ 1521).

Where the deceased received severe beating from the accused but his death was caused by some other disease which supervened, the fact of death should not be taken into account in passing sentence (31 CrLJ 477 (Mad). Where accused caused only one injury and that too by a brickbat. Sentence of imprisonment and fine was reduced to 6 months R.I. and fine of Rs. 500 (1987 PCrLJ 2013). Where the only grievous injury was caused by accused on non-vital part of body, sentence of two years R.I. was reduced to one year R.I. (NLR 1986 CrLR 234).

Where the accused a young boy, on the spur of the moment caused grievous hurt to victim resulting in death and only one blow was dealt on chest with blunt weapon, it was held that the period of detention of 4 months could be set off under section 428, Cr.P.C. and it would meet the ends of justice (1984 CrLJ 833 Ori.).

Where the injuries sustaied by the complainant were simple in nature and more or less superficial and a sentence of nine months was imposed by the Court, it was held that the sentence could be reduced to the period already undergone (Ram Kala Vs. State of Gujarat, 1979 CrLJ 1074 (1075); AIR 1979 SC 1261). Where occurence was a sudden affair during which petitioner gave a single blow to a prosecution witness with blunt side of hatchet but refrained from repeating the blow. Motive for incident as alleged by prosecution wa also doubtful. Sentenced was reduced to one years R.I. (1985 PCrLJ 1592).

Where in a case the petitioners were the father-in-law and brother-in-law of P.W. 1 and the P.W. 1 was assaulted with a club and a wooden-reaper respectively on his head and he sustained bleeding injuries on his head, it was held that loooking to the nature of the injuries sustained by P.W. 1 and the relationship of the accused with him the sentence of fine of Rs. 100 imposed on the accused was proper (Habeeb Khan Vs. State of Karnataka, 1981 CrLJ 562 (562, 563). Where grievous hurt was cuased on litle finger of right hand of the injured. Sentence of imprisonment was reduced from fourteen months to six months (1984 PCrLJ 2954).

Where there is clear finding that the prosecution case is proved and the injury caused was a very serious one, having torn a portion of the abdomen by a razor, it was held that there was no question of any reduction in the sentence (Abadhraj Dukharam Pande Vs. State of Maharashtra, 1979 CrLJ 1388 (1388).

In a case a fight started over exchange of abuses. The accused indicted two blows with a light and short stick as a result of which the victim died as a result of haemorrhage due to rupture of spleen and lung. It was found that the spleen of the

deceased was enlarged. The offence was held to be one under section 325 of the Penal Code, and the sentence of six months already undergone was considered adequate to meet the ends of justice (Ram Lubhaya Vs. State of Punjab 1989 (3) Crimes 295(297) P&H).

In the instant case, the occurrence took place as a result of sudden quarrel between some children and other of the family of accused and injured in regard to throwing of some bricks or brickbats. In the course of this sudden occurrence accused was stated to have caused the injury on the head of injured. Held that having regard the circumstances of the case and the nature of the offence as also the character of the offender, it is expedient to release the accused on probation of good conduct for a period of one year. His sentence of imprisonment shall remain suspended during this period (Hansa Vs. State of Punjab 1977 CrLJ 1601(1601-02) SC).

Where trial Court convicts an accused on causing hurt and sentences him, the High Court in revision can reduce the sentence when it believes that there was some provocation for the accused to retaliate (1964) 2 CrLJ 567=AIR 1964 Ori. 251).

Where the watchman of 60 years of age employed to prevent unauthorised persons from entering into the labour colony gave a forceful blow with danda and caused fracture, it was held that as the accused was an old retired man,the ends of justice will be met by awarding sentence of fine only (1979 CrLR (Mah) 35).

Where there is already an order of conviction passed in the matter, beyond taking the compromise on file, no permission for compounding can be granted by the Court. However, a compromise entered unto between the parties, would be a relevant consideration for the purpose of awarding sentence (1979 CrLR (Guj) 292). A compromise entered into between parties will be a relevant fact to be taken into account in awarding sentence (1979 CrLR (Guj) 292; AIR 1980 SC 1200; 1979 SCMR 507; 1988 PCrLJ 1449).

**Compounding of offence.** - An offence under the section compoundable with the permission of the court, but in case of death of the victim of grievous hurt, his heir cannot compound the offence (AIR 1980 SC 1200).

326. **Voluntarily causing grievous hurt by dangerous weapons or means.** - Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with [1][imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

**Synopsis**

1. Scope and applicability.
2. Weapon used.
3. Intention or knowledge.
4. Nature of injuries.
5. Evidence and proof.
6. Charge.
7. Vicarious liability.
8. Acquittal of co-accused - effect.
9. Punishment.

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

**1. Scope and applicability.-** This section will apply where there is no intention to death or knowledge that the grievous hurt is likely to cause death (AIR 1977 SC 893). Similarly this section does not come into play unless the hurt caused is a grievous one (AIR 1980 SC 106). Where injury was caused on the head with a sharp cutting weapon, the intention to cause death can be inferred (AIR 1978 SC 1299).

Where the accused intentionally thrust the chhurri into the of his face but also permanent privation eye of N which not only resulted in permanent disfiguration of the sight of his eye. The offence, committed by the petitioner falls within the definition of grievous hurt and he was rightly convicted under section 326 of the Penal Code (1969 PCrLJ 1862; 1968 SCMR 1276). An accused cannot be convicted under section 326, Penal Code, unless the weapon used by him was deadly and the hurt intended or known to be likely to be caused was grievous. When the injury constituting grievous hurt caused by a stick is a simple fracture of the radius of the arm and there is no evidence as to the size or nature of the stick used, it cannot be said that hurt intended or known to be likely to be caused was grievous. The conviction under section 326, Penal Code, in such a case, therefore, unsustainable and the accused can be convicted only under section 323 (AIR 1939 Mad 507=1939 MWN 414 = (1939) 1 MLJ 886=40 CrLJ 827). Tooth is an instrument for cutting and serves as weapon of offence and defence. Where the petitioner bit off the tip of his wife's nose by his teeth, he can be convicted under section 326 of the Penal Code (Jamil Hasan Vs. State. 1974 CrLJ 867 (867, 868 All).

To constitute an offence under section 326, Penal Code, the act must have been done "voluntarily". Where the accused fired with revolver near the ground where there was a group of person and there was no premeditation or intention or knolwedge of likelihood of causing death, the accused was held guilty under section 326, Penal Code (ILR 1959 AP 797).

Where several gun shot injuries were caused and it could not be shown that any particular injury could have caused death in the ordinary course of nature, but death resulted as a cumulative effect and one of the injuries was grievous, this secction was held to apply (Maina Singh Vs State AIR 1976 SC 1084 = 1976 CrLJ 835).

The accused caused with a sharp cutting instrument several injuries on the body of a woman. One of these injuries was grievous in nature inasmuch as it was inflicted on the vital portion of the body which would ordinarily cause the death of a man. It was held that the accused was punishable under section 326 and not under section 307, Penal Code (AIR 1972 SC 860 = 1972 UJ (SC) 708 = 1972 SC CrR 506). A blow on the head with an axe penetrating half an inch into the head and likely to endanger his life was held to fall under this section (Pundurang AIR 1955 SC 216 = 1955 CrLJ 572).

The medical evidence clearly indicated that there was no direct injury caused to any of the lungs. As admitted by doctor, the cause of death was toxaemia following empyma. She admitted that the patient had pneumonia which was common in the lower lobe which is 10" from the place where the patient had sustained external injuries on the chest. She also admitted that without an injury, there could be no pneumonia. Having regard to this state evidence, the Court held that it could not be concluded that the medical evidence establihsed an offence of murder and the evidence of doctor that injury to the chest was sufficient in the ordinary course of nature to cause death could not be accepted. The court further held that the offence would be under section 326, Penal Code and not under section 302 (1979 CrLR (Mah) 400).

Accused persons coming together armed with weapons and asking one of them to call deceased and attack him as soon as he comes out of his house. First blow with iron rod on head of deceased given by one accused turned out to be fatal. Assaults made by other accused on thigh and left shoulder of deceased. Held, accused who gave fatal blow was guilty under section 302 and other accused persons under sections 326/34, there being no common intention to kill (1993 CrLJ 378 (Ori).

The accused causing, with a sharp cutting instrument, several injuries on the body of a woman, one of which was grievous in nature and caused on the vital part of the body was held guilty under secction 326 and not under section 307 (1959 CrLJ 213 = AIR 1959 Ori 21). Where the witness did not sustain any serious injury on the vital part of the body and the doctor admitted that he did not find any fracture of a serious nature, the conviction under section 326 was altered to one under section 324 (AIR 1980 SC 1716 = 1980 CrLJ (NOC) 190).

2. **Weapon used.-** If it is inherent in the nature of the weapon that, if used as a weapon of offence, it is likely to cause deah the offence shall fall within section 326 irrspective of the fact whether the injury is caused by the blunt side of the weapon or by its sharp side. The evidence of the Doctor, in the instant case is that the injury of P.W. 3 was caused by the blunt side of a spade and on the basis of the said medical evidence both the Courts below have concurrently held that petitioner No. 1 had caused the injury by the blunt side of a spade. A spade is, obviously, an instrument which if, used as a weapon of offence, is likely to cause death. Therefore, the offence committed by petitioner No. 1 falls within section 326 of the Penal Code (Md. Mofazzel Hossain Vs. The State 1987 BLD 406 (Para - 10).

Where the accused in the course of a fight left the place of incident, brought an axe and inflicted a blow on the head of the complainant's father and the evidence of the eye-witnesses was corroborated by medical opinion and the doctor described the injuries to be grievous the conviction of the accused under section 326 was maintained (Ram Chandra 1982 CrLJ 36 (Raj) relying on Hori Lal AIR 1970 SC 1969=1970 CrLJ 1665 (SC).

It is wrong to say that merely because the weapon is not one which one normally associates with a homicidal attack, section 326 is not attracted. On the other hand it can also not be accepted that whenever death is caused ex *hypothesi* the weapon must be regarded as one which is likely to cause death, since death has in fact occurred. A reasonable construction is that the legislature intended to include such instruments which, though they are not ordinarily regarded as instruments suitable for killing, are in their nature such as, if used offensively, would probably cause death. It must therefore, be a question of fact in each particular case (PLJ 1973 Kar 304) It was held that grievous injury caused by dang would not fall within the purview of section 325 and would be punishable under section 326 (1986 PCrLJ 313). Injury by tooth bite is an offence under section 324 or 326, depending upon whether the injury is simple or grievous. In the instant case doctor opined the injury to be grievous because it had caused disfiguaration of the face and the offence would fall under section 326 (Jagat Singh vs. State 1984 CrLJ 1551 (Del); Jamil Hasan vs. State 1974 CrLJ 867 (All); Chaurasi Manjhi vs. State 1970 CrLJ 1235 (Pat).

Where the deceased was struck by an arrow and the trial Court admitted post mortem report in evidence but failed to examine the doctor on the ground of acceptance of the genuineness of the report in the absence of evidence of the medical expert. It could only be held that the accused inflicted by a sharp and pointed weapon, a grievous hurt and the case would fall within the ambit of section 326 (Bahadaria vs. State1979 CrLJ (NOC) 19 (MP).

Where three accused persons assaulted jointly the deceased with sticks, one of them being iron ringed and the total number of blows inflicted on the deceased was 21, some of them being on vital parts of the body but only two injuries were fatal. It was held that having regard to the paucity of the number of fatal injuries, it would not be proper to say that the three accused persons were necessarily actuated with the intention of causing death of the deceased. But having regard to the fact that three ribs of the deceased were broken and parietal bone was fractured and an iron ringed stick was used, it would not be proper to draw an inference that the common intention was only to cause simple hurt. The proper and only inference to be drawn was that the common intention of the three was to cause grievous hurt to the deceased and grievous hurt was actually caused by one of the three accused in furtherance of common intention. Therefore the offence committed by all the three was one under section 326 read with section 34 (AIR 1961 Gujerat 16).

Where it was probable that death might have been caused by the injury and the probability of the death having been caused by other factors could only be excluded by post mortem examination but the examination was not performed. There was an element of doubt as to whether death was caused by the act of the accused, namely, the injury caused. The benefit of the doubt must go to the accused and he should not be convicted under section 326 (PLD 1966 Dhaka 491).

An accused cannot be convicted under section 326 unless the weapon used by him was deadly and the hurt intended or known to be likely to be caused was grievous (AIR 1939 Mad 507). Where the medical witness is not able to assert that the injury could not heal up without the victim being treated as an in patient in the hospital for a period of at least 20 days, it is not possible to characterise the injury as a grievous hurt and the accused cannot be convicted under section 326 (ILR 1955 Trav-co 23).

3. **Intention and knowledge.**- The intention to cause death was held to be wanting where the incident was unpremeditated and though the accused were carrying arms, there was no evidence that they were waiting for the accused for assaulting him. If it had been their intention to cause the death of the accused they would have selected a better spot for the assault as the scene of offence and the time of the incident were such that they were sure to be seen and detected by passersby (1981 PCrLJ 525 (DB) Kar).

Where the accused under a spell of nervouisness at the sight of a naked man standing on his roof at a late hour in the night, fired a gunshort aiming at the lower part of his victim's thigh but death occurred due to shock and haemorrhage. The accused was convicted of an offence under section 326 (1969)21 DLR 709 = 1969 DLC 539 (DB).

Where injury was inflicted by the appellant on the spur of the moment and the fact that it was directed on the arm which is ordinarily not considered as one of the vital and vulnerable parts of human body would rather show that the appellant was not intending to cause any injury which was likely to prove fatal. The further circumstance that after causing one injury he did not repeat his attack also pointed to his being innocent of a design to bring about the death fo the deceased (PLD 1969 Kar 162 = (1969) 21 DLR (WP) 190 = 1969 PCrLJ 77 DB). Where medical evidnece is not clear as to whether death was caused by the injury suffered or otherwise, it would be proper to convict the accused under section 326 and not under section 302 (1981 SCMR 1386).

Where the evidence of the medical officer does not show that the injury which was the only grievous injury could be fatal. Therefore, the case made out against the

appellant would fall under section 326, Penal Code and not under section 307 Penal Code (1974 PCrLJ 376). Where the accused inflicted a single stab wound in the region of the thigh his intention of causing death must be ruled out and so also his knowledge that the injury in question was likely to cause death in the ordinary course of nature. It is true that in consequence of the said injury, the femoral artery of the deceased was cut and thus he lost his life due to excessive bleeding. But all the same this would not render the case of the accused any graver, for it could result in the type of damage which later caused death. He was convicted under section 326 (PLJ 1974 Pesh 84). Where the accused inflicted a single hatchet blow but did not repeat it although nothing prevented him from doing so. Conviction of the accused under section 307, Penal Code was altered to one under section 326, Penal Code (1971 PCrLJ 575). Where presence of requisite knowledge or intention under section 300 was not clear. Conviction under section 302 was altered to one under section 326 (1969 PCrLJ 1233 = 1969 SCMR 637).

Where a gun was fired by the accused and injuries on both injured persons resulted from a single gunshot and that too was aimed at their legs, although there was nothing to prevent that accused from repeating other shots for committing murder. Accused was held to have had no intention of committing murder to any of the injured persons. Conviction under section 307, Penal Code was altered to one under section 326 in the case of the victim who received grievous injury (1981 PCrLJ 517 (Kar). Where grievous hurt is caused by the accused it is necessary to determien his intention so as to find out what the offence was. Even where both the parties to the fight were determined to fight, the intention of the accused party should be ascertained (Madh BLJ 1955 HCR 361).

Where the accused inflicted injuries with a stick on his victim in a fit of anger and taking him to be dead he hanged the body to make out a case of suicide but it later on transpired that death was caused by hanging. It was held that as the accused did not have the intention to cause death when he beat the deceased, the accused was not guilty of an offence under section 302 or section 304 and the offence committed was one under section 325 and not under section 326 as the stick used is not a weapon falling within the scope of the later section (AIR 1951 Trav-co 159).

The considerations that should guide the court in arriving at the intention of the accused are the accused's frame of mind, the nature of the weapon used and also the nature and number of the wounds. For ascertainment of intention the eye-witnesses should be examined at length as to how the accused at the time of inflicting the injury exactly acted (AIR 1914 Low Bur 216;17 CrLJ 154).

A person can be guilty of voluntarily causing grievous hurt, who does not intend to cause grievous hurt but only knows himself likely to cause grievous hurt (AIR 1937 Mad 792). A person who voluntarily inflicts injury such as to endanger life must always, except in the most exceptional and extraordinary circumstances, be taken to know that he is likely to cause death (AIR 1930 Bom 483).

Where the motive of the accused in following the deceased and in one of them getting in front of the deceased and the other trying to attack his companion must have been either robbery or assault or both and what was committed was assault, and assailant's companions must have known that the assailant had a dangerous weapon for the commission of the assault and grievous hurt was likely to result but death was caused, the accused were guilty under section 326 and not under section 302 (AIR 1936 Rang 131). When the injury constituting grievous hurt caused with a stick was a simple fracture of the radius of the arm and there was no evidence as to the size or nature of the stick used, it cannot be said for certain that hurt intended or known to be likely to be caused was grievous. The conviction under section 326, Penal Code in

such a case was, therefore, unsustainable and the accused could be convicted only under section 323 (AIR 1939 Mad 507).

When the evidence fell short of showing that the two accused had entered into a plan to bring about a murder and it was impossible for accused A to appreciate or realise the weight and magnitude of the strokes which were being inflicted by the other accused B; it could not be held that A had the intention of committing murder or he knew that B, had the intention of murdering the deceased. He could not therefore be convicted under section 302/34. But since there were other injuries also which by themselves could prove fatal, the offence could not be less than an offence under section 326/34 (AIR 1953 Pat 394). It is to be noted in this context that unless grievous hurt is actually caused, the offence of grievous hurt is not established. Mere knowledge that grievous hurt is likely to be caused is not enough if grievous hurt is not actually caused AIR 1947 Mad 321).

Where in a sudden fight one of the accused gave a knife blow and killed his opponent; it was held that the accused voluntarily caused hurt and intended or knew himself likely to cause hurt endangering life, henece while there was room for doubt as to the charge under section 302, he was clearly guilty of an offence under section 326 (AIR 1942 Lah 40).

Where in a fight the two accused inflicted upon each other injuries so serious that in both cases their dying depositions had to be taken, there were no eye witnesses to the occurrence and evidence consisted of the evidence and the wounds of the complainant and the admission of the accused that he was himself wounded in the occurrence, and where in separate trials each was convicted of an offence, under section 307. It was held that in the circumstances, section 326 was the proper section for conviction (AIR 1925 Rang 133).

Where death was not caused, even when 17 injuries were caused but none of them was on a vital part, it was held, that the appropriate section applicable to the case was section 326 and not section 307 (AIR 1941 Lah 322).

When one person was killed and several others were injured in a fight between two parties. There was no proof as to which party was the aggressor. It was held that all the accused must be acquitted, because in the absence of a finding as to who was the aggressor the accused was entitled to acquittal (PLD 1977 Quetta 32).

4. **Nature of injuries.**- Where the accused caused with a sharp cutting instrument several injuries on the body of a woman, one of which was grievous in nature and caused on the vital portion of the body which would ordinarily cause death, it was held that the accused was punishable under this section and not under section 307 (Sukra Oram vs. State (1959 CrLJ 213). Where B did not sustain any serious injuries on any vital part of the body and the doctor admitted absence of fracture of serious nature, the conviction under section 326 was altered to one under section 324 (Kailash Prashad Konodia AIR 1980 SC 106 = 1980 CrLJ 190). The nature of the injuries inflicted by the accused can be of great help in deciding what the intention or knowledge of the accused was. Eery sane person of the age of discretion is presumed to intend the natural and probable consequences of his own acts. Every actual consequence is a natural and probable consequence unless and until the contrary is affirmatively shown. Where a number of accused dealt blows with lathis with the result that the assaulted person died of the injuries. It was held that having regard to the nature of the weapons used it can be reasonably inferred that they intended to cause grievous hurt punishable under section 326 (NLR 1985 CrLJ 216).

Where the accused inflicted not less than two wounds with sharp edge of an axe on his wife and three wounds on his father in law. The injury on the person of his father in law fractured bones of his left hand and incapacitated their normal use. He must be convicted under section 326, Penal Code (NLR 1979 Cr 154). Where the appellant caused with a sharp cutting instrument several injuries on the body of a woman one of which was grievous in nature and was caused on the vital portion of the body, which would ordinarily cause the death of a man. It was held that the appellant was punishable under section 326 but not under section 307 (AIR 1959 Ori 21).

Where a stab wound is given in the forearm and death occurs from haemorrhage, or where a blow is given with a spear on fleshy part of the body, or where the accused fired a gun at the deceased causing wound in the abdomen but there was no medical evidence that the injury was the cause of death, conviction under section 326 and not under section 302 is proper (AIR 1939 Mad 269; AIR 1930 Lah 950; AIR 1941 J&K 19). A blow on the head with an axe which penetrated half an inch into the head was likely to endanger life and the act fell under section 326 (AIR 1955 SC 216).

Where the accused a boy of sixteen years of age and the deceased were students. As a result of a boyish quarrel between them the accused hit the deceased from behind witha granite stone on his right temple near the ear, as a result of which the deceased died some time afterwards in the hospital. First the injury was supposed to be simple, but on post mortem, it was found that there was a depressed fracture and that the injury was sufficient in the ordinary course of nature to cause death. It was held that considering that the granite stone was an instrument which used as a weapon of offence was likely to cause death, the offence fell under section 326 (AIR 1960 Kar 301). But where the injury is such that it clearly shows intention to cause death or at least knowledge that death would be caused, section 302 would apply. Thus where the accused struck the deceased on the head with a rice pounder a very heavy piece of wood requiring the use of two hands for its use and thereby caused death. It was held that even though death resulted only due to a single blow, the accused should be convicted not under section 326 but under section 302 (AIR 1937 Mad 634). Where an injury was caused by knife causing a deep wound on stomach injuring the intestinal wall which the doctor described and dangerous to life, it has to be held as grievous and conviction for the same under section 326, Penal Code cannot be legally bad (Ramesh @ Raj Kumar Vs. State 1989 (1) Crimes 261 (Raj).

Where doctor who gave report about grievous nature of injury was not examiend as witness and no positive evidence otherwise was available to show injury as grievous,(1984 PCrLJ 1677) or where the injury caused by accused was serious although it was not legally proved as grievous because radiologist was not produced to prove X-ray reports. Accused could not be convicted under section 326/149 Penal Code. Conviction under section 326/149 Penal Code was altered to one under section 314/149 (1985 PCrLJ 985).

Accused caused one grievous injury to each of injured prosecution witnesses and had not repeated the blow although they could do so and injuries caused by them also were not declared dangerous to life. Conviction of accused was altered from section 307 to section 326 Penal Code (1988 PCrLJ 1135). Where the accused had bows and arrows and they went ahead to prevent departure of the wife of one of them and since one arrow shot was not followed by further arrows to take the lives of all the rest of the party, the only common intention with which they could fairly be

credited was an intention to cause grievous hurt with an instrument of shooting (Madh BLJ 1954).

Where a single knife wound was inflicted in the abdomen of the victim and death was not caused; it was held that the title of section 307 cannot modify the plain grammatical meaning of the words of the section itself, by in applying the section regard should be had both to the title and the body of the section. The ordinary meaning of attempt is that an act falls short of its intended result owing to some extraneous cutting short, miscalculation, or unknown factor. Here none of these causes of failue of intenton was present. The presumption is that a man intends the natural and probable consequences of his act; but that presumption, except in exceptional cases, does not extend to consequences which have not occurred. Here the man having recovered, the injury was not sufficient in the ordinary course of nature to cause death, and there is no reason in this case to presume that accused intended anything beyond inflicting the injury which in fact he did inflict namely an injury which was not sufficient in the ordinary course of nature to cause death. Therefore there could be no conviction under section 307 and the accused was convicted under sections 326 and 324 Penal Code (PLD 1962 Kar 269).Where injuries on the deceased were collectively sufficient to cause death and no particular injury was found sufficcient to cause death, it was a case of offence under sections 326/34, Penal Code and not 302/34, Penal Code (Rama Meru and another vs. State of Gujarat 1992 (1) crimes 1186 (1187).

When 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 memebrs 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 victims. 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 committed (AIR 1960 SC 725). Where the accused beat their victims with lathis and caused death of one of them, it was held that the accused had the common intention, which developed on the spot, to beat the deceased with lathis in their hands which were to produce grievous injuries and on this view, the accused would be guilty not under section 302/34 but under section 326/34 (AIR 1961 Guj 16;AIR 1954 SC 706). Where accused caused gun shot injuries to the deceased. Death of decesed was not direct result of injuries caused during occurrence. Injured died nearly one and helf months after incident. In between he was operated and for purpose of surgeries several incised wounds were made. Second haemorrhage resulting in death, took place on day when right arm of decesed was amputated. Accused was liable to be convicted for grievous hurt under section 326 and not under section 302 (AIR 1992 SC 950).

5. **Evidence and proof.-** Court's primary duty is to find out as to whether evidence led by the prosecution is true and substantially proved the occurrence and the persons charged actually participated in the same (The State Vs. Hassan Ali, 1981 BCR 70 (SC). Where the injured was on his bed in side the hospital for about a month and he was unable to move or even to sit owing to 25 incised wounds on various parts of the body, the conviction under this section was upheld (Jagannath 1974 CrLJ 1239 (All). Medical evidence on record that injuries were caused by sharp cutting weapon (Balus). Unchallenged testimony of eye-witness that accused was seen by him while coming out of house of victim with blood-stained weapon. Conviction of accused under section 326 held, proper (AIR 1993 SC 2476).

Where there were two separate incidents, first involving accused Nos. 1 to 3 (accused No. 2 being the appellant) in which an injury was suffered by S who said it was inflicted by the appellant, and the second related to accused Nos. 1 to 11 which resulted in the death of the victim and all the accused except the appellant who was convicted under sections 302/34 and 326, were given the benefit of doubt as the High Court held that the ocular testimony did not apear to be trustworthy, the Supreme Court held that the appellant's case could not be distinguished and he should also be given the benefit of the same doubt which made it imperative for the courts below to acquit his co-accused. However, his conviction and sentence under section 326 for one year's rigorous imprisonment and fine of Rs. 300 was main tained (Chandubhai Shanabhai Parmar 1982 CrLJ 987 (SC).

Where statement of the compolainant was fully corroborated by reliable evidence of prosecution witnesses and defence evidence did not appear reliable, conviction was upheld (1968 PCdrLJ 1926). None of the injuries caused by the accused according to post-mortem report were on any vital part of body. However some of the injuries caused by blunt weapons were grievous in nature. Accused convicted for offence under section 326 (1993 CrLJ 1387 SC).

Accused assaulting victim on seeing his minor daughter being sexually molested by victim. Right of private defence is extendable to such case. Fact whether sexual intercourse was with or without consent of daughter not material. Fact whether case of subsequent death of victim was internal injury due to fall or result of blow by accused also not material. Conviction under section 325 set a side. (AIR 1992 SC 1683).

Occurrence taking place near house of injured and all accused went there differently armed and they also dragged the injured together. Conviction under section 326 read with section 34, proper (1993 CrLJ 1734 SC). Where the injured prosecution witness named the accused persons as assailants and responsible for disfiguring him by chopping off his nose and ears besides giving him hatchet injuries and his statement was fully corroborated by medical evidence. FIR was lodged within a reasonable time and without any premeditation. Injured person also had no reason for substituting the accused, for real assailants, if any, the nature of injuries required at least two persons to accomplish their object. Both the accused were convicted (1980 PCrLJ 1010 Kar).

Where the complainants corroborated each other and their statements were supported by prosecution witnesses and medical evidence. No motive was shown to falsely implicate the accused. The accused himself admitted the occurrnece. Conviction was maintained (PLD 1979 Lah 129; PLJ 1979 CrC 30).

Where the accused beat the victim with a hot iron chimta for about 15-20 minutes endangring the life of the victim and she died on account of those injuries, the accused was rightly held to be guilty under section 326 (Partap Kumar 1976 CrLJ 818 Pun).

Where the accused assaulted the deceased with a dangerous weapon but it could not be said with certainty that the injury caused on the accused was in itself fatal or sufficient in the ordinary course of nature to cause death, but it was undoubtedly grievous, conviction would be under this section and not under section 302 ( Chilamakur Nagiredddy 1977 CrLJ 602 (SC); Karnail Singh 1977 CrLJ 550 (SC); Naban Epo 1981 CrLJ (NOC) 199 Gau).

In the instant case, in an appeal, the sentence and the conviction of the accused was confirmed. In revision it was found that the prosecution suppressed the genesis of the case without presenting its true version. The witnesses were

interested eye-witness was not reliable. Held, the benefit of doubt should be given to the revisionist (1985) 1 Crimes 659 (P&H).

The petitioner and the complainant both were injured in an occurrence. The trial Court held that the injuries to the accused were self-inflicted whereas injuries to the complainants were caused by the accused who was convicted. On appeal it was held that the prosecution has not explained injuries to the accused by not disclosing the genesis of the occurrence. The appellant is entitled to the benefit of doubt (1984) 1 Crimes 390). The accused a boy of sixteen years of age, and the deceased were students in the VI th standard. As a result of a boyish quarrel between them one hour before, the accused hit the deceased from behind which a granite stone on his right temple near the ear, as a result of which the boy died some time after words in a hospital. It was held that the only intention that the accused could have had would have been to give a good blow to the deceased as he entertained a grudge against him because of his former quarrel with him and considering that the granite stone in question was an instrument which used as a weapon of offnece was likely to cause death, the offence fell under this section (Vorkey Joseph.(1960) CrLJ 1213).

In Bhajan Singh Vs. State of Punjab (AIR 1978 SC 1759 (1760) the common object of the unlawful assembly was to cause grievous injury with dangerous weapons, an offence punishable under section 326. None of the accused was specifically charged under section 302. Injury caused by one of the members was found to be sufficient in the ordinary course of nature to cause death.

When the charge does not mention that the common object of the members of unlawful assembly was to kill nor that the deceased was likely to be killed in pursuance of the common object, the conviction under section 302 read with section 149 was not maintainable. But as medical evidence showed that deceased had multiple injuries ante-mortem and perforating injuries which could be caused by sharp edged weapon and also resulted in fractures of pariental bones, accused were guilty under section 326 read with section 148 (Teja Vs. State of M.P. 1990 CrLJ 262(MP) (DB); 1989 MPLJ 506; (1989) CrLR (MP) 49; (1989) 2 CrLC 269). If the appellant was not known to P.W. 3 at the time of incident and was identified for the first time in the Court in the absence of a test identification parade evidence of P.W. 3 is valueless and cannot be relied upon by the court (Mohan Lal Gangaram Gehani vs. State of Maharashtra, 1982 CrLR 77 (83) SC).

Where the accused found his wife in the company of P.W. 3 and on seeing them lost his temper and caught hold of them and cut their noses, the conviction under section 326 was set aside and he was convicted under section 335 read with section 34 (1971) 1 SCWR 810). Where evidence of injured witness was supported by ocular testimony of two other witnesses and evidence of these three was corroborated by evidence of medical officer and evidence of motive. Conviction and sentence was upheld (1986 PCrLJ 10 =PLJ 1986 CrC 89=NLR 1986 Cr. 352).

Where prosecution witness, whose both eyes were removed by accused, was found by police lying injured in house of accused. There was no special reason for him to falsely implicate accused. Presence of injury in such condition in the house of accused was a strong circumstance against accused. Conviction was maintained. But uncorroborated solitary statement of injured witness who was a person of questionable antecedents and enemy of accused was not sufficient to warrant conviction of accused (1985 PCrLJ 2575). Where the conviction was based solely on the testimony of the victim but there were several infirmities found in his evidence, the appeal was allowed and the conviction and sentence set aside (Sudhir 1985 crLJ 795 SC).

The evidence of the doctor did not prove conclusively an intention to cause the murder of the three deceased persons. There was one injury near about the region of the nose inflicted by a bhala and all other injuries were caused, by lathis, but they were superficial. The doctor seemed to be confused while stating that hala which is a sharp cutting weapon is like a lathi. In this confused state of the medical evidence, the conviction of the two accused under section 302/149 was altered to one under section 326/149 (Dhanna haudhury, 1985 CrLJ 1864 (SC).

In the case of a person who is in a government hospital there is not even a remote possibility of the person being kept inside the hospital for more than the necessary days for treatment. In the circumstances prevailing now in government hospitals, neither the patient is likely to remain there more than necessary for treatment nor the doctors would allow the patient to remain beyond that extent. Therefore, unless special circumstances are alleged the fact that the injured..... was in a government hospital will by itself prove that she was unable to follow her ordinary pursuites. the injury sustained is a grievous one (Ponni alias Ponibas Vs. Saratrimuthu Nalar, 1989 (1) Crimes 414 (416) Mad). Where the doctor did not say that the injury caused by accused No. 6 on the person of the deceased by itself was fatal or sufficient in the ordinary course of nature to cause his death, it was held that the conviction of accused under secton 302 is not sustainable. The inury caused by him however, was grievous in nature. He is, therefore, guilty of an offence under secton 326 of the Penal Code (Chilankur Nagireddy Vs. State of Andhra Pradesh, 1977 CrLJ 1602 (1604) SC).

It appeared from the medical evidence that P.W. Bishwanath did not sustain any grievous injury. He did not receive any serious injuries on any vital part of the body. The doctor admitted that he did not find any fracture of a serious nature. In these circumstances, the charge under section 326 must necessarily fail but the accused cannot escape conviction under section 324, Penal Code as that had been fully proved (Kalash Prasad Kanodia Vs. State of Bihar, AIR 1980 SC 106(106)= 1982 Bihar LT 79 (80).

6. **Charge**.- The charge should run thus :

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

"That on or about the ..... day of ..... at ..... you voluntarily caused grievous hurt to A B by means of Ex..... which is an instrument for shooting (or stabbing etc, and as the case may be), and thereby committed an offence punishable under section 326 of the Penal Code, and within my cognizance.

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

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

Where three persons, the appellant, another K and an unidentified person attacked the deceased with knives and according to the medical evidence, one was a simple injury and the other a fatal injury but there was nothing in evidence to show that the appellant had inflicted the fatal injury and there was a concurrent finding of the lower courts that the common intention of the accused was to cause grievous

hurt to the deceased, it was held that as the possiblity of the appellant having caused the simple injury could not be ruled out, hs conviction under section 302 was altered to section 326/34, more so when K had also been convicted under section 326/34 (Ashok Kumar 1977 Cr.LJ 164 SC). Common intention of six accused to give beating to complainant party. No intention to cause death. Death caused. One of the accused can be convicted under section 302 for carrying more dangerous weapon. All accused convicted under section 326/149 (1969 PCrLJ 969=1969 SCMR 401).

Both accused and co-accused sharing common intention to beat up or assault victim though not to kill him. Accused however, suddenly stabbed victim. Co-accused could be convicted under section 326/34 and not under section 302/34 (AIR 1993 SC 278).

Where the incident arose out of exchange of abuses between a few youngmen and though. A 1 and A 2 were armed with knives, the others were either unarmed or had sticks with them and the principal target was the compolainant and not the deceased and when A 1 and A 2 were alleged to have stabbed the deceased, the other accused were at some distance, it was held that it would be wrong to say that the accused shared the common intention of causing the death of the deceased and A 1 and A 2 were held guilty under section 326/34 and the rest under section 326/149 (Nammu 1979 CrLJ 1329 SC).

Where in a case the appellants did not share the common intention to cause death of deceased with their co-accused who had a spear with him but came along with co-accused from their house armed with lathis it was held that the appellants who were armed with lathis did not commit an offence under section 302 read with section 34, Penal Code, and they were liable for an offence under section 326 read with section 34, Penal Code (Bansropan Singh Vs. State of Bihar 1983 CrLJ 223=AIR 1983 SC 166). When intention to cause death not proved. One accused causing injury to victim with knowledge that it was likely to cause death, who is liable to be convicted under section 304, Part II. Other two accused causing injury but not on vital parts of deceased liable to be convicted under sections 326/34 (Guardeep Singh Vs. Jaswant Singh AIR 1992 SC 987; AIR 1984 SC 957, Relied on).

Where according to the prosecution there was a two phased attack, firstly assaulting the deceased in the lane and then to drag him to the house and to give the fatal blows near the doorwary of the house and common intention to cause death was lacking, it was held that the accused were guilty under section 326/34, Penal Code, instead of section 302/34, Penal Code (State of Punjab Vs. Surjan Sinh 1976 CrLJ 845 (847) SC); AIR 1976 SC 1130; 1976 CrLR (SC).

Where the three appellants had the common intention to cuse grievous hurt to the deceased by means of cutting instrument and one of them caught hold of the deceased and the two others assaulted him on his head causing fractures, they could legally and properly be convicted under section 326/34 but another appellant who had dealt a heavy blow on the head of the deceased by menas of a dangrous instrument without sharing the common intention was convicted under section 326 simpliciter (Kesab Singh 1982 CrLJ 624 (Ori) see also Daiya Moshya Bhil 1984 CrLJ 1728 SC; Praduman 1984 CrLJ (NOC 142 MP).

Where there was a free fight and the accused asserted his claim to a property and there was no intention to cause grievous hurt, conviction under this section read with section 34 was held to be proper (Ram Rattan AIR 1979 SC 619=1977 CrLJ 433). The accused armed with spears and lathis attacked the victims of whom one died and several injured and the persons who caused the fatal injury could not be ascertained the accused was convicted under section 326 read with section 149

(AIR 1967 All 437; 1970 SC Cr R 309). Where the accused appellant caught hold of the deceased while the latter scuffled to get himself released and immediately thereafter another accused took out a knife and started assaulting the deceased and scuffled with him, it could not be inferred beyond reasonable doubt that he shared the intention of the accused to murder the deceased and at the most he could be made vicariously liable for an offence under section 326/34 (Shambhu Kuer 1982 CrLJ 1742 SC).

Where the common object of all the accused was not to cause death but death was caused, the mere fact that one of the accused was armed with a more dangerous weapon would not justify his conviction only under section 326/149 (1976 SCMR 336 = 1969 PCrLJ 969 = 1969 SCMR 401).

Co-accused took the deceased in their grips. The accused inflicted fatal injuries. They were convicted under section 326 read with section 34, P.C. while the accused was convicted under section 302/34. State filed appeal against their acquittal under section 302, P.C. while the accused filed an appeal from conviction under section 302/34, P.C. It was contended that the co-accused accompanied the accused and were unarmed. Different versions were given by three P.Ws. as to the manner in which they played their part. Held, the co-accused can be acquitted of the offence by awarding them benefit of doubt (1985) 2 Crimes 890 (P&H).

Where the accused persons came to the house of the complainant 40 miles from their own village with the object of recovering their stolen bullock by force long after the commission of theft and they knew that grievous hurt was likely to be inflicted, nevrtheless, none took active part in the fight. None of the accused in the circumstances was responsible for murder. Intention of the accused being only to inflict grievous hurt, their conviction under section 326/149, was upheld in those circumstances (1970 PCrLJ 230 (DB).

The fact that no injury was inflicted on the deceased or his sons on any vital part of their body strongly indicates that the common object of the unlawful assembly could not have been to commit murder of these persons. The common object of the unlawful assembly evidently was to disposses them from the land and to assault them when resistance was offered in the achievement of that object. If, however, persons with such common object go to the place of occurrence armed with lathis, bhalas and tangi, they must know that grievous injury with deadly weapon was likely to be caused to the victim in the occurrence, and, therefore in any view of the matter, they can not escape punishment for the offenece under section 326 read with section 149, Penal Code (Bhupat Kumar Vs. State of Bihar, 1975 CrLJ 1405 (1409) Pat; ILR (1974) 54 (644).

Where the common intention of all the accused was not to cause grievous hurt and one of the accused acting independently cut the tongue of the victim, the other accused were not liable under this section (1971 PCrLJ 127). The common object of the unlawful assembly in the instant case was to cause a grievous hurt. None of the appellants has been specifically charged under section 302 and it is therefore not possible to hold any one of the appellants guilty of causing the injury which is sufficient, in the ordinary course of nature to cause death. It is clear that the injury was caused in prosecution of common object of the assembly or that the members of the assembly knew it likely to be caused in prosecution of the common object. The common object of the unlawful assembly was to cause grievous injury with dangerous weapons, an offence punishable under section 326. Therefore the conviction under section 302/149 was set aside and they were sentenced under section 326/149 (Bhajan Singh Vs. State of Punjab, 1979 CrLJ 7(12-13).

Where the accused were members of unlawful assembly, their conviction under section 326 read with section 149 was held proper and the sentence imposed ws held justified (1970 SC Cr. R 309). Where out of the accused persons one of them was armed with a deadly weapon which he did not use, but the accused caused grievous injuries it was held that section 326 read with section 149 applied (Balwant Singh Vs. State AIR 1972 SC 860 = 1972 CrLJ 645).

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 whcih the other members were not responsible, the conviction of the other members under this section read with section 149 cannot be held illegal merely because no member of the group was proved to have caused grievous hurt to the victim (Shambunath (1960) CrLJ 1144 (SC). Occurrence taking place near house of injured and all accused went there differently armed and they also dragged the injured together. Conviction under section 326 read with section 34, proper (AIR 1993 SC 1676). Where the seven accused appellants had attacked the complainants party for having obtained transfer of certain lands in their favour from one M causing grievous injuries to them and some of the injuries were caused by jellis and the evidence showed that three of the accused persons were armed with jellis, it was held that even assuming that one of the accused did not cause any injury, that fact alone would not exculpate him because the conviction of the accused was under section 326 read with section 149 (Balwant Singh 1972 CrLJ 645 SC).

Where the accused persons were charged for offence under section 326 read with section 149, Penal Code, i.e. for causing grievous injuries to the prosecution witnesses in prosecution of their common object, and it was found that one of them, though armed with deadly weapon, did not cause any injury, it was held that even the accused who did not cause injury was liable for conviction under section 326, Penal Code because the conviction of the accused was for the offence under section 326 read with section 149, Penal Code, and not for the offence under section 326, Penal Code alone (Balwant Singh Vs. State of Haryana, AIR 1972 SC 860 (863).

The accused was only a member of the assembly which chased the decesed. the Indian Supreme Court in the absence of any overt act on his part, sentenced him to two years R.I. (Sushil Chowdhury AIR 1980 SC 1716 = 1980 CrLJ (NOC) 180). Where the incident appears to be the consequence of some exchange of abuse between a few youngmen and the evidence shows that though two of the appellants were stated to be armed with knives, the others were either unarmed or had sticks with them and further the evidence also shows that the principal target was P.W. 1 and not the deceased and it is also seen from the evidence that when the deceased was alleged to be stabbed by A-1 and A-2, the other accused were at some distance, it was held that it could not be said that A-1 and A-2 shared the common intention of causing the death of the deceased and therefore the conviction was altered under section 326 read with section 34 instead of section 302 (Hammu vs. State of Madhya Pradesh, 1979 CrLJ 1329 (1331, 1332).

There was admitted enmity between two factions and there were injuries on both sides. Nature of injuries on prosecution party and gun-shot injuries.on accused party suggested that attack by accused party followed firing of pistol though nothing could be determined with calamity. Injuries on prosecution of one of them. The Supreme Court held that the accused had exceeded their right of private defence and were guilty under section 326 read with section 149 (AIR 1980 CrLJ (NOC) 15=1978 UJ (SC) 924= 1978 CrLR (SC) 432). 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, armed with jellis even if one of the accused with

jelli did not cause any injury, that fact wouldnot exculpate him if the conviction of the accused is for the offence under section 326, read with section 149, Penal Code (Balwant Singh vs. State of Haryana, AIR 1972 SC 860 (863); Jail Narain Mihra Vs. State of Bihar, AIR 1972 SC 1764(1765, 1766).

It is necessary for the prosecution to prove actual participation of the accused in the crime. The mere presence of the accused on the scene of occurrence wouldnot corroborate evidence of his participation in the offence and is not sufficient for his conviction (1969 SCMR 354). Principal eye witness not seeing any of appellant accused inflicting any knife injury to deceased though armed with knife. No explanation by prosecution about cut injuries on person of accused. Medical evidence stating that although injuries were collectively sufficient to cause death, individually they were not sufficient to cause death. Common intention not established. Conviction altered from sections 302/34 to sections 326/34 (AIR 1992 SC 969). Where no overt act against two of the accused was proved, save that they were arrested from a house along with the other accused. The mere fact that no prosecution witnesses were shown to have any enmity against two accused was not a valid criterion for accepting their implication. Benefit of doubt was given to the two accused (PLD 1968 SC 372 = 20 DLR (SC) 347).

The Court convicted one accused on the finding that he had caused injuries while armed with a toka but set aside convictions and sentence of the other accused after finding that no one was injured by his alleged firing from a pistol (NLR 1958 CrLJ 9).

8. **Acquittal of co-accused - effect.**- The fact that three other accused had been acquitted on the evidence on record, would not render the evidence weak as against the remaining appellants especially when they had a motive and were likely to have committed the assault (Ajti Singh 1971 SCC (Cri) 15; Makunda vs. State1983 CrLJ 1025 (Ori). Where some accused are acquitted it cannot be said that the acquittal will in all cases react on the case of the other accused. Such a result depends on the circumstances of the case. Where the acquitted accused was given benefit of doubt only as a matter of abundant caution on the premise that his alibi might possibly be true and the finding of High court did not in any manner weaken probity of the evidence against rest of the accused, the convicted accused cannot claim any benefit from the acquittal (1980 SCMR 328; PLD 1983 Lah 622).

Where the High Court recorded a finding that the minimum common object of the unlawful assembly was to cause grievous hurt to the deceased, but the Court did not convict some of the accused under section 326/149 and that acquittal having become final, it was held by the Supreme Court that the rest of the accused would also have to be acquitted of the same charge as it would not only be unfair but self contradictory to sustain the conviction of these accused for the offence under section 326/149 (Muthu Naicker 1978 CrLJ 1713 (SC).

9. **Punishment**.- As the offence under section 326, Penal Code, is non-compoundable, permission to compound the offence cannot be granted but the fact of compromise can be taken into account in determining the quantum of sentence (Ram Pujan V. State of Uttar Pradesh, AIR 1973 SC 2418 (2419). Nose cutting is very serious offence and such cases should ordinarily be committed to the Sessions. The sentence of 6 months rigorous imprisonment under section 326, in such a case, cannot be said to be excessive (1949 All LJ 64; 51 crLJ 799; AIR 1950 Ajmer 13).

The accused dealt blow on the forehead of deceased with dao. The deceased remained fully conscious for 4 days and then collapsed. There was disagreement between the doctors as to whether injury was fatal. It was held that the offence fell

under section 326 and not under section 302, and a sentence of 4 years rigorous imprisonment was held sufficient to meet the ends of justice (1963) 2 CrLJ 592). But where the occurence had occurred about four and a half years back and the accused, a 72 years old man, was suffering from shock of alleged murder of his son that occurred a few days before the occurrence, the sentence of imprisonemnt was reduced from seven years to two years (Mokbul Ali 1984 CrLJ (NOC) 45 (Gau).

The accused was a young man below 20 years having no record of criminal behaviour or antecedents or conviction for violent crimes. There was nothing to show premeditation. It was held that though the offence committed was a grave one, a lighter sentence was adequate (1970 Mad LJ (Cr) 48; 1969 Ker LT 862). Where the parties who belong to one family have settled their disputes, it is not necessary to keep the accused in jail for a longer period (AIR 1973 SC 2418; 1973 CrLJ 1612; (1973) 2 SCC 45).

Where the accused were members of unlawful assembly, their conviction under section 326 read with section 149 was held justified and the sentence imposed was held to be not excessive (1970 SC Cr. R 309). Where the case depended purely on appreciation of evidence and the courts accepted the prosecution story and the nature of injury showed that both the hands of the victim were almost aimed by the shots fired by the accused, reduction in sentence was not called for (AIR 1979 SC 1432; 1979 UJ (SC) 355). Evidence available on record supported the plea of sudden and grave provocation raised by accused. Incident admittedly took place at about 4-30 a.m. in the house of accused where injured prosecution witness was found present. House of accused was about 1/2 furlong away from the house of injured witness. Presence of injured witness with wife of accused at that odd hour must have provoked the accused. Provocation was such which could upset not merely a hasty, hot tempered and hyperesensitive person, but would upset also a person of ordinary sense and calmness. Case against accused, held, would therefore, fall under section 335, Penal Code and not under section 326, Penal Code. Conviction of accused was altered from section 326, Penal Code to section 335, Penal Code and his sentence was reduced to that already undergone by him in circumstances (Juma Khan Vs. State 1990 PCrLJ 56).

Where although the appellant had not been able to make out a case of grave and sudden provocation, the appellant did have a good reason to suspect that the frequent visits of the complainant were for the purpose of carrying on a clandestine liaision with the wife of the appellant. An element of provocation therefore, does prevail in the transaction. Sentence of two years R.I. was awarded (1975 P. Cr. L.J. 1202 (kar).

That nature of the injury showed that both hands of the victim were almost maimed by the shots fired by the appellant. The appellant was covicted under Section 326 and sentenced to three years. R1. and fine of Rs 500. He was further convicted under Section 27 of the Arms Act and sentenced to undergo imprisonment for one year. Both the substantive sentences were directed to run concurrently. It was further held that there was no room from reduction in the sentence (Gurdeep Singh v. State of Rajasthan, 1980 S. C. C. 432 (433) (SC).

The fact that the accused cut the nose and upper lip of the complainant for having illicit connection with his fife was a mitigating circumstances. Therefore sentence of 7 years RI. was reduced to 4 years RI. (1969 P. Cr.L.J. 151 (1). Where offence is committed by the accused to vindicate family honour, heavy sentence should not be passed (PLJ 1976 Lah. 792 = 1976 P. Cr.L.J. 1199 = 1966 Law Notes 409).

Where the appellant at the time of attack was worked up with the feeling rightly or wrongly, that the victim had ravished his sister-in-law. The provocation may not be grave and sudden but he wanted to redeem the honour of the family. It also appears that at the time of incident he was a student of a college. he had already remained in jail for a period of 18 months as would be found from the judgment of the trial Court. He has also remained in jail after the pronouncement of the judgment of the sentence awarded to him. Therefore the sentence already undergone by him is sufficient to meet the ends of justice (1974 P. Cr.L.J. 376).

The evidence of the eye-witnesses was that accused had only used her hands and feet in assaulting the deceased. It was held that would mean that she had fisted the deceased and had kicked him and the sentence of one year was not harsh. (1979 Cr. LR (Mah) 204)

The offence fell under Section 324, P. C. and not under Section 326 P. C. The queantum of sentence was reduced to the one already undergone in view of the fact the offence was committed in 1969, there was no previous conviction and for several weeks he was behind the bars (1985) 1 Crimes 522 (Pat).

[1][326A. **Voluntarily causing grievous hurt in respect of both eyes, head or face by means of corrosive substance, etc.**-Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt of the kind mentioned in-

(a) clause secondly of section 320 in respect of both the eyes either by gouging out the same or by means of any corrosive substance; or

(b) clause sixthly of section 320 by means of any corrosive substance, shall be punished with death, or [2][imprisonment] for life and shall also be liable to fine.]

327. **Voluntarily causing hurt to extort property, or to constrain to an illegal act.**-Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer, or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

328. **Causing hurt by means of poison, etc., with intent to commit an offence.**-Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

329. **Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.**-Whoever voluntarily cause grievous hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer any property or valuable security, or of constraining the sufferer or

1. Section 326A was inserted by Ordinance No. LXIX of 1984.
2. Subs. by Ordinance No. XLI of 1985, for "transportation".

any person interested in such sufferer to do anything that is illegal or which may facilitate the commission of an offence, shall be punished with [1][imprisonment] for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

330. **Voluntarily causing hurt to extort confession, or to compel restoration of property.**-Whoever voluntarily causes hurt, for the purpose of extorting from the sufferer or any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with impisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Illustrations**

(a) A, a police-officer tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(b) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(d) A, a Zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section.

331. **Voluntarily causing grievous hurt to extort confession or to compel restoration of property.**-Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information whcih may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisionment of either description for a term which may extend to ten years, and shall also be liable to fine.

332. **Voluntarily causing hurt to deter public servant from his duty.**-Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

333. **Voluntarily causing grievous hurt to deter public servant from his duty.**-Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intend to prevent or deter that person or any other public servant from discharging

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

his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

334. **Voluntarily causing hurt on provocation.**-Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred[1] [taka], or with both.

335. **Voluntarily causing grievous hurt on provocaion.**-Whoever [2][voluntarily] causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand [1][taka], or with both.

**Explanation.**-The last two sections are subject to the same provisos as Exception 1, section 300.

336. **Act endangering life or personal safety of others.**-Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, 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 and fifty [1][taka], or with both.

337. Causing hurt by act endangering life or personal safety of others.-Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to six months, or with fihe which may extend to five hunded taka or with both.

**Synopsis**

1. Scope and application.
2. Rashly and negligently.
3. Rash operation.

1. **Scope and application.**- This section will apply only when hurt is caused to any person by reason of its being done rashly or negligently endangering human life and personal safety of others. This act must have been done either rashly or negligently (7 CrLJ 306). Mere negligence or rashlessness is not enough to bring a case within section 337 or 338 Penal Code. Negligence or rashlessness should carry with it a criminal liability. The nature and extent of injury will be irrelevant in fixing criminal liability (AIR 1962 Mad 362).

This section applies to an act rashly or negligently done without any criminal intent. An act deliberately done cannot be said to be negligent or rash (AIR 1941 All 288). A person causing hurt by reason of negligent or rash driving is within the mischief of the section (1954 CrLJ 725). If a man fires blindly in the dark with a

1. Substituted by Act VIII of 1973, s. 3 and 2nd Sch. (with effect from 26-3-71), for "rupees".
2. Inserted by the Indian Penal Code Amendment Act, 1882 1 (VIII of 1882), s. 8.

shot gun in the direction from which he has heard sounds coming from a distane away, it can not be said that this act must in all probability cause death or rash bodily injury as was likely to cause death. He can not therefore be convicted under section 307. He can only be convicted under this section (AIR 193 Rang 220= 39 CrLJ 692). Personal injury intentionally caused will not fall under this section as it is neither rash nor negligent (1 CrLJ 557).

2. **Rashly and negligently.**- The main criterion for deciding whether the driving which led to the accident was rash and negligent is not only the speed but the width of the road, the density of the traffic, and the attempt to overtake the other vehicles resulting in going to the wrong side of the road and being responsible for the accident (Mrs. Shakila Khader vs. Nausher Cama (1975) 4 SCC 122 (126). The accused drove the bus at a speed which the circumstances existing at the time not keep a proper look out to avoid collision and failed to apply the efficient brakes which would have averted the collision and injuries were caused to four persons, two of whom died. It was held that the accused was guilty of the offence under sections 304-A read with this section (1959) MWN 69).

Where the applicant's rash and negligent driving of his lorry led to a collision as a result of which hurt was caused to a person sitting in a jeep, the applicant can be properly convicted under this section, although the hurt was not cuased knowingly (1962) 11 CrLJ 760; 1986 CrLJ 1202 (Ori). A person who caused hurt to the occupants of a motor car by rash or negligent driving was held liable under this section (1929) 30 CrLJ 1077= AIR 1930 SC 64).

Where the applicant's rash and negligent driving of his lorry has led to a collision, as a result of which hurt is caused to a person sitting in a jeep, the applicant can be properly convicted under section 337, although the hurt was not caused knowingly. The word voluntarily is not used in section 337 (AIR 1962 Guj 318). Where a motor lorry was moving on 18 feet road at mid night when its right wheel hit metal stacked away from the road causing a tyre burst which resulted in the overturning of the lorry. A passenger and clearner were injured and the latter died subsequently. The accused driver was held guilty under this section for want of an explanation why he was driving so far on the right side of the road (AIR 1953 Trav-co 617).

Where the driver of a truck was driving fast to keep up with a train moving in the same direction paralled to the road, and he suddenly came opposite some carts on the road and because of a mistake by some car drivers, there was an accident resulting in the death of a person and grievous hurt to another. The accused was convicted under section 337 because notwithstanding the contributory negligence of the cart driver, the accused was driving rashly and was therefore liable for the accident (AIR 1954 Trav co 25). Where a motorist did not stop the car even when the visibility was almost nil because of a heavy cloud of dust and this resulted in an accident. It was held that his duty was to stop when the road became invisible and that his conviction under section 337 was just (AIR 1941 Lah 113). Where there was an explosion in a factory manufacturing fire works causing death to a number of persons and sensitive explosive were also stored therein. The manufacturer were held liable under section 304-A and section 337 (Balchandra AIR 1968 SC 1319=1968 CrLJ 1501).

There is no rule of law which makes the driver of a vehicle always liable for an accident and there is no presumption that if there was an accident the driver must

have been engligent (AIR 1933 Rang 329). Where the accident was due to the pedestrain himself suddently moving into the road without looking where he was going and the driver had to make a quick decision to avoid the collision. It was held, that the driver was not guilty of rash and negligent driving (1938 Rang LJ 44).

Where a driver knew that he had defective brakes but he drove on and killed a person, his case would not be an ordinary act of rash and negligent driving in which the accused had taken all possible care but due to certain factors sometime beyond his control and sometime within his control, resulted in the loss of life of a pedestrain; but on the other hand his act was the act of a person who fully knew that what he was doing, was going to result in the death of a person whom he crushed under the wheels of his bus ignoring all rules of the road and having full knowledge that he would not be able to stop his vehicle because of the defective brakes which he had either not checked which it was duty incumbent upon him to do, or after checking the same like a desperate and callous person, decided to ply the bus. His wanton and flagrant breach of a golden rule of the road that if there is some vehicle in front of any person the best course for him is to stop his own vehicle and to avoid a headlong clash, also does not bring his case within the scope of rash and negligent driving. In such cases the only punishment for such desperate, callous and cruel person is the punishment proposed under section 304 Penal Code. His conviction was altered from under section 304A and 337 Penal Code to under section 304 Penal Code (NLR 1980 UC 439).

3. **Rash operation.**- Where a doctor operates on the eye of a patient without taking the necessary precautions of disinfecting or sterilizing the instruments for operation, and the operation is not done in accordance with any recognized method and results in injury to the patient, the doctor may be convicted under section 337 (AIR 915 Bom 101). Where there is a dispute as to whether the doctor conducting the operation was qualified to do so under the certificate he held or not, it was the duty of the court to call evidence on that point and determine the liability of the doctor after giving a finding on his qualification to conduct the operation (AIR 1964 Raj 242).

The accused prformed an operation with a pair scissors on the lid of the complainants' eye, and titched the wound with ordinary thread and needle. The operation was needless and performed in a primitive way without any precaution. The complainant's eyesight was damaged permanently to a certain extent. It was held that the accused was guilty under this section (1915) 39 Bom 523=17 Bom LR 384). Truck swerved and wagon following it hit car of complainant resulting in injuries to him. Negligence of truck driver and rashness and negligence of wagon driver proved. No reasons thus were found to interfere with findings of fact recorded by trial Court and Appellate Court in circumstances (Muhammad Riasat Vs. State 1989 PCrLJ 1495).

Complainant injured in accident. Offence of rash and negligent driving merged in offence of causing hurt by rash and negligent act. Conviction of accused under section 297, Penal Code set aside in circumstances (Muhammad Riasat Vs. State 1989 PCrLJ 1495).

338. **Causing grievous hurt by act endangering life or personal safety of others.**-Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to [1][five thousand taka] or with both.

1. Subs. by Ord, No. X of 1982, s. 6. for "one thousand taka".

**Synopsis**

1. Scope and application.
2. Defect in vehicle causing accident.
3. Contributory negligence.

1. **Scope and application.**- Section 338 applies to a case where grievous hurt has been caused to any person by an act being done so rashly or negligently as to endanger human life or the personal safety of others (Ananda Singh Meggi Vs. State AIR 1969 Ori 49). The phrase 'rashly' means something more than mere inadvertance or inattentiveness or want of ordinary care. A person who acts rashly shows indifference to obvious consequences and to the rights of others, and does not mind whether a danger would result or not. A rash act is indicative of disregard of consequence (1963) 2 CrLJ 718).

A person is said to act negligently if he acts without the required caution to prevent an undesirable result even though it was not intended. A negligent man is one who, while aiming at an end which he desires to attain, proceeds to attain it without exercise of due caution to prevent the bringing about some other result (1976 All cr. C 243).

Where there is no evidence that accused did any act so rashly or negligently as to endanger human life or personal safety of others, conviction under section 338 Penal Code is liable to be set aside (1972 All Cr. R 507).

This section deals with causing grievous hurt and by any act endangering human life or the personal safety of others. It is aggravated form of the offence under section 337. Where a driver of a motor car while drunk drove his car on the wrong side rashly, he is negligent in not seeing a cart in front of him and collided with it. The accused was held guilty under this section (Chaudhuri vs. Emperor AIR 1933 Oudh 568=35 CrLJ 296).

2. **Defect in vehicle causing accident.**- A driver of a bus who was driving the bus with defective brakes and other defects at such a high speed that in trying to stop the vehicle, on being signalled to stop, he was unable to control the vehicle which capsized as a result of which one passenger was killed and another severely injured, was guilty under the section (PLD 1966 Lah 745). He was not guilty of an offence under sectin 304 because it could not be said that he had the knowledge that death was likely to be caused as a result of his driving the bus on a hilly road. If he had such knowledge, he would not be driving the vehicle himself, and risking his own life (PLD 1966 Lah 745). Where the defect in the brakes was neither the cause nor did it contribute to the accident. On the other hand the bus was brought under control immediately and the life of the victim was saved, the mere fact that brakes of the bus were defective would not make the driver punishable under section 338 (PLD 1958 Kar 445).

3. **Contributory negligence.**- Where an accident took place because firstly the driver of the truck was going at a very high speed and secondly because of the contributory negligence of the driver of the cart who swerved to the right when the truck approached. It was held that notwithstanding the contributory negligence, the driver of the truck was liable for the damage done (AIR 1954 Trav-co 25). It is however to be noted that though contributory negligence would not be a defence entitling the petitioner to acquittal, yet it might be a factor for consideration in determining the sentence (AIR 1927 Lah 165).

[1][338A. **Causing grievous hurt by rash driving or riding on a public way.**- Whoever causes grievous hurt to any person by driving any vehicle, or riding on any public way so rashly or negligently as to endanger human life, or the personal safety or others, shall be punished with imprisonment of either description for a term which may extend to [4][two yeras], or with fine, or with both]

**Comments**

Where the accused was driving his lorry at a high speed and ignored the signal of a jeep while passing through a narrow culvert through which two vehicles could not pass at the same time resulting in a collision and the collision occured due to the rash and negligent driving of the accused and hurt was caused. The accused was held guilty under this section (1962) 2 CrLJ 386 = AIR 1962 Mad 362).

Where the applicant's rash and negligent driving of his lorry led to a collision as a result of which hurt was caused to a person sitting in a jeep, the applicant can be properly convicted under this section, although the hurt was not caused knowingly (1962) 2 CrLJ 760; 1986 CrLJ 1202 Ori).

Where an accident was due mainly, if not entirely, to the rashness of the accused in driving the motor car while drunk and getting on to the wrong side of the road while there were vehicles in front or otherwise to his negligence in not seeing the tonga in front of him and not properly controlling the motor car so as to avoid a collision, the accused was held guilty under section 338 (AIR 1933 Oudh 568 = CrLJ 296; 1976 All Cr C 243).

Where the driver of a lorry carrying passengers allowed the minor, who was sitting by his side, to drive lorry with full knowledge that minor did not know driving and the rash and negligent driving by minor resulted in grievous hurt, it was held that the driver was liable as principal offender (AIR 1951 EP 418 = 52 CrLJ 390). Similarly, where a truck driver allowed P to drive truck with full knowledge that he had no licence and P caused grievous hurt by his rash and negligent driving, the truck driver sitting by the side of P was held guilty under this section read with sections 107 and 114, Penal Code (AIR 1947 Nag 113=47 CrLJ 968).

Where the accused took his car in Court premises, reversed it and moved forward and in so doing, the left rear wheel ran over the shoulder of a person sleeping under a tree, it was held that the accused was not liable under this section (1938 NLJ 226).

Where it was found that the accused while driving a motor car at moderate speed and on the correct side of the road ran over a boy who came in contact with the car while crossing the road it was held that the accused could not be convicted under this section (115 IC 96 = 32 CWN 612 = 30 CrLJ 402).

***Of Wrongful Restraint and Wrongul Confinement***

339. **Wrongful restraint**.- Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

**Exception.**- The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

1. Inserted, ibid, after section 338, s. 7.
2. Subs. by Ordinance No. XLVII I of 1985, for "five yeras".

**Illustration**

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

340. **Wrongul confinement.**-Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

**Illustrations**

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

341. **Punishment for wrongful restraint.**-Whoerver wrongrully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred [1][taka], or with both.

**Comments**

Section 339 relates to the voluntary obstruction by a person, and not, obviously, at least, to obstructions, which are not voluntarily continued by the persons accused of the obstruction, throughout the time the obstruction lasts (9 Bom LR 30 = 5 crLJ 97).

The words 'proceed' in sections 339 and 340 is confined to the case of a person who can walk on his own legs or can move by physical means within his own power. Surely, the word 'proceeding' in section 340 includes the case of proceeding by outside agency. To contemplate that which a person driving a mottor vehicle along in a highway is stopped and prevented from moving forward would not be said to have been wrongly restrained if he is asked to get down from the vehicle and left free to move on his foot would takes away a very large part of the content and meaning of the word 'proceed' occuring in the definition in section 339. That word cannot be given the limited meaning of proceed on foot only (AIR 1964 Cal 286=(1964) 2 CrLJ 20 = 67 CWN 1029; see 39 CWN 396).

An effective restriant on the right of the freedom whether caused by threats or by acctual physical force is sufficient for purpose of commission of an offence. The coercion of the mind can, in certain circumstances, be as effective as coercion of the body in order to bring the conduct of the wrong doer within the ambit of section 341, Penal Code. Such a restraint may arise out of words, acts, gestures or the like sufficient to induce a reasonable apprehension that failure to submit, will result in the use of force (1959 CrLJ 368; AIR 1359 Punj 134=ILR 1958 Punj 2318=60 Punj LR 563).

The word 'obstruction' or 'restraint' implies a desire to proceed in a certain way. If, therefore, there was never any such desire, there could be no obstruction, though the accused may have intended it and even expressed his intention to restraint another should be motive from his present position (1957 crLJ 769=AIR 1957 Ori. 130=23 Cut LT 88).

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

The accused who were the owners of a certain land through which a pathway passed, came there armed with sticks and obstructed a neighbour when he was passing with his ploughs and struck the bulls and made them run away. The neighbour came home fearing that if he proceeded further he would also be beaten. The accused's plea of private way over the land and resistance under a bona fide claim of right were negatived. It was held that the accused were guilty under section 339 (AIR 1954 Mad 247=1954 CrLJ 283=1952 MWN (Cr) 39). Confinement in a place wherefrom escape is possible does not detract from confinement being wrongful when the person confined had the impression that he can not explicate himself (1968) 34 Cut LT 1004).

Where the complainant did not disclose that human body was obstructed and that what is caused is only an obstruction to vehicle which was in the garage, and the passage in question was common to both the parties, no offence was committed under section 339 especially in view of exception in section 339 (1975 CrLJ 1077 = (196) 2 CrLJ 20 cal).

What section 399, Penal Code contemplates is that there must be obstruction attributed directly to the person charged and the legislature apparently did not intend include within the scope of the section an act within in its remote and indirect consequence might obstruct the free movement of a person (AIR 1955 NUC (Andh) 3628; 11 CrLJ 192).

Where as a consequence of the accused forcibly taking away the licence of the complainant, the latter was prevented by the authorities from playing boat, it was held that the accused had not committed an offence of wrongful restraint or confinement (11 CrLJ 192). The complainant, his wife and daughter occupied a house. During their temporary absence, the accused put a lock on the outter door and thereby obstructed them from getting into the house. It was held that the accused was guilty of wrongful restraint (1910 MWN 727 = 11 CrLJ 708; AIR 1949 Cal 111 = 50 CrLJ 172).

Where a landlord by locking the door prevents a tenant from entering and making use of a bathroom and a privy which he is entitled to use as a tenant, the landlord is technically guilty of the offence of wrongful restraint under section 339, Penal Code. However, a disute of this kind cna be tried for more suitably in a civil Court than in a criminal Court (AIR 1950 Cal 157; 51 CrLJ 668). To justify a conviction under section 341, Penal Code, it must be found that the person complaining has a right to proceed along the path and that he was obstructed from doing so. The mere ploughing up of a 'mamul' path does not amount to an obstructon within the meaning of section 339, Penal Code (AIR 1916 Mad 696; 16 CrLJ 701).

Where the joint owner of a house having larger share prevented co-owner having a smaller share from using a door opening into Sehan, it was held that as the right of the other owner to sue the door was not estbalished, action did not constitute offence of wrongful restaint (1964) 1 Cr. LJ 40= AIR 1964 J&K 4).

Where the accused claimed right of easement to pass over inner court yard of complainant's house through gap in complainant's wall and the complainant disputed the right and tried to close the gap it was held that the complainant's act did not amount to mischief or wrongful restraint (AIR 1963 Cal 3 = (963) 1 CrLJ 46 DB). Where some persons were not physically restrained from moving further but were carried from their shop on truck at some distance, no wrongful, confinement was held to have been made out (1968 BLJR 626).The offence to be punishable under section 341 need not necessarily constitute absolute prevention of one's personal movement but the slightest unlawful interference with his lawful movement would suffice (ILR (1952) 1 Cal 251).

Where the accused prevented processionists from proceeding along mosque on public highway with music and the accused was held guilty under section 141, read with section 149 it was held that in view of the general nature of the incident itself and in view of the fact that the accused would be liable to punishment by virtue of section, 149, it will be more proper and more logical not to record a separate conviction against these accused in respect of individual acts under section 341 (AIR 1961 Kys 57 (DB).

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

That on or about ..... at ..... you wrongfully restrained A (name of the person) and thereby committed an offence punishable under section 341, Penal Code and within my cognizance.

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

342. **Punishment for wrongful confinement.**-Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand [1][taka], or with both.

**Comments**

Wrongful confinement is a species of wrongful restraint. The gist of the offence either under secction 341 or 342 is that there must be a restraint when there is a desire to proceed in a particular direction (1957 CrLJ 769 = AIR 1957 Ori 130). Confinement in a place wherefrom escape is possible does not detract from the confinement being wrongful when the person confined had impression that she could not extricate herself and any attempt on her part would be restrained (1968) 34 Cut LT 1004).

To constitute an offence punishable under section 342, Penal Code a person should not only be wrongfully restrained but should also be kept in confinement within the circumscribed limit so that he would not be free to move out of the confinement (1968) 34 Cut LT 1004). Where the accused wrongly restrained the woman and kept her confined in the house, the accused was held guilty of the offence under section 342, Penal Code, and the fact that the woman could but did not escape was held to be of no consequence (1968) 34 Cut LT 1004).

While the absence of any desire on the part of the person confined to move would detract from it being an offence under section 342, Penal Code, the mere omission of an attempt to run away when there is a watch, does not mean the absence of a desire to move. Where it cannot be said that an escape is open to the person confiend, even if he wished to effect an escape, and the circumstances are such that the person confined could not depart without being seized immediately by the confiner, the offence of wrongful confinement must be held to be committed (ILR 1950 Cut 185 = AIR 1951 Ori. 142).

Where a person acting under a bona fide belief that another person had abducted a minor girl arrested him and kept him in his own custody instead of taken him to a police station, the accused was held guilty under section 342 (27 CrLJ 1378). Where the police officer entering the house to prevent breach of peace was beaten and confiend by the accused, offence under section 332 was held to have been committed (52 crLJ 220 = AIR 1951 Ajmer 37).

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

Where a police officer, after reasonable enquiries and on well founded suspicion arrested the complainant under the warrant believing in good faith that he was the person to be arrested, no offence was held to have been committed as the police officer was protected by section 76 (25 CrLJ 797 = AIR 1924 Bom 333). Accused bodily lifted prosecutrix and wrongfully confined her in house for whole day. Medical evidence regarding injuries corroborated prosecution witness and evidence regarding rescue of prosecutrix from wrongful confinement was found reliable conviction was held proper ( 1983 CrLJ 607 MP).

The case under section 342 read with sections 34 and 149, Penal Code is a summons case and not a warrant case. In such a case, if the trial Magistrate, after recorded the evidence, finds that the accused is not guilty, the order to be recording will be one of aquittal. Where the trial Court stated at the end of the order that the accused are discharged, in effect in law, the order has to be treated as one of acquittal of the accused. No revision petition is competent against such order of acquittal (1969 Cr LJ 732 Punj).

Where an offence of wrongful confinement was committed in the course of dacoity, it was held that separate sentence for separate offences must be imposed (1962) 1 CrLJ 168 = AIR 1962 Manipur 7). Where an accused was tried and aquitted on a charge under section 342, Penal Code, he may be tried subsequently for the offence under section 436 (AIR 1962 Pat 13 = 1962 CrLJ 73).

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

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

That on or about ..... at ..... you wrongfully confined A (name of the person) for ..... day and thereby committed an offence punishable under section 342 and within my cognizance.

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

343. **Wrongful conimement for three or more days.**-Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

344. **Wrongful confinement for ten or more days.**-Whoever wrongfully confines any person for ten days, or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

345. **Wrongful confinement of person for whose liberation writ has been issued.**-Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

346. **Wrongful confinement in secret.**-Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to

any other punishment to which he may be liable for such wrongful confinement.

347. **Wrongful confinement to extort property or constrain to illegal act.**-Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liabe to fine.

348. **Wrongful confinement to extot confession or compel resoration of property.**-Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which my lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

### *Of Criminal Force and Assault*

349. **Force.**-A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's bodys, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling : Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described :

First.- By his own bodily power.

Secondly.-By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly.-By inducing any animal to move, to change its motion, or to cease to move.

350. **Criminal force.**- Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

**Illustrations**

(a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the steam. Here A intentionally causes

motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has therefore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therfore used force to Z; and if A has done this without Z's consent. intendeing or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(c) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence. A has used criminal force to Z.

(d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved hs own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure frighten or annoy Z, he has used criminal force to Z.

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z; and if he did so without Z's consent, intonding thereby to injure, fringhten or annoy Z, he has used criminal force to Z.

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(g) Z is bathing, A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling : A has therefore intentionally used force to Z ; and if he has done this without Z's consent intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(h) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses ciminal force to Z.

351. **Assault.**-Whoever makes any gesture, or any preparation inteding or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

**Explanation.**-Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

**Illustrations**

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c) A takes up a stick, saying to Z, "I will give you a beating". Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

352. **Punishment for assault or criminal force otherwise than on grave provocation.**-Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be pumished 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.

**Explanation.**-Grave and sudden provocation will not mitigate the punishment for an offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or

it the Provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

353. **Assault or criminal force to deter public servant from discharge of his duty.**-Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or to consequesnce of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to [1][three years], or with fine, or with both.

**Comments**

Section 353 prescribes punishment for assaulting or using criminal force to any public servant in the execution of his duty as such public servant with inent to prevent or deter him from discharging his duty. Mere refusal to produces some documents as required by a public servant does not come within the mischief of section 353 of the Code. In offence falling under section 353, summons rather than warrant should be issued when the party is a respectable man (The State Vs. Bazlus Sattar, (1967) 19 DLR 234).

The provision of this section applies to a case where the victim is assaulted or criminal force is applied against him while he is engaged in the discharge for public duty. When such a duty is prohibited by a statute or by an order of an officer superior and he indulges in it, when assaulted or injured, this section cannot be invoked. A public servant should stay his hands for executing what has been stayed by an order of an officer superior (1985 CrLJ 222=(1984) 3 Crimes 703). The essence of a woman's modesty is her sex. The modesty of an adult female is at large on her

1. Subs. by Ord. No. X of 1982, s. 8, for "two years".

body. Young or old, intelligent or impecile, awake or sleeping, the woman possesses a modesty capable of being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence under section 354. The culpable intention of the accused is the cruse of the matter. The reaction of the woman is very relevant, but its absence is not always decisive (AIR 1967 SC 63).

A constable interfering in an affray in order to prevent it discharges his duty as a public servant though he is not entitled to arrest the persons committing an affray the offence being non-cognizable. And the persons engaged in affray, if arrested unlawfully are entitled to inflict the necessary minimum injuries on the constable in order to release themselves from such unlawful custody. However, if the constable is subjected to criminal force after the persons escaped from his custody or where there is no need to inflict of any criminal force on him for the purposes of such escape, an offence under section 353, Penal Code will be made out (AIR 1950 Mad 365= 51 CrLJ 604).

The expression 'in the discharge of his duty as such public servant' used in section 353, Penal Code means 'in the dishcarge of a duty imposed by law on such public servant in the particular case' and is not intended to cover an act done by him in good faith under colour of his office. Section 34 of the police Act does not give any authority to the police officer to pursue the accused and arrest them, even though no such offences as alleged or contemplated by section 34 of the Act were said to have been committed by them. In such a case, the accused resisting the quesitoning by the Police Officer alleged to have received some injuries on his person, cannot be held guilty under section 353, Penal Code (1960 CrLJ 1420=AIR 1960 Assam 206=ILR (1958) 10 Assam 73=14 CrLJ 512). Where the arrest by a police officer is illegal any resistance even if force is used by the accused could not be said to be illegal (1978 CrLJ 1062).

Where no reasons were recorded by the excise officers before searching the car in which the petitioner was travelling, the search would be illegal and prosecution and conviction under section 353 would be vitiated (Krishna Chandra Behara 1984 CrLJ 1409 (Ori). It would be clear from a bare perusal of the section that one person can be said to have used force against another if he causes motion, changes of motion or cessation of motion to that other. Mere use of force, however, is not enough to bring an act within the terms of section 353, Penal Code. It has further to be shown that force was used intentionally to any person without that persons consent in order to commit an offence or with the intention or with the knowledge that the use of force will cause injury, fear or annoyance or to the person against whom the force is used (Chandrika san Vs. State of Bihar AIR 1967 SC 170).

Offence under section 353 and 228 committed in the course of the same transaction cannot be split up to avoid section 195 of the Cr. P.C. (AIR 1968 All 342=1968 CrLJ 1329). Mere disobedience of an order does not fall under this section. Therefore, disobedience of an order under section 144, Cr. P.C. is not an offence under section 353 (AIR 1953 Vindh Pra 25). On the same basis it was held that mere refusal to produce some documents as required by a public servant does not come within the mischief of section 353 of the Penal Code (19 DLR (1967) 234 (DB).

Section 353 can apply only, when the public servant is discharging the duty imposed on him by virtue of his office; in other words, he must be performing an act, which is so integrally connected with the duty attached to his office as to form part of it. Where a co-operative extension officer while proceeding to his headquaters after attending a meeting of a co-operative society was assaulted by the accused at a bus stop, the offence committed would be one under section 352 and

not under section 353. It is too much to say that he was travelling by virtue of the office which he held. The superior protection afforded to a public servant was not available to him under such circumstances; he must rank with any other citizen of the country, when he is not engaged in the performance of his official duty (1959 Kr LJ 1310 = AIR 1960 Ker 200).

The test in such cases is whether the officer at the time of the assault was lawfully discharging a duty imposed on him by law as such. If the officer making search is not acting lawfully, conviction cannot stand. If the acts of the public servants are not strictly justifiable, if he is not discharging a duty imposed on him by law, if he is not doing what it is duty to do as a public servant, the offence does not fall under section 353. It fall under section 352 (AIR 1933 Sind 174 = 34 CrLJ 1147; 1960 CrLJ 828 = AIR 1960 Ker 200).

An officer exercising his official duties grossly, illegally and in an outrageous manner, cannot be deemed to be a public servant in the executionof his duty so as to bring an assault against such an officer within the purview of section 353. Thus a head constable cannot be said to be acting in discharge of his duty if he acts as an arbitrator between two parties when they disagree and behaves in an impolite manner towards one of them (AIR 1951 Madh Bha 42; AIR 1944 Sind 89=45 crLJ 550). Legality of the execution of duty is the *sine qua non* for the application of section 353. When a duty is prohibited by statute or by orders of superior authority, it can not be siad that the public servant acts in execution of his duty, for he was not in duty bound to execute any order. In this case the village officer was not acting in execution of his duty when he attempted to take possession of the disputed property in spite of the order of stay of his superiors. The ingredients of section 353 were not satisfied and the petitioner was acquitted of the offence (1985 CrLJ 222 Ker).

Where the date fixed for the return of the warrant had already expired on the day that the process-server went to execute it, it was held that he was not acting in the execution of his duty and the conviction under section 353, for assaulting him was bad (AIR 1924 Nag 68 = 25 Cr LJ 223). Absence of a seal on a warant of arrest renders it valid and invalid and obstruction to the execution of such warrant of arrest is not punishable by section 225 or this section (1962) 1 CrLJ 91).

A collector acting under Section 46 of the Income Tax act has not authority to issue a distress warrant and a police officer executing such a warrant cannot be said to be acting in the execution of his duty a police officer within the meaning of Section 353 of the Penal Code (AIR 1923 Pat 383 : 24 Cr.L.J. 490).

A police Inspector searching the house of a person suspected of having committed theft was assaulted by his brother. it was held that the accused's brother being a suspect at the time of the attempted search, the search was not illegal and was justified under Sections 95 and 165 of the Cr. P. C. The accused was therefore, guilty of an offence under section 353, Penal Code (AIR 1919 All 207 = 17 ALJ 115 = 20 Cr LJ 174).

If under an statute an officer, before proceeding to search, has to record his reason, he will have to apply his mind to the facts and the sufficiency of the information on the basis of which he wants to search. Where no reasons are recorded as required and the Excise Sub-Inspector searching the house is assaulted by the accused, the accused cannot be convicted under Section 353, Penal Code, since the Sub-Inspector cannot be said to be acting in exercise of his powers.(AIR 1937 Pat 501 : 38 Cr LJ 982).A police constable arresting a person without written order is not acting in the discharge of his duty and an assault on him is not an offence under Section 353. (AIR 1918 Nag 137 = 20 Cr LJ 48 ; AIR 1940 Pat 361).

A charge can be legally and validly framed against the accused under Section 353, for assault by him on a Minister functioning as Chairmen of the District Advisory Committee under the orders of the Government. (AIR 1975 SC 1685) = 1975 Cr LJ 1490).

When the search is illegal and is not resisted and the seizure is not resisted, the further sets of obstruction offered when the public servants take step in discharge of their lawful duty for the safe custody of the property would be an offence under Section 353 (1976 Cr LJ 274 = 1976 ALJ 100).

Where the act of the accused, a dealer, of snatching of books of accounts and loose sheets of papers from the hands of the Inspector of Commercial Taxes who had lawfully seized them, was serious one as it showed complete disregard of law and order and it also showed an intention that the sales-tax authorities should not find out the true position about his finacial transactions, the award of consolidated sentence of six months rigorous imprisonment, for his conviction under Section 353 and 348, was not harsh (1964 BLJR 390 = (1965) 1 Cr LJ 60 = AIR 1965 Pat 8 ; (1964) 1 SCJ 116).

**Charge.**- The charged should run as follows :-

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

That on or about the ..... at..... you assaulted (or used criminal force) to A, publics servant, namely ..... in the execution of his duty as such public servant or (with intent to prevent or deter such publics servant from exercising his duty or in consequence of anything done or attempted to be done by such person in the lawful discharge of punishable under section 353, Penal Code and within my cognizance.

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

**354. Assult or criminal force to woman with intent to outrage her modesty.**-Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonemnt of either description for a term which may extend to two years, or with fine, or with both.

**355. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.**- Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punisned with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**356. Assault or criminal force in attempt to commit theft of property carried by a person.**-Whoever assaults or uses criminal force to any person in attempting to commit theft on any property which that person is then wearing or carrying shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**357. Assault or criminal force in attempt wongfully to confine a person.**- Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand taka or with both.

**358. Assault or criminal force on grave provocation.**-Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred [1][taka], or with both.

**Explanation.**-The last section is subject to the same Explanation as section 352.

*Of Kidnapping, Abduction Slavery and forced Labour*

**359. Kidnapping.**-Kidnapping is of two kinds ; kidnapping from Bangladesh and kindnapping from lawful guardianship.

**360. Kidnapping from Bangladesh.**- Whoever conveys any person beyond the limits of [1][Bangladesh] without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from [1][Bangladesh].

**361. Kidanpping from lawful guardianship.**-Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age of a female, or any person of unsound mind, out of the keeping of the lawful gurardian of such minor or person of unsound mind, without the consent of such gurardian, is said to kidnap such minor or person from lawful guardianship.

**Explanation.**-The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

**Exception.**-This section does not extend to the act of any person who in good faith belives himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

**362. Abduction.**-Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

**363. Punishments for kidnapping.**-Whoever kidnaps any person from [2][Bangladesh] or from lawful gurardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Synopsis**

(Sections 361 and 363)

1. Scope and object.
2. "Takes and entices".
3. "Lawful guardian"
4. Guardian under Mohammedan law.
5. Guardian under Hindu law.
6. Kidnapping from lawful guardianship.
7. Taking by natural guardian.
8. Custody of mother.
9. Married girl.
10. Proof of age.
11. Consent or willingness of minor.
12. Consent of guardian.
13. Evidence and proof.
14. Punishment.
15. Charge.

1. Substituted by Act VIII of 1973, s, 3 and 2nd Sch, (with effect from 26-3-71) for "Rupees".
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Schedule (with effect from 26th March, 1971).

**1. Scope and object.-** The purpose of this section is to protect minors from being kidnaped from lawful guardianship without consent of the guardian (1968 ALJ 127; AIR 1973 SC 819 = 1973 CrLJ 651). The ingredients of kidnapping are - (a) that the girl was under 18 years; (b) that she was in the lawful keeping of her guardian; (c) the accused took or induced such person to leave out of such keeping; and (d) such taking was done without the consent of the lawful guardian (AIR 1954 Mad 62 = 1953 CrLJ 1913).

The offence under section 363 is complete as soon as the person kidnapped loses control over his movements and has to go where he is taken. Where a girl of 13 years was kidnapped from her school and was detained for hours, an offence under section 363 was complete (PLJ 1975 Cr. C 376; (1967) 19 DLR SC 379 = 1967 PLD SC 363).

The object of section 361, Penal Code, seems as much to protect the rights and privilege of guardians having the lawful charge or custody of their minor wards (Bhagaban Panigrahi Vs. State 1989 (1) CrLC 116 (119) Ori). The minor to be taken out of custody of the lawful guardian as under sections 361and 366 must be a minor under 16 and 18 years would be referrable only to section 366-A when she would be taken away from place to place by inducement with intent that she may be seduced to illicit intercourse. (Tapash Nandi Vs. State, (1993(45 DLR 26).

If a girl is found below 16 years and if she is taken away without the consent of the guardian then it will be an offence and the guardian is entitled to have custody of the minor girl. But in this case age of the girl was found in between 16 and 17 years. High Court Division ordered to release her from the jail custody and allow her to go anywhere with anybody she likes (Manindra Kumar Malakar Vs. Ministry of Home (1991)43 DLR 71).

The object of this section is to protect both the rights of the parents and guardian with regard to the custody of the minors on the one hand and the children of tender age from being abducted or induced on the other (PLD 1963 Kar 873). The provisions of section 361 and other cognate sections of the Penal Code, are intended more for the protection of the minors and persons of unsound mind themselves than for the rights of the guardians of such persons. It may be that the mischief inteded to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody, but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves (AIR 1965 SC 942). A minor to be taken out of the lawful custody of her guardian as under section 363 must be a minor under 16. A minor under 18 would be referrable to section 366-A. She cannot be allowed to go wherever she wants to until she attains the age of 18 years (Dr. Bimal Kanti Roy Vs. The State and others (1994) 46 DLR 541; Nurun Nahar Vs. State (1994) 46 DLR 112; Taposh Nandi Vs. State (1993) 45 DLR 26).

**2. "Taking and entices".-** It is now well settled that the word 'taking' used in section 361 requries that the accused must have played an active role in the minor leaving her lawful guardian's house, or taking shelter in his house. Therefore, mere passive role in helping the girl in giving shelter in the house or accompanying her to hospital for medical treatment cannot amount to taking within the meaning of section 361, Penal Code. Further the question whether there has been taking must be decided with reference to the circumstances of the case including the question whether the girl was of sufficient maturity and intellecutal capacity to think for herself and made up her own mind, the circumstances under which and the object for which she felt it necessary or worthwhile to go with the accused (Zahoor Ali Vs. State of U.P. 1989 CrLJ 1177 (1180) All).

"Taking" within the meaning of section 361, Penal Code, need not necessarily be by force, actual or constructive and whethr the minor girl gives consent or not is immaterial. But there must be proof of taking which means to cause to go to escort or to get into possession. In the case of Varadarajana Vs. State of Madras (1965 (2) CrLJ 33), the minor girl willingly accompanied the accused with her desire to be his wife. While acquitting the accused of an offence under section 363, Penal Code, their Lordships observed that the law does not cast upon him the duty of taking her back to her father's house (Noor Alam @ Noor Amir Vs. State 1989 CrLR 143 (147) Cal).

Persuation by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section (AIR 1973 SC 819 = 1973 CrLJ 651). If the accused instigated the minor to go out of the keeping of her guardian then the accused can not absolve himself from criminal liability under the plea of willingness of the minor girl (1965) 1 CrLJ 483).

In order to support a conviction for kidnapping a girl from lawful guardianship the ingredients to be satisfied are : (1) that the girl was under the age of 16, (2) she was in the keeping of a lawful guardian, (3) the accused took or enticed such person out of such keeping and such taking was done without the consent of the lawful guardian (AIR 1960 Cal 406). The most essential ingredient of the offence defined in section 361 is that the minor should have been taken by the accused out of the keeping of his lawful guardian (AIR 1965 SC 942).

In section 361 which difines the offence of kidnapping from lawful guardianship all that is required is that a minor under 14 years in the case of a male and 16 years in the case of a female must be taken or enticed from the keeping of his lawful guardian. Taking implies neither force nor misrepresentation and if a girl of less than 16 is taken away from the keeping of the lawful guardian, even on her own wish, the offence of kidnapping is established. Hence the fact that the girl is a consenting party does not affect the commission of the offence (AIR 1964 Punj 83). To attract the provisions of section 361, there must be a positive act of the person taking away the minor from and out of the keeping of the lawful guardian (AIR 1950 Cal 406). The taking away of a minor from lawful custody is not the same thing as keeping the minor out of such custody, the act of taking away is completed as soon as the minor is taken out of the custody of his or her guardian (48 CrLJ 799).

The expression taking in section 361 is not confiend to mere physical taking. There is such a taking as is indicated in the common expression; If you will come along I shall take you. The expression taking out of the keeping of the lawful guardian must, therefore, signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian or, in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did. Where it was found that one girl alleged to be kidnapped by the accused had written letters in which she was desperately calling him to come and take her away and she was soon after discovered with the accused or under his control, it is legitimately open to a court, of law to assume that he finally yielded to the solicitations and made it possible for her to get away and that is sufficient taking in law for the purpose of section 363 Penal Code (AIR 1928 Mad 585).

Where a minor runs away from lawful guardianship the person with whom he takes refuge is not taking him within the meaning of section 363, Penal Code, and the law does not oblige him to return the minor to lawful guardianship. But if a grown up person induces a minor to accompany him to a place without the consent of the minor's guardian and the guardian is thereby deprived for a period of the lawful guardianship of the minor, an offence under section 363 is committed and it

is immaterial that the grown up person had no guilty intention (23 CrLJ 716). Similarly if the accused actively brings about her stay in his house while she is proceeding to the house of a near relation after leaving her husband's house of her own accord, by playing upon her weak and hesitating mind, it amounts to his taking the girl within the meaning of section 361 (AIR 1949 Ori 22).

Where the minor had gone to the house of the accused to play with his daughter from where the accused kidnapped her; it would amount to taking her from lawful guardianship of her father (AIR 1953 Raj 127). Similarly where a girl willingly went to the bus of the accused, and he removed her from there he was guilty of an offence under the section (AIR 1955 NUC 2847).

Where a girl, alleged to be a minor left her father's house only for the purpose of bringing milk from market, but when she met the accused she went away with him to his friend's house where she was kept for the whole day, and taken to the court next day to swear an affidavit and returned home after spending the day with the accused. It was held that the girl had been taken away by the accused, out of the guardianship of her father with some ulterior motive, and he could not escape the liability of having committed an offence under section 361(AIR 1965 Raj 90).

Where a minor girl was kidnapped while she was on her way to school and it was urged that as he left her father's house voluntarily therefore the offence of kidnapping was not committed. It was held, that the minor girl was still within the lawful keeping of her father even though she had left her home and was on her way to school. The word keeping has been advisedly used by the legislature and is of a much wider import than possession. This lawful keeping is not terminated merely when a child leaves its parents house. Such leaving would normally be deemed to be with the consent of the guardian, whose keeping will continue constructively notwithstanding the physical going out of the minor from such keeping (PLD 1963 Kar 873).There is a distinction between 'taking' and 'enticing' (AIR 1955 AP 59).

'Taking' is removal from the keeping of the lawful guardian's protection due to previous arrangement with the accused (AIR 1950 Cal 406; 54 CWN 329).

For taking there need not be use of force (AIR 1958 Ker 8 = 1958 CrLJ 33). The expression 'enticing' involves that, while the person kidnapped might have left the keeping of the lawful guardian willingly, still the state of mind that brought about that willingness must have been induced or brought about in some way by the accused (Sayad Abdul Sattar Vs. Emperor AIR 1928 Mad 585 (586).

Consent or willingness of the minor girl is of no consequence (AIR 1954 Mad 62= thakorlal Vs. Vadgama, AIR 1973 SC 2313 = 1973 CrLJ 1541 = 1973 UJ (SC) 705 = 1973 CrLR (SC) 515). The word 'keeping' of lawful guardian is not physical keeping it only means under the guardianship (AIR 1955 AP 59).

**3. Lawful guardian.-** Lawful guardian includes any person who is lawfully entrusted with the care or custody of the ward namely the legal guardian who has come to legally (36 Bom LR 258 = AIR 1958 Bom 339). The words lawful guardian in section 361 are used in a wide sense. They are made by the explanation to that section to include any person lawful entrusted with the care or custody of a minor (AIR 1934 Pat 170). By the explanation added to section 361 Penal Code the accepted and general meaning of the term lawful guardian has been extended so as to include a person lawfully entrusted with the care or custody of a minor. The section and the explanation are express and exhaustive. To constitute an offence there must be in fact a duly, properly and legally proved taking or enticing away of a minor from the custody of the following persons.

(1) the natural guardian.

(2) the legal guardian if the natural guardian be dead or

(3) a person lawfully entrusted with the care and custody of a minor.

The term lawfully entrusted means a declaration of trust and the handing over or the giving or entrusting of a minor to the care and custody of another by a person competent to do so unaffected by any illegality or impropriety coupled with the assent, express or implied of the person in whom the trust is vested or imposed. Neither the declaration of the trust itself nor its acceptance need be necessarily in writing; it is sufficient if the declaration is verbally made and given or if it arises from a course of conduct consistent only with the existence of such antecedent declaration and accepted verbally or by necessary implication arising from the conduct of the party so entrusted with the duty imposed. Section 361 has no application to self constituted guardians, nor to persons who are taken up and maintained by charitable institutions. The mere relationship *per se* of master and servant does not constitute the latter, the lawful guardian of a minor, in the absence of proof, be deemed to be a proper person lawfully entrusted with the care and custody of such minor (AIR 1919 Pat 27). But the explanation cannot be used to mean that as against a person who, in fact, is the civil guardian of the minor, mere *de facto* guardianship can be set up so as to convict the real civil gaurdian of an offence under section 361 (AIR 1931 Cal 446).

Under section 361 Penal Code the lawful guardian includes a de facto guardian Where a minor who is an orphan is living with the complainant, her cousin, since her mother's death, and her maternal grandmother lives by begging, the complainant had the custody of the minor with her consent which was necessarily implied. He was thus the de facto guardian of the minor (AIR 1951 Assam 122). The term *de facto* guardian includes a guardian of a minor whose guardianship is not against the wishes of the husband of the minor (12 CrLJ 239). Would be husband to whom natural father entrusted his minor girl for marriage, is her lawful guardian within the explanation to section 361, Penal Code (Bidyadhar Naik Vs. State of Orissa 1991 (1) crimes 673 (Ori).

The conception of dual guardianship is, by itself not repugnant to law and it is not difficult to conceive of cases where there may be more than one guardian. The guardianship of the father does not cease while a minor is in the custody of another person who had been lawfully entrusted with the care and custody of such minor by the father. Again, there is nothing in law to prevent the father or the mother of a minor, who may be his or her lawful guardian for the time being, from entrusting lawfully the care and custody of such minor to more than one person at a time. A person should be regarded, in the eye of the law, as having been lawfully entrusted with the care and custody of a minor, if he has aquired control over the minor lawfully and in such circumstances as would imply trust even though he may not have been formally entrusted with the care and custody of the minor by a third person (AIR 1937 Pat 263).

Under Muslim law father is the legal guardian of his minor children. The legal guardian has in law constructive custody of his minor children. Thefore if a father removes his children from the custody of his wife, he cannot be convicted on the plea that the wife had legal custody of the children and he could not remove them from her without her consent (PLD 1968 Lah 97). But in a recent case where a father removed the child from the custody of her mother deceitfully and did not produce it when called upon to do so by High Court, the Court directed that a case under sections 365/368 Penal Code be registered against him (NLR 1988 Cr. 87).

A minor cannot be the guardian of his sister. So he cannot institute a complaint of kidnapping of his sister (AIR 1921 Lah 316). But in case of a girl whose parents are dead and who is below 16 her brother, though not over 18 years of age, is deemed to be her lawful guardian (AIR 1929 Lah 835). The stepbrother of a minor married girl is not her guardian and he cannot lodge a complaint under this section, if her husband takes her to live with him (1976 PCrLJ 1325). Where petitioners uncles of minors, abducted minors from custody by their mother. It was held that they were uncles and had nothing to do with the custody or guardianship of these minors in the lifetime of the mother and the father (KLR 1987 Cr.C 14).

The position of a Karta in a Hindu joint family is unique and even though one need not go so far as to say that a person would necessarily be the lawful guardian of a minor within the meaning of section 361, by the mere fact of his being a karta, it is safe to say that very slight evidence of consent of the natural guardian would be required to hold that the karta of the family was in fact the guardian of a minor who is being brought up under his care (AIR 1937 Pat 263).

Where the guardian of a minor entrusts the custody of the minor to a third person for a limited purpose he does not thereby lose his right of guardianship of the minor. A girl under 16 years of age living under the guardianship of her mother, was sent by the latter with a female friend of her on a visit to her sister and on her way there, the two petitioners kidnapped her and took her to their own village. It was held, that the mere fact that the mother allowed the girl to be in the custody of a certain person for a limited time only does not determine the mother's right as guardian or her legal possession of the minor for the purpose of criminal law. The consent of such a person who has no authority to give consent, does not affect the question in any way (AIR 1922 Lah 380).

The fact that a father allows his child to be in the custody of a servant or friend for a limited purpose and for a limited time does not determien the father's legal possession for the purpose of the Criminal law. If the facts are not inconsistent with continuance of the father's legal possession of the minor, the latter must be held to be in his father's possession or keeping even though the actual possession should be temporarily with a friend or other person (24 Mad 284).

**4. Guardianship under Mohammedan Law.-** Under Muhammadan Law the father is the legal guardian of the minor children. The legal guardian has in law constructive custody of the minor children. He can also claim that he bonafide believed himself entitled to their custody and thus nor guilty of kidnapping his own children when he removes them from the hizanat of the minor (Ahmed Newaz Vs. The State, 20 DLR 45 (WP). Under Sunni law the lawful guardian of a male child, until he has completed the age of seven years and of a female child until she attained puberty, is his or her mother (16 CrLJ 169=37 Mad 567). The right continues though she is divorced by the father of the child (6 Bom LR 536; 147 IC 123; (1910) 12 Bom LR 891). But it is forfeited by the mother's (1) subsequent marriage to a stranger (66 IC 830=15 SLR 175). (ii) leading an immoral life (1876) 1 All 598, (iii) negligence to take proper care of the child. The father is the natural and legal guardian of minor. A legal guardian is certainly a lawful guardian and if he takes a minor child of two and a half years from the custody of the another who is not the legal or natural guardian though entitled to the custody of child until it reaches a particiualr age he cannot be said to commit offence of kidnapping ( 1968 Ker 21 = 1968 CrLJ 62).

Under Shia law the lawful guardian of a male child until he attains the age of two years and of a female child until she attains the age of seven years, is his or her mother. After the child has attained the above ages his lawful guardianship vests in the father (14 Cal 615).

Under Shafai law the guardianship of female child until she has been married vests in mother. Puberty is immaterial (1941) Mad 760 = (1941) 1 MLJ 503= 1941 MWN 308). In the absence of the mother the mother's mother is the lawful guardian of minor girl who has not attained puberty and the husband is not the lawful guardian of her person (37 CrLJ 329=AIR 1923 Cal 672).

Under the Shia law in the absence of the mother the right of guardianship of minor passes to the father and failing him to the grand-parents and other ascendents. The maternal grandmother has no right to claim as guardian (36 All 466 = 24 IC 632=12 ALJ 772).

Under Mohammadan law mother is entitled to the custody of her daughter until she attains the age of puberty in preference to the girl's husband. Hence where a person at the instance of the mother of the married girl of eleven or twelves remove the girl from the guardianship of her mother-in-law who was a lawfully authorised agent of the girl's husband, no offence of kidnapping is committed (2 CrLJ 328 = 32 Cal 444).

In the absence of proof that he was lawfully entrusted with the care and custody of the minor so as to make the explanation to section 361 of the Penal Code applicable, the forcible removal of such a girl from his custody is not an offence under section 363 of the Penal Code (24 crLJ 712 = 32 AIR 1923 Cal 672).

The custody of an illegitimate child belongs to mother. If father removes by force an illegitimate child from its mother to suppress illname, he cannot seek protection under an exception to section 136, Penal Code (62 Cal 629=39 CWN 396).

**5. Guardianship under Hindu law.**- Father and after his death, the mother is the natural guardian of the minor children of hindu unless the father has appointed anybody else as guardian (1970) 36 Cut LT 187).

A mother has no right to the custody of her children adversely to the father. He is the lawful guardian and entitled to the custody of the children. A mother removing a female child from her father's house for the purpose of marrying her without his consent, is guilty under section 361, Penal Code (11 CLR 169 = ILR 8 Cal 969). Though the mother is entitled to have custody of the child till it complete the age of seven years, if a father removes his child from the custody of the mother, he cannot be held guilty of kidnapping from lawful guardianship (ILR 1938 Mad 805; 1971 CrLJ 1369).

Under Hindu law a major husband is the lawful guardian of his wife under 16 years of age (4 CrLJ 361), and if the father of the girl remvoes the girl from her husband's house without the consent of the husband,it will amount to kidnapping from lawful guardianship (1889)17 Cal 298). But according to a well-recognised custom among Hindus, a minor married girl continues to be under the guardianship of her father until she attains puberty (AIR 1924 Nag 34=24 Mad 255).

The husband's relations, if any exist within the degree of Sapinda are the guardians of minor widow in preference to her father and her relations (6 Cal 584). Where a minor Hindu widow takes up her residence with her deceased husband's mother with the consent, express or implied, of her husband's brother, the husband's mother is lawful guardian of the girl for the purposes of section 361, Penal Code (1915 crLJ 780=AIR 1915 Lah 390 = 3 CrLJ 296 referred).

The custody of an illegitimate child belongs to mother (12 Mad 67). But when the mother is disqualified owing to here leading an immoral life, the father has a preferential right of custody of such child (AIR 1936 Sind 63= 163 IC 192).

**6. Kidnapping from lawful guardianship.-** A minor Hindu girl below the age of seventeen was living under the care and protection of her parents. She was in criminal intimacy with the accused who was running a shop near the girl's house. The girl left her parents house of her own accord and went to the shop of the accused and entreated him to take her away. The accused then took her to several distant places when ultimately he was arrested by the police. It was held that the accused had taken the girl out of the keeping of her lawful guardian within the meaning of this section (Mommoorty V. State1958 CrLJ 31).

In order to sustain conviction under section 363 it must be proved that the person from whose keeping the minor was taken away, was a lawful guardian of such minor or was a person who was entrusted with the care and custody of the said minor without the consent of such guardian (PLD 1963 Kar 873). It must be remembered that the relation between the minor and the guardian implied by the word keeping is not dissolved so long as the minor can at will take advantage of the guardianship protected and place himself within the sphere of its operation (AIR 1916 Lah 230). The word "keeping" in section 361 connotes the fact, that it is compatible with independence of action and movement in the object kept. It implies neither apprehension nor detention, but rather maintenance, protection and control manifested not by continual action but available on necessity arising, the control of the guardian is not put and end to, by the fact that the minor has temporarily left the guardian's house, or n the guardian having been struck with some infirmity or disease (13 CrLJ 736; AIR 1955 All 78).

The minor does not cease to be in the keeping of the guardian unless the guardian himself abandons the minor or the minor having attained years of discretion, voluntarily and definitely abandons the protection of the guardian (AIR 1949 Ori 22). Thus where a girl lived with her maternal uncles for more than a year and the paternal uncles who claimed an interest in the properties standing in her name, forcibly carried away and married the girl to somebody; it was held, that the paternal uncle was guilty of an offence under section 363 (AIR 1914 Oudh 329). But this does not mean that in all those cases where another person takes the minor, an offence under this section is committed. There may be a case of innocent escorting of a minor or causing him to go, for instance, a friend of the guardian may meet the ward in the bazar and may take him to his house for giving him some refreshment. That would not constitute kidnapping because though such a person has physically taken the minor from one place to another yet he has not done so with the intention of removing him out of the lawful keeping of the guardian, and in the case of such a taking the implied consent of the guardian would be presumed (PLD 1963 Kar 873). Similarly where a minor girl voluntarily left the custody of her guardian and met the accused, who treated her with kindness without employing force or fraud, it was held that no offence under section 361 was committed (AIR 1949 All 710).

**7. Taking by natural guardian.-** The explanation to section 361 cannot be used to mean that as against a person who, in fact, is the civil guardian of the minor, a mere de facto guardianship can be set up so as to convict the real civil guardian of an offence under section 361 (AIR 1938 Cal 446). A person who is in fact that father of the child alleged to have been kidnapped by him and therefore, in law entitled to the lawful custody of the child does not come within the scope of section 361 and his act in taking away the child from the keeping of the mother does not amount to an offence of kidnapping from lawful guardianship. Where the accused was convicted under section 363 for having deceitfully enticed away his own child from the custody of his mother, whom he had deserted, and in whose keeping the child had been since its birth for more than three years. It was held, that the accused was wrongly

convicted under section 363 (PLD 1968 Lah 97). A father being a natural guardian of the minor child according to some judicial authorities cannot be held guilty of kidnapping, for his taking away the child from the custody of the mother without the consent of the motehr (Kazi Mohammad Elias vs. Ferdous Ara 41 DLR (AD) 1989 (516); Vijay Kumar Sharma Vs. State of U.P. 1991 (1) Crimes 299 (All).

The only persons having an absolute right to the custody of a hindu minor are the father and the mother of the minor. No such right exists in a maternal uncle of the minor. Such a relationship would not in law be a defence to a charge of kidnapping a minor from the custody of a de facto guardian (AIR 1962 Pat 121). Therefore though a person happens to be the nearest male relative of a hindu minor girl, it does not give him an absolute right to the custody of the girl. If he takes her away without the consent of the person in whose custody she is, he is guilty under section 361. Only the natural guardian of a minor can raise the technical plea that the legal relations of the ward and guardian did not exist between the minor and the person from whose custody she is taken away (AIR 1919 All 36).

**8. Custody of mother.-** A mother cannot have a right to the custody of her legitimate children adversely to the father. Ordinarily the custody of the mother is the custody of the father and any removal of children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as a taking out of his keeping (PLD 1968 Lah 97).

Where a married woman goes away with her child from her father in law's house, the only person who can be deemed to have kidnapped the child is the mother, and the knowledge of her whereabouts by another person will not make him an abettor of an offence under section 18 (12 CrLJ 94). But the offence is of a technical nature and therefore conviction of the mother for kidnapping her own minor children from the lawful guardianship of their father was set aside on the ground that the mother in good faith believed herself entitled to the custody (1 Weir 348). Where however the mother takes the child away and marries it off without the consent of her father, she can rightly be convicted under this section and any person at whose house the marriage is performed may be convicted of abetment of an offence under section 361 (8 Cal 969). Where a mother was given custody of a minor daughter under a decree for divorce and the father forcibly removed the girl from the custody of the mother, action of the father amounted to kidnapping (60 Bom LR 329; AIR 1958 Bom 381).

After the death of the father of a minor, if a gril is unmarried, her natural guardian would be her mother. Where the girl alleged to have been kidnapped was unmarried and her father was dead, the lawful guardianship undoubtedly vested in her mother (AIR 1915 Mad 636). Where the accused was charged with kidnapping a girl from the lawful guardianship of her maternal uncle and it was found that the mother of the girl was present with the accused when he was leading the girl away and consented to it. It was held, that the maternal uncle's guardianship ceased and the guardianship of the mother revived and that taking her with her consent was no offence under section 366 (AIR 1915 Mad 1143). Where the mother from whose custody a Muslim minor girl was removed by the accused was proved to have married a stranger and consequently lost her right of guardianship, conviction of the accused under section 363, Penal Code, could not be sustained (AIR 1933 Cal 665).

**9. Married girl.-** The husband of a Muslim girl who has not attained puberty, is not a lawful guardian of her person under Muslim law. Her lawful guardian is ordinarily her mother and if the mother is dead the mother's mother (AIR 1923 Cal 672). But on her being allowed to live in the husband's house, the husband gets the guardianship of the girl and the natural guardianship is in abeyance. Therefore if a

minor girl even before she has attaiend the age of puberty is married by her legitimate guardian under the Muslim Law, the person with whom she is married is fully entitled to set up a defence against a charge under section 363, Penal Code because sections 361 and 363, Penal Code only comes into play where a minor is removed from the lawful guardianship and not otherwise (1976 PCrLJ 1325).

The husband while taking her to his house from a short visit to her mother's house or an uncle's house is the rightful and lawful custodian of the minor wife within the meaning of section 361, Penal Code. If the accused removed the girl from such custody and it was proved that the removal was at the instance of the mother, who could terminate the guardianship of the husband no offence could be said to have been committed. But where the mother did not do so and she only subsequently ratified the same after the completion of the offence, having been won over by the accused, the latter cannot escape punishment for the offence; for in such a case the offence is not taken out of the purview of section 363 Penal Code (AIR 1952 Tripura 27). The husband of a Hindu girl of fifteen is her lawful guardian; and if the father of the minor takes away the girl from her husband without the latter's consent, such taking away amounts to kidnapping from lawful guardianship even though the father may have had no criminal intention in so doing (17 Cal 298). The duty imposed upon a Hindu wife to reside with her husband is a rule of Hindu law and not merely a moral duty. An antenuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her parental abode is invalid (28 Cal 751).

**10. Proof of age.**-In a prosecution for kidnapping, the age of the girl must be proved by the prosecution. A doctor's opinion as to age is not of much value (1931 CrLJ 1041=AIR 1931 Lah 401). The medical evidence as to the age of a person can be utilised with other cogent evidence on the point which may facilitate a proper determination of the age of the person produced before the Court (Ganesan Vs. Inspector of Police 1991 (1) Crimes 302 (Mad).

It cannot possibly be said that a doctor's opinion on a point of a person's age is not entitled to any greater weight than that of any other person. Even if the indication from which age can be deduced are known to a lay man, a lay man is not in a position, as a medical man is, to examine a person, with a view to discovering the presence or absence of those indications (35 CrLJ 498). Two doctors who examined the girl gave two different ages as to her age. In such a case the matter should be reported to a third doctor for determination of her age. In the meanwhile it is ordered that the girl may stay where she likes (Babul Meah Vs. The State, 30 DLR 187).

Section 361 must be read with section 363 and the offence of kidnapping from lawful guardianship penalised by the latter section is the offence which is defined in the former. Consequently, such an offence can be committed only when the person kidnapped is under 14, if a male, and under 16, if a female (AIR 1933 Bom 417). Girl of less than 16 years attaining puberty is a minor according to section 361, Penal Code (PLJ 1986 FSC 14). Where the victim boy was aged 16 years at the time of incident and no charge of abduction by show of force or under threat was levelled against appellant. No offence was held to have been made out (PLJ 1986 FSC 14). Where the accused produced the educational institutes certificate showing the age of the girl to be above eighteen years and the investigating agency did not doubt the certificate as genuine or false, *prima facie*, the age of the girl as disclosed in the certificate is to be taken as correct (Krishna Swaroop Mathur V. State 1982 CrLJ (NOC) 24 (Raj).

It is for the prosecution to prove that the girl was under 16 years of age on the date of the alleged offence. If the court, on the evidence, hesitates to hold that the girl was below 16 on that date the accused cannot be convicted (AIR 1955 SC 574). It follows that conviction cannot be under section 363, where it could not be definitely said from the evidence on the record that the age of the kidnapped girl was below sixteen at the time when the offence as committed (PLD 1950 Dhaka 23).

In the matter of age the statement of the doctor unsupported by any other reliable evidence is of no value (PLD 1950 BJ 94). To prove that a girl was a minor, it is not enough if the Doctor concluded that that girl was between 14 and 15 years of age. The doctor has got to give valid reasons why she concluded that the girl was below 16 years (PLD 1951 Kar 679). Where the doctor without carrying out any Xray examinatin of the bones of the girl, forms her opinion on other characteristics like height, weight, breast, teeth, etc. the opinion of the doctor is in no way better than the opinion of a layman and is not entitled to the weight which the court will attach to the opinion of an expert under section 45 of the Evidence Act. (AIR 1962 Man. 5). In such cases there is a likelihood of an error of 2 to 3 years. Therefore where the doctor fixes the age of the girl at 17 years on her physical examination; it would be unsafe to convict the accused on that evidence alone (1968 PCrLJ 1192= 21 DLR 549). Where no reasons are given for the opinion of the doctor and the opinion is at variance with the evidence of the father of the minor, the court may, if the circumstances of the case so require, hold that the father stated the truth, and disbelieve the doctor (PLD 1961 Kar 679).

Examination by a radiologist for the ascertainment of the age of the girl by an ossification test gives some degree of accurancy in finding out the approximate age of the girl (PLD 1964 Dacca 228). Although it may be recognized that ossificatin is an important test for determining the age, yet having regard to the practical difficulties which would attend the application of that test, it cannot be said that ossification is an indispensable test for determining the age of a girl (AIR 1937 Pat 263).

In order to make out a case under section 363 the prosecution must establish the following ingredients : (1) That the age of the girl was less than 16 years; (2) that the girl was taken or enticed away; (3) that she was in the keeping of her lawful guardian and (4) that the guardian did not consent to her removal (AIR 1948 Oudh 1). The fact that she had attained puberty before the age of sixteen is immaterial if the offence has taken place before she had attained that age (1988 PSC 545).

When the alleged victim was not shown to be below 16 years of age, she was not subjected to rape and possibility of victim voluntarily accompanying accused was not ruled out, or where the victim who was 17/18 years old stated in court that she went with accused of her own free will, no offence was made out against the accused (1984 PCrLJ 728; 1973 PCrLJ 1012).

Where the aductee was not below 16 years at time of occurrence nor did accused forcibly take/remove her from lawful guardianship, or where alleged abductee admitted that she had been menstruating two years before she was taken away. Circumstances of the case make it apparent that she had eloped with accused (NLR 1983 CrLJ 503). Where the girl was married and 17 years old and a consenting party, no case of kidnapping from lawful guardianship or rape appeared to have been made out, nor could it be said that any force or deception had been practised upon her (1978 PCrLJ 647). Neither personal law nor Majority act is at all relevant in a case as to custody of a minor pending criminal proceedings. The statute that holds good is the Penal Code. If the allegations are that of kidnapping of a minor girl out of the keeping of the lawful guardian which is an offence under section 363 the Penal Code, then for the purpose of custody of the victim girl as

may, be prayed for in the criminal Court during the criminal proceeding, the Court has to proceed on the basis that a female is a minor if she is under 16 years of age as laid down in section 361 of the said act. Indeed for proving the offence of kidnapping (section 363 Penal Code) the minority of the victim as above will have to be proved at the trial. If, however, the allegations are that of procuration of minor girl section 366-A of the Penal code, the Court has to proceed for the aforesaid purposes on the basis that a girl is a minor who is under the age of 18 years as laid down in the said section (Wahed ali dewan Vs. State (1994) 46 DLR (AD) 10 = 1994 BLD (AD) 32).

In a charge under sections 363 and 366, Penal Code, where the question of the girl's age is of fundamental importance, the dispute about her age cannot be resolved satisfactorily upon the sole verbal statement of the girl herself (Mohiuddin Ahmed Vs. Nabin Md. 15 DLR 269).

For proving the age of the girl, the only conclusive piece of evidence may be the birth certificate, but, unfortunately, in this country such a document is not ordinarly available. And where it is available usually the name of the person is not stated, so that it becomes difficult to determine as to which of the children of a person it belongs to. In such cases the benefit of the doubt must be given to the accused (1981 PCrLJ 815). But where the birth certificate is found reliable, a conflicting statement by the doctor as to age of the victim may not be accepted (NLR 1986 SCJ 383). When a doctor gives evidence in court, particularly with regard to the age, which is most material point in the case and in support of her certificate, it is not enough if she merely repeats what she has stated in the certificate. It is the duty of the prosecution to elicit from the doctor the reasons which made her come to that conclusion and the reasons given by the doctor must be valid (1962 CrLJ 49=AIR 1962 Manipur 5).

The opinion of the radiologist should not be preferred to the positive evidence furnished by the Municipal Birth Register, the school admission reister and the evidence of the girl's father, particularly when medico-legal opinion is that owing to the variations in climatic, dietetic, hereditary and other factors affecting people of the different regions of the country, it cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and union of epiphysis in bones (1958 crLJ 637=AIR 1958 Ker 121).

The entries in death or birth certificates are *prima facie* evidence of facts stated therein. But the entires of names of persons in a register of births or deaths or marriage cannot be positive evidence of the birth, death or marirage of such persons unless their identity is fully proved (AIR 1938 Cal 120).

School Admission Register is the best evidence as to the age of the prosecution. The ossification test is not a sure test, although this is generally accepted as best available test for the determination of the age of human beings (Sachindra Nath Mazumdar Vs. Bistupada Das, 1978 CrLJ 1494 (1495) Cal). A certificate given by a doctor about the age on an examination of the teeth, appearance and voice, etc, is not the certificate of an expert but only an assertion of his opinion which was worthless (Mohamed Syedol Areffin Vs. Yeoh Ooi Gark AIR 1916 PC 242; AIR 1962 Mnipur 5(6).

The court has to base its conclusions upon all the facts and circumstances disclosed on examining all the ;hysical features of the person whose age is in question, in conjunction with such oral testimony as may be available (PLD 1958 SC 337). Generally the evidence of the parents of the victim as to her age must be given great weight but where both the parents are uncertain as to their own ages and they

give different statements as to the age of the girl at different stages, their evidence cannot be relied upon (1968 PCrLJ 529).

It is well established that medical evidence alone, even if it is based on ossification test, is not a sure guide for determining the age of a person, as different charts have been prepared for such test and further the process of ossification is dependent on a number of factors, such as climate, heredity eating habits and even environment (1984 PCrLJ 2817). Where birth certificate was not produced by the prosecution, generally the examination by a radiologist for the ascertainment of age of the girl by an ossification test gives some degree of accuracy in finding out the approximate age of the girl (PLD 1964 Dhaka 228). Therefore where there are allegations against the Civil Surgeon that he is under the influence of the other party, the Magistrate should send the girl to the radiologist for an ossification test. Where that was not done the High Court would not uphold conviction of the accused based on the opinion of the Civil Surgeon (PLD 1964 Dhaka 228).

Where there is no direct evidence to prove that the kidnapped girl was below 18 years a conviction of the accused based on the mere opoinion of a medical expert that the girl had not crossed her 18 years cannot be sustained (1957 CrLJ 475=AIR 1957 Punj 78). The ossification test, is, no doubt, a surer test for determining age. But courts have acted upon the opinion of doctors arrived at without conducting an ossification test and based on other factors such as teeth, growth of pubic and auxillary hairs, growth of the breast, height and weight of the girl. In fixing the age of the girl all these factors are relevant consideration (1958 crLJ 1211 = AIR 1958 Ori 224).

An X-ray ossification test may provide a definite basis for determining the age of an individual than the opinion of a medical expert, but it can by no means be so infalliable and accurate a test as to indicate the correct number of years and days he has lived. Hence the opinion of a medical expert based on such test cannot be regarded to be conclusive, particularly when the difference in the approximate age stated by him and the one fixed by section 363 is not wide (AIR 1957 Punj 78 = 1957 CrLJ 475).

Where a Medicial Officer does not give any reasons for the view he express and it is not based on an ossification test, the court should not attach much importance to his statement regarding the age of the minor. Where there was a contradiction in the statement of the Medical Officer and the father of the boy, the court preferred the statement of the latter (PLD 1961 Kar 679). But this does not mean that the court should without any independent evidence accept the testimony of the minor or her parents. Where the Magistrate accepted without any other evidence the statement of the girl that she was a major, the order passed by him must be set aside and the case should be sent back for further enquiry and disposal in accordance with law by some other Magistrate (PLD 1964 Dhaka 225).

Where there was wide divergence in the age of the minor girl as disclosed in different pieces of evidence. Her age was 19 years according to affidavit filed by her, 15 years 9 months and 22 days according to Matriculation Certificate, 14 years in plaint filed in Family court and 16 years when examined in High Court. Doctor on various examinations found her age to be 16/17 years. In view of conflicting versions, age given in Matriculation Certificate was held, unreliable and evidence of doctor more reliable (1985 PCrLJ 765). The entry of birth date in a non-government school's general register, though admissible under section 35 of the Evidence Act, could not be held to prove the age of the girl where the parents of the girl had not been examined as witnesses to prove her age (Ghanchi Vora Sasuddin Isabhai 1970 CrLJ 1348 (Guj).

Where the possibility that prosecutrix had crossed 16th years of her age on day of incident was excluded. Conviction for offence under section 363, Penal Code was not sustainable (1984 PCrLJ 2817). Where the medical evidence found the kidnapped girl to be between 15 and 16 years of age. It was held that the possibility of her having crossed the 16th year of her age cannot be excluded. As such, the conviction of the appellant for the offence under section 363, Penal Code cannot be sustained (1975 PCrLJ 453).

It is not safe to fix the age of a minor girl on the ossification test for the purpose of determining whether an offence under section 361 Penal code has been committed, as different tables have been prepared by the authorities in different places (1968 PCrLJ 529 (DB); AIR 1950 Cal 406 DB).

An X-ray ossification test may porovide a surer basis for determing the age of an individual than the opinion of a medical expert, but it can by no means be enfalliable and accurate. The opinion of a medical expert based on such test can not be regarded to be conclusive. When there is no direct evidence to prove that the kidnapped girl was below 16 years, conviction of the accused based on the mere opinion of a medical expert that the girl had not crossed her 16th year cannot be sustained (AIR 1957 Punj 78; AIR 1958 Ker 121 (DB).

**See also note 10 under section 366 post.**

**11. Consent or wilingness of minor.**- Consent or wilingness of the minor girl is of no consequence (AIR 1954 Mad 62; AIR 1973 SC 2313 = 1973 CrLJ 1541). The consent of a minor who is taken away from the custody of her guardian without the consent of the latter is meaningless and does not absolve the offender of his guilt for the offence of kidnapping (Rama Kanta V. State (1985 (2) Crimes 178 (183) Delhi).

The consent of a kidnapped minor is immaterial. The taking or enticing should be shown to have been by the use of force or fraud (1965) 1 CrLJ 488 = AIR 1965 Raj 90; AIR 1968 Punj 439; 1968 CrLJ 1300). It is no defene to show that the accused did not know the age of the girl and that he bonafide believed that she was over 18 years of age (AIR 1929 All 82=1929 CrLJ 218).

Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing, voluntarily joins the accused person, the accused can not be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian (AIR 1965 SC 942).

Where the girl kidnapped was a month or so below 16 years of age when she went with the accused of her own free will, the offence would technically come within the mischief of this section (NLR 1978 Cr 80). Where abductee who had an affair with accused, deserted her parent's house eloped with accused and shared his bed till she returned to house of her parents. No offence under section 366/376, was established against accused beyond reasonable doubt. His conviction and sentence were set aside (1985 PCrLJ 2021).

Where a girl under the age of 16 years having, by persuation, been induced by the accused to leave her father's house and go away with him without the consent of her father, left her home alone by a preconcerted arrangement between them and went to the place appointed where she was met by the accused, and then they went together, there was a taking of the girl out of the father's possession when he met the girl and went away with her to the appointed place as upto that moment she had

not absolutely renounced her father's protection and as such, the accused committed offence punishable under section 363 (PLD 1963 Kar 873). Even where a minor voluntarily went with the accused, with no intention of leaving the guardianship and custody of her guardian but only for voluntary cohabitation with the accused, an offence under section 363 was complete (AIR 1953 J&K 21).

Where a girl under 16 years was removed from the custody of the guardian, the offence of kidnapping was complete. Subsequent marriage of the girl with the kidnapper would not absolve him of the offence (PLJ 1977 Lah 250). But where a minor Muslim girl above the age of 16 years left the house of her patents of her own will without the intention of returning to it and married the accused of her own free will. Conviction under section 363 was illegal (1970 DLC 753=23 DLR (1971) 126).

**12. Consent of guardian.**- For an offence under section 361 there must be established (1) a taking or enticing, (2) the girl's age was less than 16, (3) she was in the keeping of her lawful guardian and (4) absence of consent by the guardian to her removal (14 CrLJ 93). Evidence that the minor was taken out of the keeping of it lawful guardinas without his consent is necessary to establish the offence of kidnapping (14 CrLJ 149). The consent of the guardian given subsequent to the commission of the offence is not sufficient. Even if the accused thought that the lawful guardian would not have objected to his taking her yet, if in fact there was no consent, an offence would be committed. Where the temporary guardian is in collusion with the other party, and the taking away is accomplished under such collusion, consent of the lawful guardian is not the consent as is contemplated by the section (10 CrLJ 295). The consent of the minor to his being taken away or the consent of the guardian of the minor given under a misrepresentation is immaterial and ineffective. It is to be moved that misrepresentation as to intention in taking away is misrpresentation of fact within section 3, Evidence Act (AIR 1916 Lah 414).

**13. Evidence and proof.**- In order to sustain convicton under section 363 Penal Code, it must be proved that the person from whose keeping the minor was taken away, was the lawful guardian of such minor or was a person who was entrusted with the care and custody of said minor ((1961) 13 DLR 444). Entrustment which this section reuqires may be inferred from a well-defined and consistent course of conduct governing the relations of a lawful guardian alleged in the indictment and the minor. Entrustment may be proved, not only by oral evidence, but also by surrounding circumstances and the conduct of the parties concerned (Nageshwar Jha V. State (1962) 1 CrLJ 449). What is required is that there must be proof of taking. The prosecution has to prove that the accused had played some active part in the girl leaving her lawful guardian's house and taking shelter in this house (1958 CrLJ 37).

The prosecution must prove that the accused either took or enticed the minor girl from her home. In such cases circumstances may speak against the accused. Where the abductee, a minor girl, was found with accused, at a place far away from her house, the circumstance lent substantial support to her statement in so far as offence of kidnapping is concerned. Conviction under section 363, Penal Code was maintained (1985 PcrLJ 1726). Where there was no reliable evidence that the accused had taken away the girl from her father's field and the evidence showed that the girl wanted to marry the accused and probably had illicit intimacy with him, the offence of kidnapping from lawful guardianship could not be said to have been proved (Ram Veer 1981 CrLJ (NOC) 47 All).

What has to be establshed under this section is the taking or enticing of a minor girl under 14 years or of a minor male under 16 years from lawful guardianship (1970 Cut L.T. 187; AIR 1955 AP 59). Where a college going girl on

verge of majority phoned to accused, meeting him and going with him to Sub-Registrar's office for registration of the marriage agreement and there was no threat or inducement held out by accused and he girl's instance on marrying the accused, held that there was no taking (AIR 1965 SC 942=(1965) 2 CrLJ 23).

The mere fact that the minor leaves the protection of her guardian, does not put her out of the guardian's keeping. If, however, it is proved that the minor has abandoned her guardian with no intention of returning, she cannot thereafter be deemed to continue in the keeping of the guardian. If a girl of less than 18 years is taken away from the keeping of her lawful guardian even at her own wish, the offence undder section 361 is made out (Sulek Chand, V. State AIR 1964 Punj 83). Even if a minor girl leaves the parent's house voluntarily, the lawful guardian has still control over her (Mst. Bhagia, 1967 CrLJ 1240).

Good faith is not defence to charge of kidnapping under section 361. The exception is only to the effect that the guardian believes himself to be the lawful guardian of the minor (Kalayayani Dasi, V. State 1938 crLJ 751). Where the appellant is a close relation of the kidnapped girl and he had absolutely no intentions or motive to take her away it was held that it was not easily believeable that the appellant had forcibly taken away the girl, in the presence of her mother and the appellant could not be convicted for kidnapping punishable under section 363 (Krishna Vs. State 1980 CrLJ 121 (123) All).

If the evidence of the prosecutrix indicates that the girl was of easy virtues as the medical report shows that she was used to sexual intercourse this would not be sufficient for the exoneration. The mere fact that the prosecutrix complied with the wishes of the accused can be no stretch of imagination provide a good defence for taking her away from the lawful guardianship. The word 'takes' implies want of wish and absence of desire of the person taken (Rasool Vs. State 1976 CrLJ 363 (365-66) All).

In determinign whether a person takes a minor out of the lawful keeping of its guardian, the distance is immaterial. Even if a person takes a minor girl without the consent of her guardian to a distance of twenty or thirty yards, it would amount to taking her out of the keeping of her lawful guardian as required by section 361, Penal Code (AIR 1968 P&H 439 = 1968 CrLJ 1300). It is not necessary for taking of the minor out of the keeping of her lawful guardian that there should also be an enticement of the minor. Even if there is no evidence of enticement and it has been established that the minor has been taken out of the keeping of lawful guardian and that the minor girl is below 18 years (16 years in Bangladesh) and offence of kidnappng has been committed (1968 ALJ 127).

The accused was convicted under the sections for having subjected the prosecutrix to forcible sexual intercourse. It was observed that prosecution had failed to prove that accused played any active part in taking the prosecutrix out of the keeping of her lawful guardian. Held, that prosecutrix had voluntarily gone to accused's house to contact matrimonial alliance with him without the accused play in any overt or covert role therein. At the relevant time the prosecutrix had attained age of discretion. The appeal was therefore, accepted and sentence was set aside (Pramijit Singh Vs. State H.P. 1987 CrLJ (HP) 1266).

Where the accused was in the habit of visiting a prostitute, and he there met a young married girl below the age of 16 whom he seduced and then carried her about and kept her concealed from her husband, it was held that the girl having been already with the prostitute, the accused took advantage of his opportunity to seduce her, and that he could not therefore, be held to have taken or enticed her, and he

could not, therefore, be convicted of kidnapping (Rakhal Nikari Vs. Emperor 2 CWN 81).

Though an offence under section 363 is not compoundable yet if complainant, father of prosecution resiled from his previous version given in FIR and private complainant and also filed an application for withdrawal of his complaint on basis of compromise between the parties. His refusal to support prosecution story even though it involved his daughter, would adversely affect case of prosecution (1987 PcrLJ 13034).

**14. Punishment.-** The act of taking and keeping away a young minor girl from her parents house should be viewed by the Court with sterness and the culprits should not be lightly dealt with such matters, otherwise it is likely to have adverse effect on the morals of the society (AIR 1965 Raj 90 = 1965 CrLJ 483).

It is open to the court to impose a sentence of fine as well sentence of imprisonment. But the Court is not bound to sentence an accused to fine in every case (50 crLJ 88). It is not essential to impose a sentence of fine along with a sentence of imprisonment. But sentence of fine alone is illegal (AIR 1949 All 587; 50 CrLJ 884 DB).

Where a girl under sixteen years remained with accused for a whole day but neither sexual intercourse was committed nor any intention to do so was shown by the accused. The sentence of accused was reduced to six months. R.I. already undergone (1986 PcrLJ 2499 (DB). If the girl is almost 16 and she has gone of her own accord with the man, it may be an extenuating circumstances, and a lenient sentence may be passed (PLD 1978 SC (AJ&K) 1 = NLR 1978 Cr 80).

Where two persons are kidnapped in the course of the same transaction, there are two distinct offences of kidnapping and it is lawful to award separate sentences for each offence although it is not necessary that the sentences should run consequentively (27 CrLJ 64 Lah).

**15. Charge.-** The charge should run as follows :-

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

That you, on or about the ..... day of ..... at ..... kidnapped X out of Bangladesh without the consent of that person (or some person legally authorised to so consent on his behalf) and thus kidnapping the person from Bangladesh and thereby committed an offence pounishable under section 363, Penal Code and within my congizance.

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

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

That you, on or about the ..... day of ..... at ..... kidnapped X a minor (below 14 years of age of a male or 16 years of age if a female) or any person of unsound mind or took or enticed out of keeping of the lawful guardianship without his consent and thereby committed an offence punishable under section 363, Penal Code and within my cognizance.

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

364. **Kidnapping or abduction in order to murder.**-Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with

[2][imprisonment] for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

**Illustrations**

(a) A kidnaps Z from [1][Bangladesh], intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

**Comments**

This section provides for the case of kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The section is not applicable where the object of the kindapping is to hold the kidnapped person to rasons. In such a case the offence will be punishable either under Section 365 (27 Cr LJ 64). The offences of murder and kidnapping are mutually exclusive and there can be no conviction under both sections 302 and 364, Penal Code (1968 PCrLJ 569=19 DLR 573 (DB).

One view is that where the case for the prosecution is that the person abducted was in fact murdered, there can be no scope for a charge under section 364 and the abductor should be charge either with murder pure and simple or at least with abetment of murder (1981 DLR 97 (DB); 1972 PCrLJ 933 (DB)=PLD 1958 Dhaka 499; PLD 1950 Dhaka 4 (DB).

When there is a doubt as to the applicability of section 302/109 of the Penal Code to the facts of the case, the safer course is to charge and convict the accused for the lesser offence (PLD 1964 Dhaka 697 (DB).

To establish an offence punishable under Section 364,it must be proved that the person charged with the offence has the intention at the time of the abduction that the person abducted would be murdered or would be so disposed of as to be put in danger of being murdered. Even if after the abduction the accused person placed the abducted person in danger of being murdered that would not establish the charge of abduction punishable under Section 364 against him. It would be necessary to establish that he intended at the time of the abduction to place the abducted person in a position which would put her in danger of being murdered (AIR 1940 Cal 561 = 192 1, C, 2352 = 42 Cr LJ 285). It is necessary to establish that the accused placed the abducted person in danger of being murdered (AIR 1940 cal 561).

The section thus, would be attracted even though the person was not, in fact, murdered in consequence of the abduction with the intention of murder. The expression to order that such person is very wide indeed. In order to murder would mean with the object or aim at.It is to be gathered from the facts and circumstances of each case at the time when alleged abduction or kindapping took place. The intention or the aim cannot be susceptiable of direct proof, but there must be some proof in considering the facts and circumstances of the case at the time of taking away, which would point to the conclusion of the fact that it was done with the aim to kidnap and to murder or to be disposed of in such a position as would be considered possible for them to be murdered (Al-Haj abdul Cani Vs. State (1992) 12 BLD 490).

Where the accused was one of the persons who were responsible for kindnapping or abducting the deceased, so that he may be murdered or may be so

1. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Schedule (with effect from 26th March, 1971).
2. Subs. by Ordinance No. XLI of 1985, for "transportation".

disposed of as to be put in danger of being murdered and the deceased was found lying murdered on the next day, the conviction of the accused was altered from one under Section 302, Penal Code, to Section 364, Penal Code (64 Punj LR 1917). If the murder has actually taken place this section will have no application (AIR 1953 Hyd 249 = 1953 CrLJ 157).

Offences of murder and kindanapping are-co-extensive and there can be no conviction for both the offences. If abduction is followed in by murder no charge can be framed under section 364 of the Penal Code and the charge must be one under Sections 302/109 or for murder pure and simle (Soleman Vs. The State 42 DLR (1990) 118).

The section is not attracted where death of the abducted person only is proved but there is nothing to show that abduction was for the purpose of murder. This section is attracted where after abduction the abducted person is not heard of and the fear is that he might be murdered. Where abducted man is indeed murdered and the body has been found than the proper charge that can be laid is under section 302 or section 302 read with section 109 against the abductor, according to the state of evidence (Hafez Abdul Khair Vs. The State, 29 DLR 1 (SC); 29 DLR 269 (SC); 10 DLR 374; 53 CWN 169; 1 DLR 173).

In order to bring home a charge under this section the Judge must be satisfied that at the time when the accused took away the deceased, they had the intention to cause his death (1956 SrLJ1313).

In Hafiz Abul Khair and another Vs. The State, (1977) 29 DLR (SC) 1, it is stated that "Instances of minor offences given in the illustration under Section 238 show that an offence under Section 364 is not minor offence to the offence under Section 302. The offence under Section 364 is a distinct and specific offence which has been so recognised injudicial pronouncments too". In the same case it was further held: "The offence under Section 364 can be better described as a lesser offence are neither synonymous nor same kind of offence, so they do not fall under the same eategory. An offence to be a minor offence to a major one must to be a congnate offence to a major one, having the main ingredients in common. The ingredients of the offence of murder and those of the offence of abduction for murder for putting the abducted person in danger of being murderd, are not common. Hence the offence under Section 364 is not also a cognate offence to the offence under Section 302" (The State Vs. Sree Ranjit Kumar Paramanik (1992) 12 BLD (Ad) 291).

Therefore where an accused is charged under Ss. 302 and 364, Penal Code, he can be convicted under Section 364, Penal Code even though the charge of murder fails (AIR 1954 Hyd. 88 = ILR 1953 Hyd. 756 = 1954 Cr. L. Jour 641 (DB). But in that case charged under Section 364 must have been framed. Where the appellants were charged under section 302/34, Penal Code, but were acquitted of the said charge and were instead convicted under section 364, Penal Code, for which they were never charged and were thus taken completely unaware in the matter of thier conviction under section 364/ 34, Penal Code, A clear prejudice was casused to them and therefore their conviction under section 364, Penal Code was illegeal. The case was remanded with a direction that the accused be retired after framing a proper charge under Section 364 (1988 P. Cr. L. J. 1489 = PLJ 1988 Cr. C. 390; NLR 1985 UC 101 ; NLR 1981 Cr. 602 (Lah).

This primary object can be gathered from the facts and circumstances of each case. An intention or purpose or object as such may not be suceptible of direct proof which nevertheless must be proved to substantiate a charge under section 364 of the

Penal Code. In the absence of direct proof the prosecution must prove such an impeachable fact and circumstances which would lead a reasonable man, a man of ordinary prudence, to the irresistable conclusion that the object or the purpose of the alleged abduction or kindanpping was that the victim may be murdered or with the knowledge that murder would be the likely result though actual murder need not be proved. Any fact or circumstances lacking in those essential particulars as to *mens rea* would not substantiate a charge under Section 364 of the Penal Code. It is further to be noted that such *mens rea*, intention or purpose can be freferable only to the point of time when adduction or kidnapping allegedly took place (1981) 33 DLR 97 (DB).

In order to establish a charge of abduction in order to murder, when the case is one of abduction by decitful means, it is not enough for the prosecution merely to prove certain circumstances under which the abducted person was induced to go, nor even to prove a mere misrepresentation. They must prove that there was a misrepresentation that the particular misrepresentation was the result of a plan to murder and that it was one by which, the abducted person was himself decieved and was induced to go (41 CWN 287, Foll) = AIR 1940 Dhaka 21 = PLD 1950 Dhaka 52; 50 Cr LJ 1008 = (1936) 41 CWN 287 = 1975 Cr LJ 950 (All). The intention of the abductors as to what they did at the time of abduction and immediately thereafter is relevant (AIR 1968 All 170= 1968 CrLJ 584).

The witnesses were unanimous in their evidence that they had seen the accused taking away the boy with him. They were all independent witnesses. It was held that the testimony of the witnesses could be relied upon and that it was the accused who had comitted the offence (1976 Cr LR (SC) 185 = 1976 Cr LJ 1578 = AIR 1976 SC 2055). Mere abduction is not an offence. In order to sustain a conviction under Section 364 it is incumbent upon the prosecution to prove that the abductors had the intention at the time of abduction that the person abducted should be murdered or would be so disposed of as to be put in danger of being murdered (ILR 40 Pat 809 = 1975 Cr LJ 950 (All).

Where the *modus operandi* discolosed in the ranson letters was clearly putting the father of the boy whom the accused had kidnapped in fright of the boy being murdered in the case the ransom money was not paid for one reason or other, the accused was held guilty under Section 384 and 386, Penal Code (1975 Cr LJ 559) = AIR 1957 SC 381).

The offences of murder and kindnapping are mutually exclusive and there can be no convictionunder both sections 302 and 36, penal Code (1968 P. Cr. L. J. 569 = 19 DLR 573 (DB).

One view is that where the case for the prosecutionis that the person abducted was in fact murdered, there can be no scope for a charge under section 364 and the abductor should be chage either with murder pure and simple or at least with abetment of murder (1981 DLR 97 (DB) ; 1972 P. Cr. L. J. 933 (DB) ; PLD 1958 Dhaka 499 ; PLD 1950 Dhaka 4 (DB).

When there is a doubt as to the applicability of section 302/109 of the penal Code to the facts of the case, the safer course is to charge and convict the accused for the lesser offence (PLD 1964 Dhaka 697) (DB).

Use of force was not necessary to prove offence of abduction, Abduction of complainant by accused may be proved beyond reasonable doubt even when no force was used (1988 P. Cr. L. J. 372). Proof of a pre-conceived plan for comitting murder is necessary for a conviction under Section 364, Penal Code (PLD 1968 Dhaka 158 (DB) ; AIR 1938 Cal. 51 (DB). and the prosecutionmust prove such unimpeachable

facts and circumstances as would lead a reasonable man to an irresstible conclusion that the object aiming at kidnapping and abduction of the victim was either that he might be murdered or be so disposed of as to be put in danger of being murdered (PLD 1968 Dhaka 158 = PLR 1967 (20 Dhaka 1016 (DB).

Where the deceased abducted and murdered but only one of the abductors had inflicted injuries likely to cause death where as the other had caused simple injuries in order to teach him a lesson, the Court set aside their conviction under Section 302/ 34, and convicted them under Section 364/ 34 and Section 323/ 34. The accused who caused simple injuries were treated leniently and their sentences under Setion 364/ 34 were reduced to those already undergone where as sentences under Section 323/ 34 were maintained (1981 SCMR 587).

Where abductee was abdducted by a companion of accused who by deceitful means had induced abductee to go from her house with them and accused at worst could have been vicariously liable for the act of his companion. Person who abducted the abductee and was principal accused was not prosecuted at all. It was held that unless principal accused is prosecuted or convicted, conviction of a person sharing common intention or object, abettor, conspirator and vicariously liable was not possible under the law (1986 P. Cr. L. J. 2254) = NLR 1986 Cr. 246). Before a Court can act on circumstantial evidence the circumstances proved must be complete and of a conclusive nature so as to fully inconsistent with the innocence of the accused and are not explainable on any other hypothesis except the guilty of the accused. As there was sufficient interval between the death of the boy, and the recovery of the body, the link in the chain of the circumstantial evidence does not appear to be fully completern these circumstances, the accused was entitled to benefit of doubt under Sections 302 and 364. However, there cannot be any doubt that the respondent had taken away the child for the purpose of snatching ear-rings, which were recovered from him and which has been accepted by the High court. (1979 UJ (SC) 323).

Where there were independent witnesses evidencing that they had seen the accused taking away the boy with him, it will be sufficient to convict the accused under this section (AIR 1976 SC 2055=1976 CrLJ 1578).

Where an abductor was charged with murder of the abducted person, there can be no further charge under section 364(1960 Ker LJ 220). Where in a charge under sections 302/34 and section 364, the cause of murder was not poroved, the conviction under section 364 is mantainable (1958 Raj LW 384). Where the accused was tried for murdering a girl and also under section 364 for abducting her. There was no evidence of murder not evidence that notive for abduction was to murder the girl. It was held that the accused could not be convicted under Section 364 unless it was conclusively proved that the girl was murdered (8 DLR (W. P.) 8; AIR 1940 Cal. 561 = 42 Cr. L. J. Jour 285 (DB).

Where the dead body of the abductee is discovered and the medical evidence gives the time of death to be approximately the same as the time of abduction, but the dead body is definitely identified as that of the alleged victim. The mere proximity of time of death and abduction does not peove the prosecution case of abduction and murder (1980 P. Cr. L. J. 733). Mere recovery of bones of a human being, from a place in a jungle which is accessible to all could not be used as a circumstance incriminating accused in comission of offence of kindapping and murder of deceased (1985 P. Cr. LJ 391 (DB).

Where the accused, a young lad joined the other culprits for avenging the murder of his elder brother. But in doing so, he might have been influenced by what his elders were doing, he was sentenced to 4 years R. I. (1971 P. Cr. L. J. 162 (DB) (Lah).

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

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

That you, on or about the.....day of.....,at.....kidnapped (or abducted) X, a person under the age or then, in order that the said X might be murdered (or subjected to grievous hurt, or slavery, or to the lust of any person) or might be so disposed of as to be put in danger of being murdered (or subjected to grievous hurt, or slavery or to the lust of any person) and there by committed an offence punishable under section 364-of the Penal Code and within my cognizance.

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

[1][364A. **Kidnapping or abducting a person under the age of ten.**-Whoever kidnaps or abducts any person under the age of ten, in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the last of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the last of any person shall be punished with death or with [2][imprisonment] for life or with rigorous imprisonment for a term whcih may extend to fourteen years and shall not be less than seven years.]

365. **Kidnapping or abducting with intent secretly and wrongfully to confine person.** Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. **Kidnapping, abducting or inducing woman to compel her marriage, etc.**-Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourwe, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [3][and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid].

**Synopsis**

1. Scope and application.
2. "With the intent that she may be compelled".
3. Compelled to marry against her will.
4. "Forced or seduced to illicit intercourse".
5. Custody of girl before and after trial.
6. Secction 366 and 376.
7. Consent of prosecutrix.
8. Evidence and proof.
9. Need for corroboration of statement of prosecutrix.
10. Evidence as to age.
11. Punishment.
12. Charge.
13. Place of trial.

1. Section 364A was inserted by the Criminal Law Amendment Act, 1958 (Act XXXIV of 1958), s. 2.
2. Subs. by Ordinance No. XLI of 1985, for "transportation".
3. Inserted by the Indian Penal Code (Amendment) Act, 1923 (Act XX of 1923), s. 2.

**1. Scope and application.-** This section prescribes the punishment for kidnapping and abduction of a woman with the intention of forcibly marrying or holding sexual intercourse with her. The section will apply where the abduction or kidnapping of a woman is for the purpose of marriae or seduction and the mere fact that the girl is a consenting party will be a matter to be taken into account in awarding punishment and will not absolve the accused from all blame (Sulekh Chand Vs. State AIR 1964 Punj 83).

Use of force was not an essential ingredient of section 366, Penal Code. "Abduction" and kidnapping could be achieved even by deceitful means (Nawabkhan Vs. The State 1990 CrLJ 1179 (MP).

All that the section requires is that the minor girl or woman should be kidnapped or abducted, as the case may be, for the purpose of being compelled to marry against her will, and the marriage would be valid or not has nothing to do with the commission of the offence (Rathiman Vs. State AIR 1967 Mad 409 (410). Section 366 applies whether the offence is kidnapping or abduction, the additional ingredient being required that such kidnapping or abduction is with the object of marriage or seduction (State Vs. Sulekh Chand AIR 1964 Punj 83(85) = 1963 CrLJ 454). If the prosecution cannot prove that abduction was with the intention of committing illicit intercourse or contracting forcible marriage, there can be no conviction under this section (1968 PCrLJ 479; 1969 SCMR 491 = 1969 CrLJ 1091).

Abduction of a married woman comes under section 366 Penal Code (AIR 1918 Cal 136=19 CrLJ 640). Forcible abduction does not amount to an offence under section 366 unless there are other ingredients of the offence namely; the intention either that the girl should be seduced or forced to illicit intercourse or that she should be compelled to marry agianst her will (PLD 1959 Dhaka 956 DB).

Where an accused made a minor girl leave her guardianship by inducement so that she may be seduced to illicit intercourse the accused was held guilty under this section (1968) 1 SCWR 324). a husband cannot be convicted under this section (1966 Raj LW 460). Kidnapping and abduction are two distinct offences and their ingredients are entirely different (1957 Cr.LJ 674). In kidnapping consent of the person enticed is immaterial. In abduction consent of the person removed, if freely and voluntarily given, condones it. In kidnapping the intent of the offender is irrelegant, but in abduction it is an all important factor. Kidnapping from lawful guardianship is not a continuing offence for as soon as the minor is removed out of his or her guardianship the offence is completed, but the person is being abducted not only when he is first taken from any place but also when he is removed from one place to another (AIR 1953 Pun 258); 1953 CrLJ 353).

Where a minor girl is kidnapped and later on it is found that the accused had illicit intercouse with her, the accused is liable to be punished under section 366 (AIR 1953 Punj 258). It is not necessary for a conviction under section 366 that the accused should know definitely who the guardian of a minor girl is whom he finds wandering about and makes use of, for his own ends (AIR 1957 Assam 39). Where abducted woman (above the age of 16) leaves the house of her proector of her own will, no offence under section 366 is committed (1978 PCrLJ 647). Where the evidence showed that the accused did not compel the girl to go from her place but she accompanied the accused of her own free will and that there was no inducement by deceitful means to go out of her village, the accused cannot be convicted of an offence of abduction under section 366(AIR 1953 Pun 258).

Where the circumstances rendered it more probable that the girl had eloped with the accused rather than that she was abducted; the accused should be acquitted (AIR 1928 Lah 274). In this connection it must be noted that if a grown up girl accompanies the accused from place to place without any complaint there is a presumption of consent (1979 PCrLJ 575). Where the abductee travelled from place to place with the accused but did not rouse ay alarm to attract others to rescue her there would be a presumption of elopement and not of abduction (1979 PCrLJ 575). Where there is no evidence to prove that husband has divorced his wife his attempting to take away her forcibly does not constitute and offence under Section. 366, Penal Code (Prem Chand v. State of Bajasthan, 1989 (1) Cr. L. C. 689 (691) (Raj).

In the present case from the testimony of P. W. 5 Km. Rajkumari it is amply clear that the prosecutrix was spirited away from her parent's house at night and kept confined in a room in the neighbour hood. Her version is that she was subjected to a forcible sexual intercourse by the accused but the High Court keeping in view the statement of Dr. (Mrs.) Chopra, P. W. 2 in her cross-examination based on the ossification that the girl was below 17 years of age felt that it was difficult to hold that she was definitely below 16 years of age, acquitted the accused of the charge under Section. 376 of the Penal Code as it felt that the circumstances tend to show that the girl had eloped with the accused. This however does not exonerate the accused from the charge of kidnapping. The fact remains that the prosecutrix was taken from the lawful guardinanship of her father Mool chand. She was a minor being below the age of 17 years as found by the High Court on the medical evidence. the High Court has rightly held that the ingredients of an offence under Section. 366 have been made out by the prosecution beyond all reasonable doubt (Bhushan Lal. V. State of Madhya Pradesh, 1988 Cr LR 111 (111) (S. C.).

Where there is evidence of the minority of the girl in the case under Section. 366, Penal Code, but the evidence regarding the other essential ingredients of the offence under Section. 368, Penal Code, namely, the taking away of the girl by the accused, etc. is absent, the accused cannot be convicted under this section (Biswanath Ghosh v. State, AIR 1957 Cal. 589 (591): 1957) Cr. L. J. 1114).

A girl below 18 years of age was not kidnapped or abducted under fear of causing death. She newt with the accused of her free will and with the consent of her mother as her prospective marriage with the accused was not liked by her brother. She was not taken away by the accused to seduce her to illicit intercourse. It was held that the charge under Section 366 must fail (Lalta Prasad v. State of Madhya Pradesh, 1979 Cr. L. J. 687 (868) (SC).

**2. "With the intent that she may be compelled".-** The gist of the offence under this secton is that the abducted or kidnapped girl should be compelled to submit to a marriage or seduced for illicit sexual intercoruse (1951 CrLJ 115).

Seducton implies surrender of woman's body who is otherwise reluctant or unwilling to surrender herself to illicit intercourse in consequence of persuation, flattery, whether such surrender was for the first time or is preceded by similar surrender on earlier occasions. Where a prostitute offers herself for money not casually but in the course of her profession there are no scruples to overcome and surrender by her is not seduction within the code. Where a person instigate another to seduce a prostitute it cannot be said to intend to seduce her (AIR 1962 SC 1905).

Where an accused made a minor girl leave her guardianship by inducement so that she may be seduced to illicit intercourse the accused was held guilty under this section (1968) 1 SCWR 314).

Abduction by itself is not an offence and in the absence of some evidence that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be seduced or forced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercouse, a conviction under section 366 cannot stand (29 CrLJ 479).

For a conviction under section 366 it is necessary that there should be kidnapping or abduction of a woman with the intention or knowledge specified in the section (AIR 1955 NUC 211). Where prosecution fails to prove on evidednce the intent of the accused that the woman, even if she is below 16 years of age, will be compelled to marry any person or knowing it to be likely that she will be compelled to marry any person against her will, there cannot be any conviction of the accused for such as act of kidnapping or abduction under section 366 (1970) 22 DLR 753).

Intention is the main ingredient of an offence under section 366 and if the intention is established then the offence is complete. It is not necessary for the prosecution to prove that sexual intercourse has taken place. Intention can be gathered even from surrounding circumstances (PLD 1970 Dhaka 1). Where it is clear from the evidence that the person who is charged under this section had abducted the woman in order that she might be seduced to illicit intercourse, he can be convicted under section 366 and punished (AIR 1952 Trav-Co 379)

In order to obtain a conviction under this section it is not sufficient to show that the woman has been abducted i.e. that she had been obliged by the use of force or induced by the practice of deeit to go from any place. It is necessary also that this should have been done with one of the specified intentions, and that which is relevant to the present case is the intention that she should be subjected to illicit intercourse, that is to say intercourse outside wedlock, by the use of either force or seduction (1969 PCrLJ 1091=1969 SCMR 491).

The intention to abduct is to be gathered from conduct. Affirmative proof is not allways possible. It is to be inferred from the fact and circumstances of each case. So also, abetment by conspiracy or aid can be inferred from circumstances and conduct. Where the the accused person took the victim girl to Calcutta for the purpose of prostitution, and they, however, adopted the deceitful means inducing her that she should go with them to see Calcutta and it is by this means, they induced her to go from the village to Calcutta, their conviction under Section. 366/ 34, Penal Code, is well founded (Khali Sahu Laxmi Dei@ Martha v. State, 1975 Orissa J. D. 175 (187); NLR 1984 SLJ 1).

Where it is clear from the evidence in the case that the intention of the accused in forcibly carrying a minor girl was not only to persuade her, unwilling as she was, to change her mind and to accept him as her husband but also to marry her in spite of her refusal, and that he kept her confined for over 6 hours while she was standing and crying and refusing to stay and marry him, there can be no other conclusion than that his intention was to compel her to marry him, or, if opportunity permitted, to marry her forcibly and the case is within the ambit of Section. 366 (K. Joggayya v. King, AIR 1951 Orissa 142 (145): I. L. R. (1950) Cut. 185); 1970 P. Sr. L. J. 166).

**3. Compelled to marry against her will.**- To convict a person under the second part of this section it is essential that that he should be found to have practised some "criminal intimidation" or employed "any method of compulsion". So, if the girl has gone out with the accused willingly and without any body having exercised any compulsion on her, no charge under this section can be made out against him (Nura

v. Rex, AIR 1949 All. 710 (712) = 51 Cr. LJ 29 = 1950 AWR 98, over ruled in S. Varadarajan v. State of Madras, AIR 1965 SC 942).

Though every act done against the will of a person is done without his consent yet an act done without the consent of a person is not necessarily against his will, which expression imports that the act is done in spite of the opposition of the person to the doing of it (AIR 1933 Rang 98). Where there was no evidence to show that the girl was being kidnapped with intent to compel her to marry against her will, the offence under section 366 was not made out (AIR 1953 Raj 127)

In a case under section 366 the prosecution has to prove, on evidence, beyond all reasonable doubt its main ingredient, namely, that the accused kidnapped or abducted a woman with the intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will. So if it is found that the woman alleged to have been kidnapped or abducted is a consenting party and no act was committed by the accused against her will, then the accused cannot be brought within the mischief of section 366 (1986 PCrLJ 1616).Even repeated requests to one who knew her limitations, namely, that she was completely within the grip of the requester where she was imprisoned and was given no food and drink certainly amounted to forcing her to consent. even if consent in such circcumstances would have been given, that would not amount to consent in law (K. Joggayar Vs. King AIR 1951 Ori 142 (145).

Where a girl under 16 years of age is taken away from the keeping of her father by the accused with the object of marriage or seduction, he is guilty of an offence of kidnapping punishable under section 366, Penal Code, notwithstanding the fact that the girl accompanied him of her own accord and not as a result of force or misrepresentation, or even when the girl was taken away at her own request (1984 SCMR 386; PLD 1962 Kar 886).

Where a girl of about 10 or 11 years of age was taken away with the consent of her mother and married against the wishes of her brother who was her guardian for marriage and against her own will, it was held, that an offence under section 366 was committed. In such a case it was unnecessary to consider whether the girl had any right to act of her own free will in the matter, consent at all even for purposes of section 366 of the Penal Code and a prosecution will lie in such circumstances (AIR 1925 Cal 578; PLD 1972 Lah 121). But there may be circumstance in which though an offence under section 361 is committed yet the subsequent marriage or illicit intercourse with the kidnapped girl may not amount to an offence under section 366 thus where a girl at the time of kidnapping from lawful guardianship intended to cohabit of her own free will with the kidnapper, or where abductee had an affair with accused. She deserted her parents house and eloped with accused and shared his bed till she returned to her parents. No offence under section 366/376 was established against accused beyond reasonable doubt. Conviction and sentence were set aside (1905 Upp. Bur Rul. 17; 1985 PCrLJ 2021). Where it was not unlikely that the girl herself eloped with some of the accused and on missing her, her parents got up the story to recover her and to bring her paramours into trouble; it was held, that conviction under section 366 was improper.(AIR 1925 Lah 274).

The prosecutrix had written a lot of letters out of friendship and relationship. She had also shown an affidavit of marrying him. The incident took place when she was of 18. Held, no offence was made out as she was a consenting party. Conviction and sentence was set aside (1985) 1 Crimes 157 MP).

It was contended that the prosecturix of 16 was a consenting party. Medical report and school certificate put her age at 12. Held, the conviction of the accused

was well founded and should be maintained as her consent is of no importance (1986) 1 Crimes 524 Del). Where a woman was abducted by a man whom she had not married but with whom she had lived willingly for a couple of months as his wife before the abduction and whom she probably intended to marry the Lahore High Court held that an offence under section 366 of the Penal Code had not been established (1932 CrLJ 421; AIR 1924 Lah 218). Similarly where a girl had gone out of her father's house and went with the accused willingly and without any body having exercised any compulsion on her, no charge under section 366 can be made out against the accused (AIR 1949 All 710=51 CrLJ 29; 1970 CrLJ 1383= AIR 1970 Punj 456).

Where it was found that the woman alleged to have been abducted was going wih the accused willingly and that she was above eighteen years of age and there was no evidence that she had been induced to go by any deceitful means and the woman herself was not examined the commitment of the accused for trial under section 366 was quashed (AIR 1936 Pat 103=160 IC 161).

Where the girl voluntarily surrendered herself and her chastity to the accused and followed him from village to village, no offence of abduction under section 366, Penal Code, can be said to have been committed in view of the consent given by the prosecutrix (1968 CrLJ 1390=1969 CrLJ 1310).

Consent on the part of a woman, as defence to an allegation of seduction, requires voluntary participation not only after the exercise of intelligence based on the knowledge, significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence, fear or terror is no consent (1968) 1 crLJ 690).

Where the accused had taken out from the parents custody the minor girl who was of nature understanding with a suggestion that they woudl get her married in a good family and there was no evidence on record to show that the complainant girl was in any way compelled either to accompany the accused or to subject herself to illicit intercourse with the accused it was held that the mere suggestion that the accused would get hr married in a good family did not constitute any pressure on the complainant girl to do something against her will and hence no offence could be attributed to the accused (1962 CrLJ 481=63 Punj LR 29 = 1961 All WR (Supp) 64).

**4. "Forced or seduced to illicit intercourse :".-** The term "seduce" is used in this section in the general sense of enticing or tempting, not in the limited sense of committing the first act of illicit intercourse. The substantial offence in the section is the act of kidnapping or abduction, and the intention or knowledge that the girl may be forced or seduced to illict intercourse raises it to an aggravated form of the man offence of kiddnapping or abduction and punishable with greater severity. The material words in the section are "illicit intercourse" rather than "forced or seduced". It is the illicit nature of the interourse, for which the kidnapping or abduction takes place, that constitutes the aggravation of the offence and not the priority in point of the time of such intercourse. (Lakshamn Ball v. state AIR 1935 Bom. 189 = ILR 59 Bom. 652).

The verb "Seduce" is used in two senses. It is used in its ordinary and narrow sense as inducing a woman to astray from the path of virtue for the first time; it is also used in the wider sense of inducing a Woman to submit to illicit intercourse at any time or to any occasion. It is in the latter sense that the expression has been used in Sections 365 and 366-A of the Penal Code, which sections partially overlap. Seduction implies surrender of her body by a woman who is otherwise reluctant or unwilling to submit herself to inllicit intercourse in consequence of persuation,

flatery blandishment or importunity whether usch surrender is for the first time or is preceded by similar surrender on earlier occasions. But where a woman offers herself for intercourse for money-not casually but in the course of her profession as a prostitute-there are no scrupulous nor reluctance to be overcome, and surrender by her in not seduction within the Code. It would then be impossible to hold that a person who instigates another to assist a woman following the profession of a prostitute abets him to do an act with intent that she may or with knowldge that she will be seduced to illict intercourse AIR 1962 SC 1905 = (1963) I Cr. LJ 16; 1934 Lah 227; 35 Cr LJ 1386; Over ruled). It is a criminal offence where a female under 16 years has been induced to surrender her chastity to an unlawful sexual intercouse. Where this has been accomplished by her seducer by the use of seductive arts such as flattery, solicitation importunity or by importing some other species, beguilement, or deception, the offence is completed. It does not matter whether the accused person achieved his object by means of brute force or the victim capitulated to the gentle prompting of confinding love by deceitful promises; his guilt in either case is established (1968 PCrLJ 1743).

It is to be noted that the word forced as used in section 366 is used in its ordinary dictionary sense and would include forced by stress of circumstacnes (AIR 1930 Cal 209). Therefore a person who compels a girl to go with him with intent to have sexual intercouse with her, commits an offence punishable under sections 366 and 362 of the Penal Code (12 CrLJ 241). Seduced to illicit intercourse means induced to surrender or abandon a condition of purity by indulging in unlawful sexual intercourse. Therefore an accused person cannot be convicted of an offence under this section unless it is proved that the girl was leading a pure lire from unlawful sexual intercourse at the time when the kidnapping took place (PLD 1965 Kar 299). But this does not mean that it is necessary to prove that the girl has never, at any time, surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter, may have resumed a life of purity (AIR 1933 Cal 718).

The question whether the life of chastity to which she returned was the result of her enforced separation from her lover or was voluntary, makes no difference in law for the purpose of attracting the provisions of section 366 (37 CrLJ 270). It follows that the expression seduced to illicit intercourse is nto restricted in meaning to inducing a girl to surrender her chastity for first time and an accused may be convicted under section 366 even if the women had illicit intercourse with him before she was kidnapped (AIR 1930 Cal 209). On the same principle where a girl who had been seduced by some persons but had been subsequently left alone, is taken away by the accused, with a view to profit from her sex and her youth conveying her to some man other than her original seducer, he cannot claim immunity from conviction under section 366 on the ground that other men had previously taken advantage of her (AIR 1937 All 353).

**5. Custody of girl before and after trial.**- If a girl is found below 16 and taken away without the consent of the guardian then it will be an offence and the guardian will be entitled to her custody. Even if it is presumed that at time of occurrence of her kidnapping the detenu was minor but now when she is found major the Court has no jurisdiction to compel her to go with her father (Manidra Kumar Malakar Vs. Ministry of Home (1991) 43 DLR 71 ; 42 DLR 349= 1990 BLD 85). An abducted girl after her recovery by the police cannot be detained against her will specially in the case of a legally wedded woman. Where a Magistrate ordered the girl to be given in the custody of the man of her choice. The order was held to be illegal and was set aside (PLD 1962 Quetta 108). But taking a minor into custody or arranging for his or

her detention, with a view to temporarily isolating him or her from certain influences, may be necessitated by the dictates of justice. Such detention has the complexion of the custody of a guardian. It has an objective different from confinement or placing restriction on his other movements. It is for giving a chance to the minor to develop his or her own independent opinion free from external pressure. This is a discretion inherent in the court. Consideration as to how that discretion is to be exercised and what facilities are available to the Magistrate in exercising that discretion, is his concern, subject to supervision of the courts to which he is subordinate (PLD 1963 Dhaka 464=15 DLR 148).

**6. Section 366 and 375.**— The offence of abduction under section 366 is made out as soon as the accused person takes away a woman. But when he has committed the offence of abduction under section 366 the further question to be decided is whether he has had illicit intercourse witht he woman. If the answer is in the affirmative it would amount to rape as defined by section 375. Where a man has illicit intercourse with an adult woman with her consent, it is not rape under the law. In such a case the accused person will be held guilty under section 366 but not guilty under section 376 (AIR 1938 Cal 460). Where a person is convicted of abducting a girl with intent that she may be compelled to marry any person against her will or in order that she might be forced or seduced to illicit intercourse, ordinarily that person should only be convicted under section 366, Penal Code, and not under section 376, Penal Code, unless very clear evidence in respect of the latter offence is forthcoming (AIR 1950 All WR 105). Where the girl was a consenting party in abduction as well as in illicit intercourse and the age of the girl was more than 14 years though less than 16 years, conviction should be under section 366 and not under section 376 (AIR 1953 J&K 21).

Where a person is convicted of abducting a girl with intent that she may be compelled to marry any person against her will or that she might be forced or seduced to illicit intercourse, ordinarily he should be convicted only under this section and not under section 376 unless very clear evidence in respecct of that offence is forthcoming (Sri Ram, DLR 5 Ajmer 33; 4 Al Cr. D 642).

**7. Consent of prosecution.**-A prosecutrix of under 18 was found a consenting party to sexual intercourse. Held, the charge of abduction and rape cannot be sustained. Opinion of the radiologist on her age cannot be a basis to determine her age in the absence of direct evidence on it (1985) 2 crimes 607 (Del). Where according to the evidence it is clear that the girl was taken away by the appellant with the consent of the mother, and she was not taken away by the appellant for the purpose of compelling her to marry against her will, it was held that no offence could be made out (Lalta Prasad Vs. State of Madhya Pradesh, 1979 CrLJ 867(868).

Where a minor girl left her husband and father in law of her own accord and meeting the accused on her way stayed with him voluntarily without any fraud or force being practised on her no offence committed (AIR 1914 All 376=15 CrLJ 265). a man committing sexual intercourse with a girl in a field near her own home without the intention of taking her away is not guilty of an offence under section 366 Penal Code (AIR 1932 All 580=34 CrLJ 100). If it is found that the woman alleged to have been kidnapped or abducted is a consenting party and no act was committed by the accused against her will, then the accused can not be brought within the mischief of section 366 of the Penal Code. However there could be a conviction of the accused under section 363 of the Penal Code, for kidnapping the said girl if the prosecution could prove the ingredients of an offence punishable under section 361 of the Penal Code. In a case under section 366 , Penal Code if no direct evidence can be found as to the actual intention of the abductor or kidnapper the said intention

shall have to be inferred from the circumstances of the particular case (Nurul Islam Vs. The State 23 DLR 126).

Where the abducted girl who was above 18 years of age went with the accused willingly and there was no evidence to show that she had been induced to go by any deceitful means employed by the accused and the woman herself was not examined the commitment of the accused for tiral under section 366 was quashed (AIR 1936 Pat 103 = 160 Ind Cas 161). When a minor girl had been taken away by the acucsed on her own request, he was held to be guilty of an offence under section 366 and was sentenced to 12 months R.I. (PLD 1962 Kar 886; AIR 1953 Punj 258). Where a girl than 16 years of age is taken away from the keeping of her father by the accused with the object of marriage or seduction, he is guilty of an offence of kidnapping punishable under section 366 Penal Code, notwithstanding the fact that the girl accompained him of her own accord and not as a result of force or misrepresentation (AIR 1964 Punj 83; 1962 (1) CrLJ 841; PLD 1972 Lah 121).

Where a woman had of her own free will gone away with the accused to marry him and to give up prostitution, there can be no conviction under this section (1969 SCMR 491 = 1969 PCrLJ 1091). Where evidence showed that the prosecutrix was moving with the consent of her guardian no offence could be said to have been made out (AIR 1979 SC 1276=1979 CrLJ 867).

Where an abducted woman had voluntarily lived with the accused for two months before abduction as his wife and whom the accused intended to marry no offence under this section was held to have been made out (AIR 1924 Lah 218 = 24 CrLJ 421). Where the prosecutrix was below 18 years of age, offence, under section 363 and 366, Penal Code stood committed by accused even if prosecutrix was a consenting party (Bijender Singh Vs. State of Haryana 1993 (2) Crimes 537 (P&H).

Where the prosecutrix had attained the age of discretion and was on the verge of attaining age of majority, left the house of her father without persuation or deceitful means and voluntarily joined company of accused and permitted him to take her away from one place to another and have even sexual intercourse with her cosent, prosecution cannot be said to have proved charge u/s. 366 Penal Code (Baldeo v. State of U. P. 1993 (1) Crimes 1009 (All).

When the girl herself files an affidavit that she was 20 years of age when she married accused & since then is leading happy marital life, the Criminal prosecution of husband accused under section 366 Penal Code should be quashed (Baby @ Sita Kumar Agarwal v. Officer-in-charge, Police station, Purighat & ors. 1993 (1) Crimes 1036 (Ori.).

**8. Evidence and proof.-** In an offence under section 366, Penal Code the prosecution must prove that the abduction took place with the intention mentioned in the section; but then the intention can also be inferred from the conduct of the accused and the circumstances of the case. Ordinarily it is not possible for the prosecution to establish the intention except by proving the conduct (AIR 1930 Lah 52 = 31 Cr. LJ 529 = AIR 1953 Raj 127 = 1953 Cr. LJ 1028; 12 Cr LJ 393 = 31 Cr LJ 529 = AIR 1930 Lah 52. )

The existence of an intention, like any other fact, has to be inferred by evidence of conduct and circumstances, as intention is after all a matter of inference from the circumstances of the case and the subsequent conduct of the accused after the abduction has taken place (AIR 1954 Mad Bha 97 = 52 Cr LJ 643). Mere finding as to abduction is insufficient, the further finding that the abduction for any of the purpose mentioned in the section is also necessary for a conviction under this section (AIR 1979 SC 1494).

Where a girl is kidnapped by a person from the lawful guardianship and another person unconnected with kidnapping takes the girl for illicit intercourse, the latter person cannot be convicted under this section (AIR 1961 Bom 282= (1961) 2 CrLJ 578).

Conviction for the offence of kidnapping u/s 366, read with section 114, Penal Code is not sustainable when the prosecution has not succeeded in proving beyond reasonable doubt that the prosecutrix when kidnapped has not crossed her 18th year and when there are facts stating that he continued to remain with the accused without any complaint or shouts for help (Shitalprasad Lalluram and another v. State of gujarat 1992 (1) Crimes 545 (456).

Where there is a likelihood of defence verson, e. g. that the alleged abductee was previously betrothed to him, came away to him of her own accord and married him on the same day, being true; the accused cannot be convicted (1983 P. Cr. L. J. 1428; 1968 P. Cr. L. J. 1968). Covniction u/s. 366 Penal Code is not maintainable when there is an admitted fact that prosecutrix went with the accused on her free will and there is counfused evidence regarding her age (Manohar Lal v. State 1988(1) Crimes 627 (Del).

In abduction and rape cases the accused is entitled to rely on the direct statements of the victimes which can be placed in three categories (i) before the alleged crime ( ii) after the alleged crime but before the trial; and (iii) at the trial. The abductee, if alive and competent to depose, is the most important witness in such a, case. If she deposes against the accused at the trial, she can be confronted with any of her previous statements visualized above; but in order to succeed, the accused will have to prove that the previous statement was a voluntary statement. In this behalf it will be extremely important to note whether qua the time when it was made, she was, generally speaking, under the control of the accused becausee dozens of meehanisms of coercion and deceit can further be applied on a person who is already a victim of violence and/or deceit to obtain a statement favourable to the culprits (PLD 1978 lah. 1936 ; PLJ 1978 Lah. 485).

In cases involving sexual offences the rule of prudence is that the evidence of the prosecutrix alone should not be acted upon unless substaintially corroborated by other evidence (PLD 1958 Dhaka 403 (BD); AIR 1936 Cal. 18 (DB) ; AIR 1938 Lah. 474) But a case of abduction or kindnapping only is not a case of sexual offence, and the rule does not apply to an offence under section 366 (1983) 35 DLR 373 ; PLD 1958 Dhaka 403 = 10 DLR 237 (DB). Even then some corroboration of the evidence of the prosecutrix is necessary for conviction of the accused, particularly if the person abducted happens to be a grown-up girl (PLD 1959 Kar. 635; 1968 P. Cr. LJ. 477).

Where there are injuries on the back, the lege and arms of the prosecutrix. They coroborate her story that the two accused had assaulted her and she was resisting the assault. There is further corroboration of the prosecution story provided by the recovery of the broken bangles and the shalwar and chappal of the prosecutrix at the instance of the accused and there is no background of enmity between the prosecutrx's family and that of the petitioners. The accused must be convicted (1969 P. Cr. L. J. 778). Where no other reliable evidence was availabe, the prosecution was left with the bald statement of the prosecutrix, but it did not inspire confidence at all in the peculiar circumstances of this case which kept her father quiet for three days who then dubbed her as an imbecile to cover her disappearance from the house. Even otherwise it is not considered safe to rely on the solitary testimony of the prosecutrix in such cases without its corroboration from any other source (1974 P. Cr. L. J. 180; PLJ 1974 Lah. 207).

Where prosecution case was not proved to the hilt, benefit of the doubt should be given to the accused (1987 P. Cr. L. J. 691) ; 1984 P. Cr. L. J. 1932; NLR 1984 UC 87; 1983 (35) DLR 373 (DB). Where there were material discripancies and inherent improbabilities in the prosecution case and the abductee appeared to be a consenting party (1986 P. Cr. L. J. 1616), or where prosecutrix was a consenting party and concealed facts as to the real person with whom she left her parents house, accused was given benefit of the doubt and acquitted (1983 P. Cr. LJ. 1547). The Judge if he decides to accept the uncorroborated testimony of the victim girl or woman should state the reasons why he considers it safe to convict the accused without any corroborative evidence (1983 (35) DLR 373 (DB). where the evidence of P. Ws., was not reliable, for the simple reason that the appealant was known to the complainant and there had been cases between the parties and in some cases the appellant was an accused person but the name of the appellant was not disclosed in the first report, and no explanation had been given for the omission.The complainant who had lodged the first report was himself an eye-witness and was present in the house when the ladies had been abducted. The complainant had clearly stated in the first report that barring the absconding accused none was identified. The incident had taken place in broad daylight. Therefore the subsequent implication of the appellant by the complainant was not sustainable (1970 P. Cr. L. J. 517 (Kar).The previous statement of the victim girl after the alleged commission of the offence is considered to be legally admissible as evidence of conduct (35 DLR (1983) 373).

In cases falling under section 366, Panal Code, the evidence of the girl alleged to have been kidnapped or abducted must be taken with great amount of caution. She went from place to place along with the accused and stayed in a number of hotels. She did not inform this fact to any body any where at any stage. She voluntarily came back along with the accused. The girl has stated that she was induced to go with the accused giving her false hopes that she would be shown actors and actresses and various places and for that reason, she left her house and met accused and there after, she went with them to various places, By her own statement it is impossible to hold that any of the acused persons by deceitful means induced her to go from her house to various places. Her evidence was that for the first time when the accused and she were in the hotel at V, she was compelled by the accused persons to marry the first accused. They threatened her that they would end her life. By the time she reached V. She was in the company of the accused persons for a number of days and stayed in various hotels. It is not her case that any time before, any of the first accused persons compelled her to marry the first accused and to have illecit intercourse. That being so, the charge under Section 366, Penal Code, cannot be sustained (1972 Mad LJ (Cr) 177 (Mys).

The accused taking a girl under 18 years of age about from place to place with the intention of seducing her to illict intercourse but force or deceitful mean not being used, cannot be held guilty under section 366, P. C (26 Cr. LJ. 1151 ; AIR 1925 Oudh 454). Where the accused finds a minor girl wandering about and makes use of her for his own ends, an offence under section 366 is made out. It is not necessary that the accused should definitely known who the guardian of the minor girl is (25 Cr LJ 193; AIR 1924 Oudh 355).

Where a girl who is already seduced by some, but left alone, is taken away by the accused with a view to profit from her sex and her youth by conveying her to someman other than her original seducer, they cannot claim immunity from a conviction under section 366 in respect of this young and helpless girl on the ground that other men had previously taken advantage of her (AIR 1937 All 353; 1937 ALJ 547; 1937 AWR 203; 168 Ind Cas 833; 38 Cr Lj 621.

A minor Mohammedan girl was taken away with the consent of the mother, She also consented to the marriage of the accused with her daughter. The marriage was performed but neither the girl nor her brother who was her guardian for marriage under the Mohammadian Law, consented to it. The Court held that the accused was guilty of an offence under section 366 of the Penal Code (84 Ind. Cas 434; 26 Cr. LJ 290; AIR 1925 Cal 578).

Where prosecutrix in a complaint for rape and abduction was the only witness against the accused. She had no grudge against the accused nor had they ever annoyed her otherwise. No explanation was forthcoming as to why after all prosecutrix blamed accused for such an indictment. The fact that prosecutrix was used to sexual intercourse afforded no justification on the part of accused to appease their lust on her. Conviction and sentence was maintained (1984 PCrLJ 1438).

Where abductee was over 16 years old at the time of her alleged abducton. She was taken to different places but made no effort to complain against accused who was responsible for her forcible abduction. Abductee made inconsistent statements in her two statements recorded under section 164, Cr. P.C. and affidavit filed before High Court. No relieance, could be placed on abductee with regard to her story of abduction (1982 PCrLJ 32).

**9. Need for corroboration of statement of prosecutrix.-** Where the medical evidence shows that the prosecutrix had been used to sexual intercourse, in order to accept the statement of the prosecutrix that she was compelled, threatened or otherwise induced to go with the accused, there should be corroboration of some material particular from some independent source and her bare statement cannot be considered sufficient to sustain the accused's conviction (Ram Murti v. state of Haryana, AIR 1970 SC 1029 (1032) 1970 SC 668 Bondal v. State of M. P. , 1983 Cr. C. J. 607). What exactly amounts to corroboration of the main evidence is always a difficult question. It must necessarily depend on the facts of each particular case (1961 CrLJ 689). The kind of corroboration required by the rule must be independent evidence, that is to say, the evidence of some witness other then the girl herself (AIR 1934 Cal 7 = 35 CrLJ 796).

Where the evidence shows *prima facie* absence of compulsion, corroboration is requried for accepting her bare statement (1978) 1 Kant LJ 26). It is too well settled by now, to need any authority, that it is advisable to have corroboration of the evidence of the prosecutrix in a case of rape but corroboration can be dispensed with if in the particular circumstances of the case, the Court is satisfied that it is safe to do so. It has, however also been held that the said rule of prudence does not apply to cases of kidnapping (Emperor v. Banubai Ardeshir Irani, (1943) 45 Bom. L. R. 281 (292-94) 44 Cr. L. J. 534 (F. B. ); Shamrao Shivram Aknad v. State of Maharstara, (1974) Cr. L. J. 86 (88).

It is settled beyond controversy that in cases under section 366 it is prudent to look for corroboration of the statement of prosecutrix before a verdict of guilty can be returned and that if such corroboration is not available it would be completely unsafe to convict the person concerned (1972 CrLJ 395 (Manipur).

In the instant case, the prosecutrix was moving freely with a number of persons. She was visiting hotels and other places of recreation and at no point of time she made any complaint to the police or anyd one. But, on the other hand, she informed her parents that she was happy and earning at Madras. Held that in order to accept her statement that she was compelled, threatened or otherwise induced to go with a number of persons for illicit intercourse, there should be corroboration of some material particular from some independent source and her bare statement

cannot be considered sufficient to sustain the conviction. In this case there is no corroboration confirming the story of her and therefore it is dangerous to base a conviction on her testimony (Ponnamma v. State of Karnataka (1978) 1 Kant. L. J. 26 (27); 1978 Cr LJ 1241 (1242) Knt). The rule that corroboration is required of the evidence of the prosecutrix in the case of a sexual offence like rape is not rigidly applicable in case of a mere abduction charge which is not a sexual offence. If majority of prosecution witnesses are disbelieved, it does not follow that the entire prosecution story must also be disbelieved (Shah Alam Vs. The Crown 10 DLR 237).

Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of proudence under given circumstances. Indeed, from place to place, from age to age, from varying lifestyles and behavioural complexes, inferences from a given set of facts, oral and circumstantial may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of preceedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed (Rafiq v. State of Uttar Pradesh, 1981 All. L. J. 139 (140).

**10. Evidence as to age.**— Where the allegation is that of kidnapping which means taking from the custody of the lawful guardian, namely the parents, sections 361, 366, 366-A of the Penal Code will be attracted. The minor to be taken out of custody of the lawful guardian under sections 361 and 366 must be a minor under 16 years of age, and 18 years would be referable only to section 366-A when the girl would be taken away for illicit intercourse with "another person" and not with the kidnapper (Tapash Nandi Vs. The State; 45 DLR 26, Followed in Nurun Nahar v. state (1944) 46 DLR 112).

The benefit of uncertainty as to the age of a girl must go to the accused (Statyapal & ors. v. State of U. P. (All) 1989) (1) Crimes 477 (Ker).

It is seen that the Penal Code provides puishment for different effences committed against minors, so me time 18 years and sometimes more than 18 years, but less then 16 years and sometimes less that 21 years and sometimes 21 yeras, the Penal Code need bo be strictly construed and the offence having attracted the specific provision of the Penal Code, the age of the victim need be determined in accordance with the Penal Code and not with reference to the Majority Act. The allegation is that of kidnapping which means taking from the custody of the lawful guradian, namely the father of the minor daughter by deceitful means. This allegation, as in the First Information Report, clearly attracted the offences as under Section 361 and under Section 366 of the Penal Code. The minor to be taken out of custody of the lawful guardian as under Sections 361 and 366 must be a minor under 16 years of age. 18 years would be referrable only to section 366. A when she would be taken way from place to place by inducement with intent that the girl may likely be seduced to illicit intercourse with "another person". The present allegation was not to the effect that she was taken for illicit intercourse with another person but with the kindapper. The finding of fact to the effect that 16 years would be the age limit for the instant case to bring home the charge of abduction against the accused and the prosecution's own story having proved that the age of the girl to be above 16 years, the question of her being a minor could not arise (Tapasi Nandi Vs. State (1992) 12 BLD 637 (639).

The question of age of the prosecutrix in cases under Section 366 and 376, Penal Code, is always of importance. It is paricularly so in a case where according to the medical evidence the prosecturix is found to have been used to sexual intercourse and the rupture of the humen is old (Ram Muthi v. State of Haryana, AIR

1970) (S. C.) 10320. A girl allegedly kidnapped by the appellants stayed with them for 15 days and travelled with them from place to place meanwhile. Her medical report showed she was above 18. They were acquitted of charge of kidnapping since they were absolved of charge of rape to which she was a consenting party (19840 I Crimes 851 (P & H).

The accused on their being convicted filed an appeal. Prosecutix involved in the incident was of about 18. Medical evidence relied her version of the case story of abduction was found concocted and testimony totally incredible and false. Sexual intercourse could not contitnue without her consent for 13 days. Held, she was neither abducted nor raped (1985) 2 Crimes 512 (Del).

Where a minor girl is kidnapped, and latter on it is found that the accused had illicti intercourse with her, the accused is liable to be punished under this section (Kamakhya Prasad Agarwala v. State, AIR 1957 Assam 39 (420 (D. B.) ;1957 Cr. L. J. 353).

Where the prosecution failed to prove the age of the girl to be below 18 years on the date of offence, it was held that the charge under Section. 366, Penal Code could not be brought home to the accused. His conviction on that account was, therefore, set aside by the High Court(Ghanchi Hora Samsuddin Isabhai v. State of Gujarat (1970) Cr. L. J. 1348 (1349): AIR 1970 Guaj 178). A person dealing with girl of the border age of 18 years does so at his own peril and if it is proved that girl is below 18 years he must suffer the consequences notwithstanding his bonafide belief that she is above 18 years (AIR 1964 Punj 83).

**Evidentiary value of age given in school certificate.-** It is a matter of common knowledge that the ages given at the time of admission of girls and boys in schools are far from being precise. More often than not, attempt is made by the parents and guardians of their wards who get admission in the chools, to understate their ages and to give a later date of birth than the real one, Thus, the age given in the school certificates are not dependable for determination of the precise date of birth of a student, to whom the entry as to the date of birth in the schools records pertains (Raunki Saroop v. State, 72 Punj. L. R. 332(334-35); AIR 1970 Punj. 450). It is common knowledge that parents very often mention a lesser age of the child at the time of admission in a school (Babir Singh Vs. State of Haryana 1989 (1) Crimes 417 (P&H).

The only conclusive evidence of the girl's age is the birth certificate, but where such evidence is not available ordinarily the court will have to base its decision upon facts and circumstances as disclosed by the physical features and other oral evidence (Sedheshwar Ganguli, AIR 1958 SC 143 = 1958 CrLJ 373).

High School certificate is not a conclusive or high probity evidence on the question of age of proseccutrix (1984) 2 Crimes 837 P&H). School certificate was produced to prove age. However, in said certificate name of original school from which student was transferred was not mentioned. Such school certificate was not relied upon for proving age (1993 CrLJ 2886 SC).

It is a notorious fact that in our country correct date of birth is never disclosed in the school admission register (AIR 1965 SC 282; AIR 1970 SC 1029).

**The birth register.-** The birth register extracts are certainly the most dependable evidence as to age, as they are seldom, if ever, subject to the infirmities (AIR 1963 Ker 18(22) = 1972 Ker LJ 810). An entry in a birth register is the best proof of age of the victim and may be preferred to any other evidence on the point (1969 PCrLJ 313). Where the entry is made by the concerned official in the discharge of his official duties, it is clearly admissible under Section. 35 of the

Evidence Act and that it is not necessary for the prosecution to examine its author. In the instant case the prosecution has proved the age of the girl by over-whelming evidence. To begin with, there is the evidence of a Doctor who is a radiologist and who after X-Ray examination of the girl found that she was about fifteen years of age. Thus as corroborated by a certificate which is proved by the Head Master, there is yet another document a certificate copy of the relevant entry in the birth register, who born to Lajwanti, wife of Daulat Ram on 11th November, 1957. It was contended that in the absence of the examination of the officer/cowkidar concerned who recorded the entry, it was inadmissible in evidence but the contention is not acceptable for the simple reason that the entry was made by the concerned official in the discharge of his official duties (Harpal Singh V. State of Himachal pradesh, 1981 Cr. L. J. 1(1-2)

The only conclusive piece of evidence of the girl's age may be the birth certificate, but unfortunately, in this country, such a document is not ordinarily available. The court or the jury has to base its conclusions upon all the facts and circumstances disclosed on examining all the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available (1958 Cr LJ 273 = AIR 1958 SC 143). Physical examination for verification of girl's age can only be with her consent. Ascertainment of the age of girl on a charge of kidnapping the question to be duly gone into upon due consideration of all facts and circumstances (Janendra Nath Shaha Vs. Abdul Khaleque, 15 DLR 272). The entires in death or brth certificates are *prima facie* evidence of the facts stated therein (AIR 1938 Cal. 641). Entries of names of persons in a register of births or deaths or marriage cannot be positive evidence of the birth, death or marriage of such person unless their identity is fully proved (AIR 1938 Cal 641).

**Medical evidence.**- In a case under section 366, in view of the fundamental importance of the question of age of the girl concerned, it is the duty of the Judge to obtain evidence of the medical witness with the utmost precision and to have brought out clearly whether the witness was prepared to stake his opinion that the girl could not be of 16 years or above (AIR 1946 Cal 493 = 47 CrLJ 325 DB). But much weight cannot be attached to the opinion of the doctor if he does not state any reasons for his opinion where a doctor express an opinion as to age but does not give any reasons and there is a contradiction between the statement of the doctor and the father of the minor, it would be proper to accept the statement of the father as correct (13 DLR (WP) 69=PLD 1961 Kar 679).

It is true that a doctor is not in a better position to form an opinion about the age of a person than a lay man, but the statement of a doctor is more than an opinion when from his statement it does not appear doctor has relied entirely on certain phyisical peculiarities, such as teeth, etc, his statement is not a legal proof but a mere opinion (41 Cr LJ 142 = 185 IC 271). Where the age of a minor was proved by medical evidence and statement of the parents, it was held that there was no reason to disbelieve their testimony when not challenged by the accused (1977 Cr LR (MP) 130).

Medical evidence on age cannot be of mathematical precision and it is all the more risky to convict someone else on the basis of medical evidence which is likely to vary (1972) 2 Cut WR 1836). Where the doctor is inexperienced, his opinion can not be relied upon (1979 CrLR (Mah) 118).

**Ossification test.**- Ossification of bones test for determing age is regarded as a surer test but it is by no means conclusive as various factors may hasten or delay osseous changes (AIR 1954 Ori 33; AIR 1957 Punj 78). An ossification test may provide a surer basis for determination of age of an individual than the opinion of a

medical expert, but the opinion of the Radiologist can not be preferred to the positive evidence of the entry of date of birth made in the register of births and deaths, immediately after two months of the date of birth of the accused. (1993 CrLJ 549; AIR 1988 SC 1796; AIR 1982 SC 1297=1982 CrLJ 1777 Rel on). On can take judicial notice that margin of error in age ascertained by the radiological examination is two years on either side (Ram Das Vs. State of U.P. 1990 (1) Crimes 41 (All); AIR 1982 SC 1297 = 1982 CrLJ 1777 SC).

Non-production of Radiologist to prove X-Ray report relating to age of alleged abductee, renders conviction a nd sentence of accused unsustainable (NLR 1987 Cr 836). It cannot be laid down as a rule of law that in all cases of rape in order to determine the age of the girl raped the ossification test must be performed, though it is desirable, where possible, because the medical opinion is that which is a surer test as to the age of the persons concerned, particularly in the formative period. However, even ossification test leaves much room for speculation and does not give a surer indication as to the age of a girl, particularly when it is in border region. Hence it cannot be said that the medical evidence should be rejected simply because there was on ossification test (AIR 1950 Cal 406 = AIR 1957 Assam 39 = 1957 Cr LJ 353).

The ossification test is, no doubt, a surer test for determinating age. But courts have acted upon the opinion of the doctors arrived at without conducting an ossification test and pased on other factors such as theeth, growth of pubic and auxiliary hair, growth of the breasts, height and weight of the girl. In fixing the age of the girl all these factors are relevant considerations (AIR 1945 Orissa 33 = 1958 Cr LJ 1211: AIR 1958 Orissa 224; (1952) 1 Cr LJ 659).

The evidence regarding age of the girl may be either (a) positive or (b) medical. But it should be borne in mind that the opinion of the radiologist should not be preferred to the postive evidence furnished by the Municipal Birth Register, the school admission register and the evidence of the girl's father, particularly when medico-legal opinion is that owing to the variations in climatic, dietetic, herediatary and other factors affecting the people of the different States of India, it cannot be reasonably expected to formulate a uniform standards for the determination of the age by the extent of ossification and union of epiphysis in bones (1958 Cr LJ 37 = AIR 1958 Ker 121).

**See also note 10 under section 363 supra.**

**11. Punishment.-** When the accused knows that the seduced girl, although a consenting party and grown-up and having previous intimacy with accused, is a married woman, the offence of seduction is most reprehensible and sentence of two years is not excessive (AIR 1952 Sau 10 = 4 Sau LR 151).

When offence was committed, girl was actually run away from her husband, Her age was no border line, of minority and majority. The Court held that these circumstances should legitimately be considered and sentence of two years reduced to one year (AIR 1949 Orissa 322 = ILR (1949) 1 Cut 194 = 50 Cr LJ 650). The kidnapped girl went away with the accused willingly and the medical evidence indicated that although the girl was under 16 years of age she was accustomed to sexual intercourse, It was held that, in the circumstances, the sentence of 4 years R. 1. was exeessive and sentence of 12 months already undergone was sufficient as it was not a case of a woman being forcibly compelled or unlawfully induced to leave her home for the purpose of illicit intercourse (AIR 1941 Cal 315 ; 14 RC 37 = 195 Ind Cas 12 ; 24 Cr LJ 649).

If the girl is a willing party and the accused did not ill-treat her, one years sentence is sufficient (1935 MWNd 358). Where a girl was abducted forcibly by her

second cousin and the motive for abduction was to bring about a marriage and that there was no evil desire to spoil the future of the girl, the Court held that the sentence of five years R. I. should be reduced to two and a half years (AIR 1927 Rang 336 = 101 Ind Cas 456 = 6 Bur LJ 25 = 8 AI Cr R 33 = 28 Cr LJ 424).

The abduction of school girls while on way to school or back to home and commission of rape on them as one of the most heinous offences one can conceive and deserve heavy punishement (1972 LJ 395 (Manipur).

Where the medical evidence showed that the girl was fully developed and used to sexual intercourse and her physical appearance showed that she had been perhaps endulging in it for quite some time, it was held that in view of the facts that the accused were released on bail as far back as 1963 when they had undergone a substantial part of their sentence, the accused who were brothers could not be coveting the same girl, the ends of justice would be served by treating the period of imprisonment already under gone by them as suficient for this case (1970) 1, SCWR 689 = 1970 SCD 461 = 1970 SC CR R 523).

The Probation of Offenders Act should not be extended to the abominable culprit who had shown sufficient expertise in the art of abduction, seduction and sale of girls to others who offer a tempting price (1979 UJ (SC) 594).

Where the accused took away a grown-up girl on her own request, the sentence was reduced to 12 months R.I. (PLD 1962 Kar 886). The abduction of a married woman is a reprehensible crime. Therefore even when the accused had previous intimacy with her and she deliberately eloped with the accused, a sentence of 2 years R.I. was passed (AIR 1952 Sau 10 DB).

**Compromise** : Where the parties have enterd into a compromise, and the abductee was married to accused and in exchange sister of accused was married to cousin of abductee, and children were born out of wedloc. Abductee appeared in Court and stated to be happily living with the accused. Imprisonment suffered by accused during trial and after conviction, would meet the ends of justice, (1988 PCrLJ 112=NLR 1988 CrLJ 148).

**12. Charge.**- The charge should run as follows:

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

That you, on or about the----day of---at----, kidnapped (or abducted) a woman X (by criminal intimidation or abuse said X, namely, with intent that she may be compelled to (or knowing it likely that she will be compelled to) marry Y against her will or in order that X may be forced (or seduced) to illicit intercourse or knowing it likely that she will be forced (or seduced) to illicit intercourse or knowing it likely that she will be forced (or seduced) to illicit inter course and thereby committed an offence punishable under section 366 of the Penal Code and within my cognizance.

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

Charge must state from whose guardianship the minor was taken away, without which the charge cannot be sustained. For a charge under section 366 for kidnapping a minor with intent that she may be compelled or knowing it to be likely that she will be compelled to marry against her will, her age must be below 16 years. Charge under section 366 when the woman above 16, is abductd (Ear Ali Vs. The State, 11 DLR 249).

Where the purpose of the offence as required by the section is not mentioned in the charge the charge cannot be said to have been properly framed (Chotey Lal Vs. State, AIR 1979 SC 1479 = 1979 CrLJ 1126).

In a case where an accused person is charged with kidnapping and abduction, it is essential to take a separate verdict on each charge (Nanda Ghose vs. Emperor AIR 1939 Cal 321(323) = 40 CrLJ 649=43 CWN 429). Notice of a charge of kidnapping under section 366, Penal Code is not a fair, proper and sufficient notice of a charge of abduction (AIR 1927 Cal 200 = 28 CrLJ 201). Kidnapping and abduction being two distinct offences, separate charges in respect of them should be drawn up if it is desired to charge accused with both offences (Mofizuddin vs. Emperor; AIR 1927 Cal 644 (646) = 28 crLJ 805; Gur das vs. State AIR 1953 Punj 258 (259).

If, however, it is doubtful as to whether an offence of kidnapping or of abetment of kidnapping had been committed from the facts which could be proved in a case the accused could be charged in the alternative with kidnapping as well as abetment of kidnapping. If the accused was not charged in the alternative with the two offences but was charged only with the substantive offence of kidnapping he could be convicted of abetment to kidnap if the evidence proved abetment only and not the actual offence of kidnapping. By virtue of section 423 of the Code of criminal procedure the High Court also has the power to this subject to the condition that thereby it does not cause any prejudice to the accused (1957 CrLJ 688).

The crux of the matter is that in case the facts make it doubtful if an offence under one section or the other is committed, the accused can be charged with both the offences in the alternative and even if not charged he can be convicted of the offence with which he could have been charged by virtue of section 236, but was not charged of course it is necessary that there should be no prejudice (1957 CrLJ 688). But omission to split up the charges does not vitiate the trial if the necessary particulars are given and the omission to split up the charges has not caused failure of justice (Ramizullah Vs. Emperor, AIR 1934 Cal 85 (86) = 35 CrLJ 487 = 37 CWN 1071).

Where the question of the age of the girl is in dispute it is permissible to frame charges under this section for abduction and kidnapping in the alternative (Prafulla Kumar Bose vs. Emperor, AIR 1930 Cal 209 (210) = 31 CrLJ 903). Where a married woman of 15 years of age had gone outside at night to answer the call of nature and was seized, taken away and raped by the accused and they were charged under section 366, Penal Code for kidnapping or abduction, the case did not fall within the provisions of secton 236 Cr. P.C. and the accused should be charged in the alternative for having committed some one of the offnces ( AIR 1933 Cal 673 = 34 CrLJ 1218).

**13. Place of trial.-** The initial place where the offence of kidnapping was committed or the place where the intention of kidnapping was achieved could both be the place where the offences could be tried, as the said offences are comitted during the same transaction. In the instant case, the committal order in regard to both the offences under Sections 366 and 376 of the Penal Code are legal and the Court of Session at Chickmagalur has got jurisdiction to try the said offences-under Sc. 165 and 376 of the Penal Code though the offence under Section. 376, Penal Code, is committed outside the jurisdiction of the said Court (State of Karnataka v. M. Balakrishna, 1980 = Cr. L. J. 1145 (1151) (Knt.). Kidnapping and place of concealment may be in different places and the case may be tried at either of the place (Ram Prtab Vs. State AIR 1970 Raj 250).

[1][366A. **Procuration of minor girl.**-Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.]

**Comments**

This section requires that a minor must be induced to go from any place or to do any act with the intention or knowledge that such minor may be forced or seduced to illicit intercourse with another person. Where there is no direct talk between any of the minor girl and any of the accused which can be regarded as inducement to her, the case of the accused does not come directly within the terms of this section. They can not, therefore, be convicted under section 366-A (State vs. Gopichand Fattumal, AIR 1961 Bom 282 (283) = (1961) 2 CrLJ 578).

Under section 366-A the age limit is 18 years and there it has been provided that whatsoever induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with 'another person' (Tapash Nand vs. State, 1992 BLD 637=(1993) 45 DLR 26; Followed in (1994) 46 DLR 112).

The aim of the provisions of this section is to prevent immorality, and the provisions are framed more with the desire of safeguarding the public interest of morality than the chastity of one particular woman. The fact that the minor girl was a consenting party can not take the offence out of the purview of section 366-A Penal Code. The consent may be induced and such consent would not prevent the commission of an offence. Once the offence of inducement has been committed the girl's subsequent willingness will neither prevent the offence nor reduce the gravity of the offence of the accused (Bhagwari Prasad Vs. Emperor AIR 1929 All 709 = 30 CrLJ 985).

The accused must induce a girl; (2) such girl must be under eighteen years of age; (3) the girl must be induced to go from a place or to do an act; (4) the accused must do so with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person (AIR 1962 SC 1908 = (63) 1 Cr LJ 16)

Before a person can be convicted under this section it must be established that the girl induced is below the age of eighteen years. The fact that the accused *bona fide* believed or had reasonable grounds for believing that the girl was over the prescribed age is no defence to a charge under section 366-A Penal Code nor is the fact that the accused did not know that the girl was maried a valid defence (33 Cr LJ 673) = AIR 1932 Lah 555 = 2 C.C.R 154.

The essential ingredient of an offence under section 366-A is that the accused intended or knew that it was likely that the girl might be or would be seduced to illicit intercourse with another person. In the absence of evidence as to such intention or knowledge on the part of a person, he cannot be held guilty of the offence under section 366-A Penal Code however peprehensible his conduct might have been otherwise (34 Cr LJ 220 = AIR 1933 Oudh 45 = 9 OWn 1181). Where there was an elopement of a girl aged 18 years with her lover (accused) with whom she had prior contacts, the accused was entitled to an acquittal (1979 Cr LR (Mah) 118).

1. Section 366A were inserted, by the Indian Penal Code (Amendment) Act, 1923.

A woman aged about 16 years having quarreled with her husband left his house with the idea of going to her maternal grandfater. On the way she met A and B, who offered to take her to her grandfather, but took her to a neighbouring village and attempted to sell her and on being unsuccessful concealed her in A's house. The woman was discovered in A's house and A And B were charged under section 356-A, Penal Code. It was contended that A did not know that the woman was married. The Court held that even assuming that A did not know that the woman was married, his attempt to sell her made him liable under section 366-A and that the manner in which A tried to sell her was clear indication of his intention or knowledge that the girl would be subjected to illicit intercourse. The conduct of B also showed his guilty knowledge and intention (32 Cr LJ 60 = AIR 1930 Lah 463).

The term "seduced" is used in the general sense of enticing or tempting, and not in the limited sense of committing the first act of illicit intercourse. The word "seduced" should not be taken to have the narrow meaning of inducing a girl to part with her virtue for the first time but that even though a girl may have be the first acts of secduction surrendered her chasity, subsequent seductionfor further acts of illicit intercourse is also meant to be included (1910) 1 KB 818; AIR 1930 Cal 209 Cal 209 = 50 Cr LJ 593).

There is "seduction" when a woman is induced to sonsent to unlawful sexual intercourse by enticement and persuasions overcoming her reluctance and scruples. It occurs where a man abuses the simplicity and the confidence of a woman to obtain by false promise what she ought not to give. It is criminal offence where a female under 18 years has been induced to surender her chasitity to an unlawful sexual intercourse. Where this has been accomplished by her seducer by the use of seducive acts such as flattery, solicitation, importunity or by improting some other species of artifice, beguilement or deception the offence is completed. It does not matter whether the accused person achieved his object by means of brute froce or she may have capitulated to the gentle promptings of confiding love by deceitful promises; his guilt in either case is established (1958 Cr LJ 107 = AIR 1958 Punj 323). When a married girl is unnappy with her husband and the father takes her from the husband's house and give her as a wife to somebody else, that can hardly be called trafficking in women but having regard to the provisions of Section 366-A the act of the father would come within those provisions (AIR 1930 All 497 = 31 Cr LJ 861).

When the girl stated that on her own accord she went to the accused's house and persuaded him to execute a marriage agreement, then after registration of the agreement, she went to her father's house and showed him the agreement, that her father locked her in a room, that she broke open the lock and went to the accused's home, the Court held that no offence was made (1971 Cr LJ 6 = 1970 UJ (SC) 864). Merely giving shelter to a girl carrying her from place to place without knowing that she was married and without any intention or knowledge that she was likely to be forced or seduced to illicit intercourse does not amount to an offence under section 366-A, Penal Code (28 Cr LJ584). The accused took a girl under eighteen years of age from place to place in order to compel her to mary against her will or in order that she may be forced or seduced to illicit intercourse. There was no evidence that accused used force or deceitful means to gain his end. It was held that no offence under section 366, but one under section 366-A was committed (AIR 1925 Oudh 454 = 26 Cr LJ 673 = AIR 1932 Lah 555).

Victim was 15 years old at time of offence. Accused forcibly taking her away from custody of her mother, obtaining false affidavit as to age from her and marrying her under threat and committing rape. Consent of victim even if it is there would be no valid consent. Conviction of accused under under Ss. 366 A and 376 (1993 Cr. L.

J. 1920). The fact that the minor is a consenting party would not prevent the commision of an offence under section 366-A, Penal Code. Where in a prosecution for an offence under section 366-A, Penal Code it appeared that the accused first put forward the story that the girl was to be taken to her sister but even after the girl discovered that she was not being so taken, she fell in with the plan of the accused, the Court held that the offence of inducement has been committed and the girl's subsequent willingness neither prevented the offence nor reduced its gravity and the accused was, guilty under Section 366- A, Penal Code (30 Cr LJ 985=AIR 1929 All 709).

Where a woman follows the profession of a prostitute, that is, she is accustomed to offer herself promiscuously for money to "customers", and in following the profession she is encouraged or assisted by some one, no offence under section 366-A is committed by such person (1936) 1 Cr LJ 16 = AIR 1962 SC 1908).

It cannot be said that the evidence of the girl always needs corroboration in cases under this section, but where it is found that the girl in question has has been definitely lying on important pointsin her story, then it is unsafe to rely on other parts of her evidence to convict any person of a criminal offence unless that evidence is corroborated in material point. The presence of the girl in the house of the accused is not a material point for the purpose of corroboration in a case under this section (1946) 48 CrLJ 301). To sustain conviction under section 366-A Penal Code, 1860 it should be proved that the prosecutrix was induced with intent that she might or knowing that it was likely that she would be forced or subjected to illicit intercourse with any person, besides being induced to go (State (Delhi) Admn.) v. Jagdish and another 1988 (3) Crimes 6 (Del).

Where the District Magistrate desired an acquittal under section 368, Penal Code to be reversed not because it was wrong but because it would preclude a fresh trial, the question was one which ought to be raised in appeal and that the appropriate procedure was to prefer an appeal against the order or accquiatal and ask for conviction either under section 368 or section 366-A in the alternative; conviction under section 366-A may be made even though no specific charge was framed (AIR 1925 PC 130 = 26 Cr LJ 1059 = 35 Cr LJ 28 = AIR 1933 Nag 259).

**Charge.-** The charge should run as follwos:-

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

That you, on or about the------day of------, --induced X (a minor girl under the age of eightenn years) to go from (name of the place) or to do any act or acts (name them) with the intent that the said X may be or knowing that it is likely that the said X will be forced (or seduced) to illicit intercourse with Y (specify the name) and thereby committed an offence punishable under section 366-A Penal Code and withing my cognizance.

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

[1][366B. **Importation of girl from foreign country.**-Whoever imports into [2][Bangladesh] from any country outside Bangladesh any girl under the age of twenty one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person,

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

1. Section 366B were inserted, by the Indian Penal Code (Amendment) Act, 1923.
2. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, Second Sch. (with effect from 26-3-1971).
3. Second paragraph of section 366B was omitted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule (with effect from the 26th March, 1971). liable to fine;

shall be punishable with imprisonment which may extend to ten years and shall also be liabel to fine.]

367. **Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.**-Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural last of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be puished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

368. **Wrongfully concealing or keeping in confinement, kidnapped or abducted person.**-Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

369. **Kidnapping or abducting child under ten yeas with intent to steal from its persons.**-Whoever kindnaps or abducts any child under the age of ten years with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven yars, and shall also be liable to fine.

370. **Buying or disposing or any person as a slave.**-Whoever import, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liabe to fine.

371. **Habitual dealing inslaves.**-Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

372. **Selling minor for purposes on prostitution, etc.**-Whoever sells, lets to hire, or otherwise disposes of any [2][person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, 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. Subs. by Ordinance No. XLI of 1985, for "transportation".
2. The words within square brackets were substituted for the words "minor under the age of eighteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by section 2 of the Indian Criminal Law Amendment Act, 1924 (Act XVIII of 1924). The word "eighteen" was previously substituted for the word "sixteen" by s. 2 of the Indian Penal Code (Amendment) Act, 1924 (Act V of 1924).

[1][**Explanation I.**-When a female under the age of eighteen years is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

**Explanation II.**-For the purposes of this section "illicit intercourse" means sexual intercourse between person not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communitites, as constituting between them a quasi-marital relation.]

373. **Buying minor for purposes of prostitution, etc.**-Whoever buys, hires or otherwise obtains possession of any [2][person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be] employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[3][**Explanation I.**-Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

**Explanation II.**-'Illicit intercourse' has the same meaning as in section 372.]

[4][374.-**Unlawful compulsory labour.**-(1) Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

[5][(2) Whoever compels a prisoner of war or a protected person to serve in the armed forces of [6][Bangladesh] shall be punished with imprisonment of either description for a term which may extend to one year.

**Explanation.**- In this section the expressions "prisoner of war" and "protected person" shall have the same meaning as have been assigned to them respectively by Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and Article 4 of the Geneva Convention Relative to the Protection of Civilian persons in time of war of Aguust 12, 1949, [7]********

1. Ins. by the Indian Criminal Law Amendment Act, 1924 (XVIII of 1924).
2. The words within square brackets were substituted for the words "minor under the age of eighteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be" by section 2 of the Indian Criminal Law Amendment Act, 1924 (Act XVIII of 1924). The word "eighteen" was previously substituted for the word "sixteen" by s.2 of the Indian Penal Code (Amendment) Act, 1924 (Act V of 1924).
3. Ins. by Act XVIII of 1924, s. 4.
4. S. 374, renumbered as sub-section (1) of that section by the Pakistan Penal Code (Amdt.) Act, 1958 (XXXVI of 1958), s. 2.
5. Sub-section (2) was added; ibid.
6. Substituted by Act VIII of 1973, s. 3 and 2nd Sch., (with effect from 26.3.1971) for "Pakistan".
7. The words "ratified by Pakistan on the second June 1951" were omitted by the Bangladesh Laws (Revision and Declaration) Act, 1973, Second Sch.

**Of Rape**

**375. Rape.-** A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following description :

First.-Against her will.

Secondly.-Without her consent.

Thirdly.-With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

Fourthly.-With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With or without her consent, when she is under fourteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.-Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

**376. Punishment for rape.-** Whoever commits rape 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, [1][unless the woman raped is his own wife and is not under twelve years of age, in which cause he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**Indian amendment:** The heading of section 375 and 376 was substituted by words "sexual offences" for the words "of rape" by the Criminal Law (Amendment) Act No. 43 of 1938.

New Section 376-A, 37-B, 376-C and 376-D were added by Act 43 of 1983 in Indian Penal Code. After the amendment the latest position of section 375 and 376 have stood as follows:

**"Sexual Offences"**

375. **Rape.**—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following decriptions:-

First—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any personin whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is cr believes herself to be lawfully married.

Fifthly.—With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or ntoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and conse quences of that to which she gives consent.

Sixthly.-With or without her conser when she is under sixteen years of age.

**Explanation.**—Penetrationis sufficient to constitute the sexual intercourse necessary to the offence of rape.

1. Ins. by the Indian Penal Code (Amendment) Act, 1925 (Act XXIX) of 1925, s. 3.

**Exception.**—Sexual intercourse by a man with his won wife, the wife not being under fifteen years of age, is not rape.

376 **Punishment for Rape.**—(1) Whoever, except in the cases provided for by sub-section (2)m commits rape shall be punished with imprisoment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to tem years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of mprisonment for a term of less than seven years.

(2) Whoever:-

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the pemrises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of jail, remand home or other place of custody established by or under any law for the time being in force or of a wonan's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home place or institution ; or

(d) being on the management or on thestaff of a hospital, takes advartage of his official position and commits rape on a woman inthat hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) cmmits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adepquate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

**Explanatian 1.**— Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

**Explaintain 2.**—" Women's or children's institution means an institution whether called an orphange or a home for neglected woman or children or a widows' home or by any other name, whcih is established and maintained for the reception and care of women or children.

**Explaination 3**—'Hospital' means the precincts of the hospital and includes the precincts of anyinstitution for reception and tratment of persons during convalessence or of persons requiring medical attention or lehabiltation.

376.A.— **Intercourse by a man with his wife during separation.**—Whoever has sexual: intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extent to two years and shall also be liable to fine.

376.B. **Intercourse by a public servant with woman in hsi custody.**—Whoever, being a public servant, takes advantage of his official positiond and induces or seduces, any woman, who is in his custody as such public servant or n the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

376-C. **Intercourse by superintendent of jail, remand home etc.**—Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate or such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall dalso be liable to fine.

**Explanation 1.**—"Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding aany other office in such jail, remand hime, place or institution by virtue of which he can exercise any authority or control over inmates.

**Explanation 2.**—The expression "women's or children's institution shall have same meaning as in Explaination 2 to sub-section (2) of Section 376.

376-D. **Intercourse by an member of the management or staff of a hospital with any waman in that hospital.**—Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape shall be punished with imprisonment of either description for a term which may extend to five years and shall be liable to fine.

**Explanation.**—The expression "hospital shall have same meaning as in explaination 3 to sub-section (2) of Section 376" [Vide Act 43 of 1983 Section 3].

**Synopsis**

(Sections 375 and 376)

1. Definition and ingredients of rape.
2. "Without her consent".
3. "When her consent has been obtaiend by putting her in fear of death or of hurt".
4. When consent is obtained by impersonating her husband.
5. Consent tainted with fraud or deception is not free consent.
6. Sexual intercourse when can be said to be with consent.
7. Burden of proving non-consent.
8. Consent is irrelevant when the girl is minor.
9. Penetration.
10. Testimony of prosecutrix.
11. Whether the prosecutrix is an accomplice.
12. Need of corroboration of testimony of prosecutrix.
13. Nature and extent of corroboration.
14. Conviction on uncorroborated testimony of prosecutrix.
15. Presence of Semen or blood on clothes.
16. Appreciation of evidence.
17. Marks of injury and violence.
18. Medical evidence.
19. delay in lodging FIR.
20. Evidence and proof.
21. Punishment.
22. Charge.

**1. Definition and ingredients of rape.-** The word "rape" literally means a forcibel seizure, and that element is a characteristic feature of the offence. It is a complete definition of the offence, and the five clauses appended to this secton are merely explanatory of non-consent, which is of the essence of the crime. The offence is said to be rape when a man has carnal intercourse with a woman (i) against her will, or (ii) without her consent. The meaning of these two clauses may not be apparent, but they are intended to cover two separate contingencies. If the sexual intercourse was without the cconsent of the girl or against he rwill, her age is immaterial for the offence of rape (Kamakhya Prasad Agarwall Vs. State, AIR 1957 Assam 39 (43) (DB) = 1957 CrLJ 353).

Rape amounts to ravishment of a woman by force, fear of fraud without her consent. When a man has carnal intercourse with a woman against her will or without her consent the offence of rape is said to be committed. All though the offence of rape is usually by violence it has been held that rape can be committed without violence, the essential point being that the women's free and conscious permission has not been obtained in the case of adults and in the case of girls below 16 years her consent is no defence at all. (AIR 1960 Mad 308 = 1960 CrLJ 927; 1977 CrLJ 556). When the accused had sexual intercourse with the girl with her consent after having promised to marry her, he could not be held guilty of rape (Hari Majhi Vs. State, 1990 CCrLJ 650 Cal (DB).

Age of the accused is immaterial for an offence of rape. The offence is committed where it is against the will of the girl or of there is no consent. But it is necessary for the prosecution to show that the accused had attained the full state of puberty (1957 CrLJ 353 = AIR 1957 Assam 39).

Ingredients requried to constitute the offence are (1) The accused had a sexual intercourse with a woman - (a) against her will; (b) without her consent; (c) with her consent when her consent was obtained by putting her in fear of death or hurt; (d) with her consent when the man knew that he is not her husband and that her consent was given because she believed that he was another man to whom she was or believed herself to be lawful married; (e) with or without her consent when she was under sixteen years of age.

(2) There was penetration.

(3) that she was not below fifteen (thirteen years in Bangladesh) years of age even if sexual intercourse was with her husband.

2. **"Without her consent".-** Consent is an act of reason accompained with deliberation after the mind has weighed as in a balance, the good and evil on each side. Consent denotes an active will in the mind of a person to permit the doing of the act complained of (1972) LR 2 CCR 10).

Consent to intercourse on the part of the woman is a good defence to a charge of rape unless the woman is undable to consent or dissent by reason of (i) extreme youth, (ii) unconsciousness, (iii) idiocy or imbecility, or unless the consent be obtained by personating her husband, or by other fraud, sexual intercourse under influence of drink cannot be said to be intercourse with consent (ILR (1952) 2 Raj 817).

Where prosecutrix is a major & had voluntarily left her parent's house, it can safely be concluded that any criminal proceedings instituted on the report u/s. 363 & 366 of Penal code shall be an abuse of the process of the court (Rita Devi v. State of Bihar & others 1991 (2) Crimes 368 (Patna).

Where a person is charged with the offence of having committed rape, the

question for determination is whether the woman was or was not a consenting party, and in this connection her testimony without any independent evidence in support there of that she was not a consenting party is insufficient for a conviction. The first and foremost circumstance that can be looked for in case of this kind is the evidence of resistance which one would naturally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistent may lead to the tearing of clothes, the infliction of personal injuries and even injuries on the private parts (1966) Cr. LJ 210; 1984 Cr LJ (NOC) 74 (Raj).

Woman are seldom proved to translate their thoughts in these matters into words. They usually leave the matter of consent to tacit understanding. In such cases, consent becomes a matter of interference to be made from evidence of previous or contemporaneous acts and conduct and other surrounding circumstances. Nonresistance if not otherwise accounted for should be real and unreal for there is such a thing as maiden modestry, and some resistance is stimulated even by women who are most anxius for the connection. In determining the question of consent these guiding principles deserve to be kept in view (AIR 1967 Raj 159 = 1967 CrLJ 922).

It is not a case in which the accused came forward with a story that they had sexual relations with prosecutrix by her consent or as a result of previous liason. It is a clear-cut case in which on the prosecution side there is clear allegation of rape and on the defence side the whole story is challenged as fabricated and false. The witness heard the shrieks of the lady and hence they had entered the house. If the lady was crying, she could not be a consenting party. It is true that the laddy could not put up much of struggle hence did not suffer any injury. The reason is aparent. The rapists were two in number. One had pinned her down and gagged her mouth while the other was committing rape on her. She was already pregnant and she knew about it. Therefore, in order to ensure that her child in the womb does not suffer any injury or her pregnancy is not damaged, she might not have put up stiff reistance. But in the special circumstances of the case, it will not mean that she was a consenting party. Thus the charge under Section. 376 Penal Code, has been rightly established against both the accused persons and they were correctly convicted on that charge as such (Nanhey Lal v. State of Uttar Pradesh, 1986 (1) Crimes 733 (735) (All).

Where a man has illicit intercourse with an adult woman with her consent, it is not rape under th law (NLR 1985 AC 88). Only sexual intercourse without free consent of the woman amounts to rape (1 Suth WR (Cr.) 21 DB). Where the alleged victim was not proved to have been below 17 years of age on the day of occurrence and was further shown to be a consenting party, an offence under section 376 was not made out and the accused was entitled to acquittal (NLR 1985 AC 88). Where no marks of injury were found on any part of body of prosecutrix. Tear in her hymen was found to be an old one and prosecutrix appeared to be a consenting party. Prosecutrix was a woman of 17/18 years of age and explanation given for delay in lodging FIR was found without any weight. Accused was acquitted (1983 PCrLJ 196).

It is not necessary that the accused should raise a defence of consent by the girl before the fact of consent can be considered. The accused may not do so because of the danger that admission involved may mean conviction for the offence or because he may be ashamed of publicly acknowledging his shameful act. Therefore even where no defence of consent by the girl is raised but there is absolutely no evidence on the record of any struggle having taken place, nor were marks of any injury found on the person either of the complainant or of the accused, rape is not proved to have been committed upon the prosecutrix (1985 PCrLJ 2396)

Where a grown up girl was carried about by the accused and subjected to sexual intercourse and now and then left by herself and there was no evidence of protest on her part (AIR 1931 Lah 401), or where, in a case of alleged rape of a girl of over 14 years of age, the evidence showed that the girl left her home without compulsion (1970 P.CrLJ 163) and that she joureyed with the accused from place to place, that though literate, she did not write or communicate with her people, that she never complained of any illtreatment by the accused to any of the people she met and there was only her own evidence that the alleged sexual intercourse was without her consent; it was held, that the circumstances indicated that if there was any sexual intercourse it was with her consent and the offence of rape was not proved beyond reasonable doubt (1988 P.Cr.LJ 1234).

Where, from the evidence of the prosecutrix herself, it clearly emerged that she was a girl of easy virtue and though she was raped one after another by as many as five persons within less than 24 hours she did not complain to anybody on any occasion, it would lead to the conclusion that those who had carnal knowledge of her had it with her consent (1962 Jab L.J. 825). In a case of rape, consent, if any, given by the victim must be voluntary. A mere act of helpless resignation in the fact of inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either crowded by fear or vitiated by duress, cannot be deemed to be "consent". Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation after having fully exercised the choice between resistance and assent. The qestion of consent or compulsion is to be judged on a careful consideration and scrutiny of the evidence of the victim and from other corroborative evidnece, if available and the attendant circumstance preceding, accompanying or following the acts of sexual intercourse (Bijay Kumar Mohapatra v. State 1982 Cr. L. J. 2162 (2169) (Orissa).

In Arjan Ram Nourata Ram Vs. State, AIR 1960 Punj 303 (304) = 1960 CrLJ 849, three policemen in uniform followed the prosecutrix, plied her with questions and accused her of vagrancy. This conduct was held to be a sufficient threat and a surender to them in the circumstances could not amount to a free consent. Even though there were no injuries on the person of the prosecutrix, absence of resistance did not necessarily imply consent.

It is inconceivable that a grown up girl of about 16 years would submit to sexual intercourse without struggling. In the absence of injury in such a case, it has to be held that the girl must have been a consenting party (1971) AWR 565). When the woman was in advanced stage of pregnancy the fact that there was no resistance from her would not make her consenting party. The mere presence of semen on the bori cloth of the woman is not sufficient to prove that she was a consenting party, especially in the absence of any supermatozoa in the vagina (AIR 1925 Lah 94 = 6 LLJ 474).

Where the husband was dragged away to the verandah and the door was bolted upon her who stood by and did not resist him when he was single and without any arms on him where as there was no marks of violence on her, the accused was acquitted (1977 Cr LR (SC) 233; AIR 1977 SC 1307 = 1977 Cr LJ 817). Where a married girl above 18 years of age alleged to have been raped did not bear injury makes on her person, it was held that possibility of her willingness could not be ruled out (1977 Cr LR (MP) 376; 1977 Cr LJ 556).

Where victim of rape was below 16 years of age, question of consent did not arise. The fact that no injury was caused to private part of that victim was used to sequel intercourse was held irrelevant (1981 Cr LJ I). Appellant had indulged in sexual intercourse for over a year as result of which the prosecutrix became pregnant

twice and abortion had therefore to be effected. When first sexual act was done she was of 17 years. Held, the constant sexual intercourse was not without her consent. Accused was set at liberty (1985) I Crimes 936 (Del).

**3. "When her consent has been obtained by putting her in fear of deatch or of hurt"**—The fear which clause thirdly or section 375 speaks of is negatived by the circumstance the girl is said to have been taken away by the police constable right from amongst her near and dear ones at a point of time when they were all leaving the police station toghether and were crossing the entrance gate to emerge out of it. Her failure to appeal to her companions who were no others than her brother, her aunt and her lover and her conduct in following the constable and allowing him to have his way with her to the extent of satisfying his lust in full, makes it clear that the consent in question was not a consent which could be brushed aside as "passive submission" (AIR 1979 SC 185 = 1978 CR LJ 1864 = (1979) 16 ACC 7 (SC).

**4. When consent is obtained by impersonating her husband**—In order, that section 375, fourthly, Penal Code may be attracted, the consent by the woman must have been given because she believes that the offender is another man to whom she is married or believes herself to be lawfully married (1967Cr LJ 1411).

Clause "Fourthly" will not be applicable in a case, when consent by the woman to the accused having sexual intercourse with her was not given under the belief that the accused was another person to whom she believed herself to be maried to the accused (1969) Mys LJ 304).

Where both the accused and prosecutrix believed marriage to be in a valid form and had sexual intercourse, it was held that the accused did not commit any offence under section 376 (1979 Cr LR (Mah) 118).

**5. Consent tainted with fraud or deception is not free consent.**- Consent tainted with fraud or deception is not free consent (Saleha Khatun Vs. State of Bihar 1989 CrLJ 202 (204) Pat). The ingredients necessary to constitute an offence of rape is illustrated in Section. 375 of the Penal Code. The consent always means free will or voluntary act. In case consent was obtained on the basis of some fraud and allurement or practising deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed the accused to have sexual intercourse with her. Therefore, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, *prima facie* to conclude that it was "with consent." Such type of consent must be termed to be consent obtained without her consent. Consent obtained by deceitful means is no consent and comes within the ambit of ingredients of the definition of rape (Saleha Khatoon v. State of Birhar, 1989 Cr. L. J. 202 (204) (Pat.).

If a person having close touch with the family and acting almost like a father induces the girl to accompany him on the pretext that her father was ill and she was required to visit him and on the way during night time she is made a victim of sexual assault, it may be that she might have not resisted or might have even passively suffered the assault, it would amount to obtaining consent by deception and not free consent. The argument that the girl may have consented and therefore the accused should be given the benefit of doubt had no merit (Gajanand Maganlal Mehta v. state 1987 Cri LJ 374 (Gauj).

**6. Sexual intercourse when can be said to be with consent.**— When the evidence clearly indicate that prosecutrix objected to the act of sexual act the fact that she did not make an alarm or the fact that she did not tell the witness that she was sexually assaulted by accused are not sufficient to indicate that she consented to sexual act (Vijayan Pillai @ Babu v. State of Kerala; 1990 (1) Crimes 261 (ker).

Where the prosecutrix was a consenting party and there was nothing in the evidence to hold that she had raised any shouts and she did not make any complaint against the appellant having forcibly committed sexual intercourse with her and she was about 22 years old and was a married woman with a child, it was held that it could not be said that the appellant committed sexual intercourse with prosecutrix against her will or consent (Vijay Kumar v. State of Madhya pradesh, 1985 (1) Crimes 405 (407) (M. P.).

In Suddaram Vs. State, 1958, MPLJ (Notes) 120, the accused had been misbehaving with the prosecutrix for one hour and she raised an alarm only when she apprehended that certain persons were approaching the scene of the offence and feigned that she was the victim of forcible criminal assault in order to hide her shame. These circumstances indicate the willingness of the prosecutrix which was confirmed by absence of sufficient injuries on her person and consequent lack of struggle on her aprt.

Where the affected girl (above eighteen years of age) was in love with the accused and she conceived and also under went an abortion, consent on her part in having sexual intercourse with the accused could be infered (Moinurl Mia v. state 1984 Cri Lj (NOC) 28 Cau). Where presecutrix while being taken away by accusd did not make any complaint to her uncle who met her on the way of their travelling by bus but did not make mention to any one that she was being taken away, circumstences indicate that she was willing party for the purpose of offence u/s. 376 Penal Code (Bheera v. State of Rajasthan 1991 (1) Crimes 99 (Rej).

The consent or compulsion is to be judged on a careful consideration and scrutiny of the evidence of the victim and from other corroborative evidence, if available and the attendant circumstances preceding, accopanying or following the acts of sexual intercourse (Bijoy Kumar Mohapatra v. State 1982 Cri LJ 2162 (Ori); Nilambar Goudo v. State 1982 Cri LJ (NOC) 172 (Ori).

When the victim is over 18 years of age, she is competent to give consent (Nilambar Goudo v. state 1982 Cri LJ (NOC) 172 (Ori). But if a woman consents to sexual intercourse prior to penetration, no matter how tardily or reluctantly and no matter how much force had been used, the act does not amount to rape (Jarnail Singh v. State 1972 Cri LJ 824 (Raj).

When from the circumstances it could not be declared that the gril had been subjectted to or was under any fear or compulsion such as would justify an inference of passive submission it was held that the sexual ntercourse in question is not proved to amount to rape (Tukarama v. State of Maharashtra, AIR j1979 SC 195).

Complete absence of any injury or her back or buttocks or to her private part indicate that she was a consenting party (Sardara v. State of Haryana, 1980 Punj. L. R. 220 (223); 18 DLR 91 (WP).

There is a difference between aubmission and consent. Every consent involves a submission but the consverse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act of criminal character like rape must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance the good and evil on each, side, with the existing power and capacity to withdraw the assent according to one's will or pleasure. A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammell right to forbid or withold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former (1958 Cr. L. J. 563 = AIR 1958 Punj.).

**7. Burden of proving non-consent.**—In rape cases, the burden of proving non-consent by the prosecutrix on the prosecution (4 Cr. APP. R. 225; 1959 Cri. L. R 450). As a matter of fact the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is incumbent of the prosecution to make out that all the ingredents of section 375 were present (AIR 1979 SC 185; 1978 Cr LJ 1864).

The onus to prove that the accused commmitted sexual intercourse with prosecutrix without her consent and against her will as laid down in Sec. 375 Penal Code, is on the prosecution. It is well settled that conjectures and surmises cannot take place of positive proof. The prosecutrix is the best witness to prove whether the accused committed sexual intercourse with her without her consent or against her will (Joginder Singh v. State of Haryana, 1973 Cur. L. J. 291 (295).

In a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts (Tukaram v. State 1978 Cri LJ 1804 (SC); 1979 SCC (Cri) 381). Where the accused admitted having subjected the prosecutrix to sexual intercourse and asserted that it was with her consent, the burden shifted upon him to prove that he had the sex act with the prosecutrix with her voluntary consent. If the accused failed to prove this his conviction would be legal (Fitta v. State of H. P. 1987 Cr LJ 1379 (HP).

**8. Consent is irrelevant when the girl is minor.**—Where the prosecutrix was below 16 years of age when she was taken away by the appellant and his co-accused and subjected to rape and plea was taken that she was a consenting partly, it was held that her consent was wholly irrelevant either for determining offence under Sec. 366 or under Sec. 376 Penal Code, of which the appellant was convicted (Bhubender Parkash V. State, (1985) 1, Crmes 524 (528) Delhi); Shaindra Nath Biswas v. State, (1985) 1 Crimes 505); AIR 1958 Ori. 224 (227); 1985 Cr LJ 1211); Ulahamian alias Kochappen Vs. State of Kerala 1989 (1) Crimes 22 (24) Ker).

Promiscuous intercourse was effected when the prosecutrix was of below 16. Her consent was immaterial in view of Section 375 fifthly. Conviction upheld but sentence reduced (1985) 1 Crimes 506 (Cal). Consent or willingaess of the minor is of no consequince (AIR 1954 Mad 62; AIR 1973 S. C. 2313; 1973 Cr LJ 1541). Man having intercourse with a minor girl even with her consent is guilty of offence of rape (AIR 1932 All 580; 34 Cr LJ 100; 1969 Cr LJ 1282).

If there be no consent, or if it be against the will of the girl, the age of the girl is mmaterial for the offence of rape (1957 Cr LJ 353; AIR 1957 Assam 39).

The Medical evidence showed that there were no signs of rape on the victim and that she was habituated to sexual intercourse. The victim was found to be below 16 years. Held, that consent of such woman was wholly immaterial and furnished no defence (Delip v. State of M. P. 1987 Cr L. J. 212 (M. P.).

**9. Penetration**—To constiture the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of the hymen. Partial pentration of the penis within the labia majora of the vulva or pudendum with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law (1961, 1 Cr LJ 689; 1974 CrLJ 1098). Penetration required to prove a case under S. 376, Penal Code can be partial one which may not be sufficient to deprive the woman of the marks of virginity (Aqeel Ahmed v. State 1992 P. Cr. LJ 42).

It is clear from the language used in Section 375 and from the addition of the explanation to the section that to constitute the offence of rape under Section 376, Penal Code, there need not be a complete act of sexual intercourse, and that it is

sufficient if there is penetration. The use of the word "penetration" without any further words of limitation shows that it was intended to cover even partial penetration e. g. vulval penetration (1964 DLT 222; 1970 Mad LJ (Cr) 701; (1970) 2 Mad LJ 422).

When penetration had not taken place and an attempt was made by the accused to ravish the prosecutrix, a girl of 8/10 years of age, the offence under section 376 Penal Code is not made. It amounts only to an attempt to commit rape (Kuldip Singh v. State of Punjab 1988 (2) Crimes 597 (P & H).

Pratial penetration is sufficient in the legal sense to constitute the sexual intercourse sufficient to constitute offence of rape (Madan Gopal Kakkad v. Naval Dubey & Anr. 1992 (1) Crimes 168(170). For the offence of rape to be committed, it is not necessary that there should be complete penetration. In the instant case what was found by the doctor was mere congestion and that might have been caused due to the superficial application of force of the male organ to the private part of the prosecutrix, and penetration was not free from doubt. In view of the medical evidence as well as the evidence of the prosecutrix the accused was held guilty of making an attempt to have unlawful intercouse with the prosecutrix (Das Bernard V. State1974 Cri LJ 1098 (Goa).

While there must be penetration in the technical sense, the Slightest penetration would be sufficient and a completed act of sexual intercourse is not at all necessary. Even vulval penetration, has been held to be sufficient for a conviction for rape (1962) 2 Cr LJ 668; 1962 ALL Cr R 462). The depth of penetration is immaterial, Consequently form the mere fact that there is no dilation of the vaginal canal it cannot be assumed that the offence is not committed when the injury to the hymen shows clearly that there is penetration by the male organ (AIR 1957 Orissa 78 = 1957 CrLJ 469).

For a conviction under Sec. 376, Penal Code, penteration is necessary. In cases of sexual intercourse the hymen may not remain intact if the vagnal orifice is big enough to admit two fingers easily. In case of girls of less than 14 years the distensibility of the vaginal orifice has to be taken in view. If penetration takes place in the case of girls of such an age then there can be expected to be widespread damages of the fourchette, hymen, *labia majora*, *labia minora*, vulva and the vaginal canal. In this case the doctor did not notice any injury on the *labia majora* and the *labia minora*. Held that in the case of penetration these organs could not escape injuries or at least the signs of viloence. From these circumstances it can be deduced that penetration had not taken place when an attempt was made by the accused to ravish. In that case an offence under Sec. 376 Penal Code, is not made out. The act of the accused amounted only to an attempt to commit rape (Suresh Chandra v. State of Haryana, 1976 Cr. L. J. 452 (454 (P & H)= 1974 Punj. L. J. (Cr) 477= (1975) 2 Cr. L. T. 43).

Where according to medical report no intercourse had taken place nor was there possibility of partial intercourse, there being no marks of injury on private parts. But swabs stained with semen suggested some penetraton. It was held, women can not put up false case of rape to disgrace themselves. Torn clothes and cut hair of victims of rape were also reccovered. Absence of injuries on their private parts, *per se* was not enough to say that women had not been molested (1983 PCrLJ 992). For an offence of rape, while there must be penetraton in the techinal sense, the slightest penetration would be sufficient and a completed act of sexual intercourse is not at all necessary (AIR 1960 Mad 308 = 1960 CrLJ 927 (DB).

In Bagdi Ram. V. State of Rajasthan (1984) R.C.C. 1), in an attempted rape case on a girl aged about eleven or twelve years old, the medical examination of the prosecutrix Ramudi was made at about 5.00 p. m. on 12. 2. 82 by Dr. Anish Ahmed. The report issued by him is Ex. P/3. He stated that on examination he found the "Labia Majora Bruised and tender; Labia Minora Bruised and Tender, Hymen-Intact and admits one index finger but is painful; No injury on the thigh, breast and checks. The doctor further stated that there had been sexual act outside the vagina and upto the portion below the hymen, but there was no penetration into the hymen. It is true that all that is rlquired to make out an offence of rape, is that the private parts of the male must be inserted in those of the female. As such, even partial penetration is sufficient to constitute an offence under section 375, Penal Code. But the difficulty in the instant case, is the want of required material on the point. The girl is of the tender age of 10-12 years. No injuries were noticed by the doctor on her private parts of course, the doctor found Labia Majora and Labia Minora brusied and tender. But the hymen was found unruptured. The doctor did not state that Labia (Majora and Minora) was found bruised due to any injury. It was held in Suresh Chand v. State of Haryana (1976 Cr LJ 452), that in case of a girl of tender age, if penetration takes place, there should be widespread damage of the fourchette, hymen, Labia Majora, Labia Minora, vulva and the vaginal cannal. If no injuries are noticed on the Labia Majora and Labia Minora, it can be deduced that no penetration had taken place. The offence in these circumstances would not be of a rape but that on an attempt to commit rape. The prosecutrix P. W. 1 Kamudi deposed that penetration was full and there was bleeding from her private parts. She also deposed that the skirt she was wearing got drenched with the blood of her private parts But these facts are not borne by the medical evidence. No blood was found on her skirt. The doctor also did not notice any blood on her private parts. In these circumstances coupled with the facts that her hymen was found intact and unrupured and no njuries were found on her private parts, it is difficult to hold that penetration even partial had take place. As such, no offence of rape can be said to have been made out. All that can be safely said on the baisis of the testimony of prosecurtrix is that the accused took the girl in a side, felled her down, raised her skirt and lay over her. Hed tried to insert her male organ in the private parts of the gril. The act of the accused, thus, amounts to an attempt to commit rape. A similar view was taken in Suwalal v. State of Rajasthan (1972) RLW 620).

**10. Testimony of prosecutrix.**— The evidence of a prosecutrix in a rape case is customarily received by courts with some suspicion. In certain jurisdiction, it is the rule that the solitary evidence of the prosecutrix being a woman of full age is not accepted as sufficient but requries corroboration by independent evidence, in order to be believed (Momtaz Ahmed Khan Vs. The State, 19 DLR 259 (SC). Ordinarily, the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than in expected of an injured witness (Chandraprakash Kewalchan Jai & Arn. v. State of Maharashtra; 1990 (1) Crimes 724 (SC). Conviction for offence or rape can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity (State of Himochal Pradesh v. Raghubir Singh 1993 (2) Crimes 888 (S. C.).

If the evidence of the victim (prosecutrix) does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, there is no reason to insist on corroboration except from the medical evidence (Ahmad Shaikh Hussain Ibrahim v. State of Goa 1992 (2) Crimes 1013 (1014); State of Maharashtra v. Chandraprakash Kewal Chand Jain, AIR 1990 SC 658 (659).

It is rare that a girl or a woman in our society makes up a false story showing herself as the victim of sexual intercourse by a stranger or an outsider (Sattu alias Satya Narayan Vs. State of Rajsthan, 1989 (2) Crimes 583 (584, 585 (Raj). As regards proof of rape, it is seldom that direct evidence is available beyond the evidence of the raped woman (Mst. Bhonri Vs. State (1953) 4 R.L.W. 255). The only witness who can prove that is the woman raped. In practice, a conviction for rape almost entirely depends on the credibility of the woman, so far as the essential ingredients are concerned, the other evidence being merely corroborative. Her testimony is vital in a case where the woman is married and the medical evidence in no way corroborates the charge of rape (AIR 1942 Mad 285 = 43 CrLJ 576). When the accused is charged with an offence under section 376 or 354, Penal Code, the prosecutrix is the material witness (Amar Dev. Vs. State of H.P. 1989 (2) Crimes 564 (HP). It is rarely that a girl or a woman in our society makes up a false story showing herself as the victim of sexual intercourse by a stranger or an outsider (Sattu alias Satya Narayan Vs. State of Rajesthan 1989 (2) Crimes 583 (Raj).

There is no presumption of law which differentiates the evidence of the complainant of rape case from that of the complainant in any other offences (AIR 1940 Cal 461). It can not be said that the evidence of the prosecutrix in a rape case is on the same footing as that of an accomplice. An accomplice is a person who voluntarily participates in the commission of a crime along with others. In the case of a prosecutrix for rape she is the victim of the offence and not the offender. The case of an accomplice therefore, materially differs from that of a prosecutrix for rape and the evidence of both can not be placed on the same footing (1980 P CrLJ 1023; AIR 1958 SC 749).

Where the prosecutrix was a minor girl and she had been the victim of an outrage, she could not be regarded as an accomplice and her evidence had to be judged by the ordinary principles for determining its intrinsic worth or credibility. In such cases the conduct of the girl might be more than enough to justify acceptance of her story. Where the prosecutrix was a girl of tender age and a virgin, not used to sexual intercourse, and her story found support from the marks of violence on her person and the injuries on her private parts, she could not be regarded as an accomplice, she being the victim of the outrage. Where she was a victim and there was nothing to doubt the identity of the culprit, nothing more than the evidence of the prosecutrix would appear to be necessary to connect the culprit with the offence (PLD 1979 Kar 147).

Prosecutrix in a sex offence is a victim of crime and law no where says that her evidence cannot be accepted unless it is corroborated in material particulars (State of Rajsthan Vs. Shri Narayan 1992) 2 Crimes 1155 SC). It is the rule that the solitary evidence of the prosecutrix being a woman of full age, is not accepted as sufficient, but requires corroboration by independent evidence, in order to be believed (19 DLR 259 SC). On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness as he is the best witness. The real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration not withstanding (Bhogrinbhai Vs. State of Gujarat, AIR 1988 SC 753=1983 CrLJ 1096).

In case of rape the first question that arises for consideration is whether the law requries corroboration. The rule of law is that corroboration is not essential before there can be a conviction but the necessity of corroboration, as a matter of prudence except where the circumstances made it safe to dispense with it, must be present in the mind of the Judge, before a conviction without corroboration can be sustained. It would be dangerous to formulate the kind evidence which should or

would be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to particular circumstances of the offence charged - K, (Mohammad Vs. State of Karnataka, (1977) 2 Kant LJ 308; (1973) 1 SCC 533).

In rape case prosecutrix cannot be said to be an accomplice. Court normally looks for corroboration in order to satisfy itself if prosecutrix is telling truth. The requirement is the rule of prudence (Idam Singh Vs. State of Rajasthan, 1977 CrLJ 556).

A natural witness, a rustic woman,in agitated mood who earlier escaped molesation and later saw murder, is bound to commit mistkaes in her testimony. The Court should appreciate these mistakes and accused should not be acquitted on these minor mistakes like wrongly naming the other eye-witnesses (State of Tamil Nadu vs. Karuppusamy and others 1992 (2) Crimes 18(19).

It is not necessary that there should be corroboration to the evidence of the victim of rape (particularly gang rape) (State of Orissa Vs. Damburu Naiko and another 1992 (2) Crimes 77(78). Oridinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of evidene, unless there are special circucmstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation (State of Maharashtra Vs. Chandra Prakash Kewalchand Jain AIR 1990 SC 658 = 1990 CrLJ 889 SC).

Statement of a ravished girl is admissible as corroborative evidence under section 157 of the Evidence Act and also as a conduct under section 8 of the said Act (44 CWN 830; AIR 1952 Cal 83; AIR 1963 Ori 58). The whole story as to rape was narrated by the victim girl to his witness shortly after the incident. Her statement to witness, if proved, corroborates her testimony given in court (1978 CrLJ (NOC) 79). When the victim girl is a child of tender age, her statement should not be received and accepted as true without corroboration. But, her mothers statement consisting of what had been narrated to her by her daughter shortly after the incident, amounts to corroboration. Of course, the weight to be attahced to it is a different matter (State vs. Rameswar AIR 1951 Raj 30=1952 CrLJ 502). Where a tender girl is said to have been raped, her statement immediately after the rape, crying and weeping, is admissible as explaining her act of crying under section 8 of Evidence Act and by way of corroboration under section 157 of the said act (AIR 1925 Nag 74 = 25 CrLJ 1214).

Where the victim of rape was a deaf and dumb girl of 13 years and she was not examined, any infirmity occasioned by her non-examination would be cured when there was an eye-witness to the act of rape and the Courts believed his evidence. No further corroboration would be necessary (AIR 1979 SC 1194).

Chemical Examiner's report was not the only manner in which a sexual act can be proved. Statement of the victim which is fully corroborated by medico-legal report and testimony of doctor was also sufficient to prove it (NLR 1980 Cr. 529). The corroboration of evidence of the prosecutrix by the evidence of a lady doctor and injuries on the person of the accused are sufficient corroboration of statements of the prosecutrix (1968 PCrLJ 1818) Where statement of prosecutrix found support from medical evidence. delay in examination of prosecutrix and lodging of FIR was explained in FIR and her stay was supported by her mother. Accused may be convicted under this section (1987 PCrLJ 1034).

Under section 157 of the Evidence Act the evidence of the prosecutrix can be corroborated by a previous statement made by her after the occurrence. Whether

such corroboration should be considered sufficient or not is really a question of fact, and the circumstances under which the statement is made by the prosecutrix and the time which elapses between the occurrence and her statement have to considered (AIR1949 Cal 613). In some cases the weight of conduct of the prosecutrix may be nil, but in other cases, where corroboration is not essential for conviction, her conduct may be more than enough in itself to justify, acceptance of her story. This depends upon the facts of each case (AIR 1963 Ori. 58). The statement of the prosecutrix may be corroborated by the retracted confession of the accused, (AIR 1952 Raj 123 DB) or by the evidence of her mother (AIR 1952 SC 54).

The statement made by the complainant to her husband immediately after the incident is admissible under section 157 of the Evidence Act and has corroborative value (AIR 1983 SC 911). The statement of the prosecutrix to her mother or the neighbours shortly after the incident complaining against the accused, is corroborative evidence (AIR 1940 Cal 461). Where a young girl of 14/15 years was raped by her stepfather and she narrated the incident to her mother. The medical evidence supproted the version of the victim. Her age as given by the lady Doctor was 14/15 years. Chemical evidence revealed that the bed sheet which was recovered at the instance of the girl was stained with semen. The accused was convicted (1981 SCMR 448). But the mere fact that the story was told to a number of relations shortly afer the occurrence is insufficient corroboration (PLD 1960 SC 325=12 DLR (SC) 165). It would not be sufficient corroboration in the case when the story related by such persons is unnatural (AIR 1955 Sau 96=1955 CrLJ 1525).

A prosecutrix being 16/17 years of age, cannot be considered as below the age of consent. Question of corroboration is very much attracted in the circumstances, and the corroboration must come from independent sources apart from testimony of the prosecutrix herself. In its absence accused may be acquitted (PLJ 1982 Cr. C 23). If the circumstances show that the prosecutrix dwas a woman of mature age, used to sexual intercourse, and her conduct raised a suspicion that she might have been a willing party, her story would certainly require strong corroboration as she could be regarded as an accomplice (KLR 1988 Cr. 495). The statement made by the prosecutrix to the witnesses after a period of three years cannot be said to be at all independent nor sufficiently connected with the crime itself (AIR 1955 NUC (Pat) 3245).

The presence or absence of blood or semen would only be corroborative evidence. Therefore where in a case of rape the only evidence was the circumstances that semen was detected on a piece of cloth which was recovered from the house of the accused, and that it was also discovered on the shalwar which was alleged to have been worn by the woman at the time, and the accused was a married young man and the woman was a grown up woman who admittedly passed the night at her husband's house before making the first information report. It was held that that was a wholly neutral circumstances which did not help the case of either side (AIR 1927 Lah 867). The report of the chemical analyst regarding presence of semen on the complainant's clothes is not sufficient to prove that the complainant was actually raped; AIR (1930 Lah 193). On the other hand the fact that it was not proved that clothes which the accused were wearing at the time of medical examination were stained with semen, did not show that the accused did not commit the offence of rape (AIR 1923 Lah 238). Where there was no reliable evidence as to the commission of the offence and chaddar stained with semen, which was an important piece of evidence was not taken into possession by police to provide corroboration to statement of victim, (1984 PCr.LJ 1381) or where no blood or semen was discovered on the body of the prosecutrix and there had been great delay in making the FIR and

there was enmity between the parties. All these circumstances combined to raise a doubt in favour of the accused to the benefit of which he was entitled (AIR 1916 Lah 292).

**11. Whether the prosecutrix is an accomplice.**— While considering the question of the necessity of corroboration of the evidence of a girl or woman who is said to have been raped, in all circumstances it cannot be said that she is an accomplice. In cases where she is not a freely consenting party and not an accomplice, if she was abducted by deceitful means or by force or if she was ravished against her will and without her consent, she is not an accomplice. In such circumstances she is a victim of an outrage. On the basis of the facts of each case the trial Court has to come to a finding whether it is safe to act upon the testimony of the complainant without being supported by the independent corroborative evidence. This view finds support in the decision in the case of Rameshwar Vs. The State of Rajasthan, 1952 SCR 377 [(Abdul Quddus Vs. State 1983 BLD 18; (1983) 35 DLR 373 (Para 16)].

It has been held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence however, it has been emphasised that courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person, accused of abduction or rape, has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible has not accepted. The only rule of law is the rule of prudence, namely, the advisability of corroboration should be present in the mind cannot be considered to be an accomplice. As a rule of prudence however, it has been emphasised that courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person, accused of abduction or rape, has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible has not accepted. The only rule of law is the rule of prudence, namely, the advisability of corroboration should be present in the mind of the Judge. There is no rule of practice that there must in every case be corroboration before a conviction can be allowed to stand. As to type of corroboration may be required when the court is of the opinion that it is not safe to dispense with that requirement, it has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged (1973) 2 SCJ 140 ; (1973) 1 SCC 533 ; 1973 Cr LJ 673; AIR 1973 SC 469).

In Rameshwar Kuryan Singh v. State of Rajasthan (AIR 1952 SC 34), the Indian Supreme Court has observed that a woman who has been raped cannot be equated to an accomplice. The learned Judges have however, laid down the following rule:

"The true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example as its demeanour, unlikelihood of tutoring

and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

Section 133 of the Evidence Act says that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But the rule of practice is that it is prudent to look for corroboration of the evidence of an accomplice by other independent evidence. This rule of practice is based on human experience and is incorporated in Illustration (b) to section 114 of the Evidence Act which says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Even though a victime of rape cannot be treated as an accomplice, on account of a long line of judicial decisions rendered in our contry over a number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration (Rameshwar v. State of Rajashan, 1952 SCR 377 = AIR 1952 SC 54= Curucharan Singh v. State of Haryana, (1973) 2 SCR 197= AIR 1972 SC 266 1 and Krishan Lal v. State or Haryana, (1980) 3 SCR 305= AIR 1980 SC 1252).

It is now well-settled that a woman, who has been raped, is not an accomplice. The rule is not that corroboration is essential before there can be conviction in a case of rape, but the necessity of corroboration, as a matter of prudence, except where the circumstances make it unsafe to dispense with it, must be present to the mind of the Judge. In the present case, the corroboration of the testimony of the victim girl (P. W. 1) is afforded by the doctor (P. W. 7), who opined, after examination of the victim girl on 28. 10. 1976, that the victim girl was in the state of pregnancy more than six months (Sachindra Nath Biswas, (1985) 1 Crimes 506;Bhoginbhai Hirijbhai Vs. State of Gurjal AIR 1983 SC 753 (para 11).

**12. Corroboration of testimony of prosecutrix.**— It is extremely dangerous and permissible only in exceptional cases to convict a man of sexual offence on the uncorroborated testimony of the complainant. The corroboration must be by independent evidence coming from another person altogether. The evidence of some person as to what the girl said to him is no corroborative evidence within the meaning of the rule (Rashid Ahmed Vs. The State, 10 DLR 532). It is a settled principle of law that a prosecutrix should be corroborated by independent evidence for circumstances in order base the conviction upon her evidence, particularly when the prosecutrix is an adult woman. Numerous decisions may be had in this connection; of them are (1967)19 DIR (SC) 259, Montaz ahmed Khan Vs. the State; 10 DLR 532, Rashid Ahmed Vs. the State, 14 DLR 821, Mafizuddin Mondal Vs. The State, and 12 DLR (SC) 165, Md Abdul Khaleque Vs. the State (Abul Kashem Vs. State (1992) 12 BLD 513 (517)j.

Ordinarily, corroboration of the the woman raped is to be looked for but that is not an absolute rule. If the Court is completely satisfied with her evidence, it is open to it to convict the accused even on her uncorroborated testimony (Banaspati Mangal v. State of MP 1962 Jab LJ 840= 1962 MP (Notes) 330 = (1963) 2 Cr LJ 354).

It has been observed in the case of Rameshwar Vs. The State of Rajasthan AIL 1952 SC 34, that the rule, which has hardened into one of law, is not that corroboration (in case of sexual offences) is essential before there can be conviction but that the necessity of corroboration as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, that there is no inflexible rule that though corroboration should ordinarily be

required in the case of a grown up woman, it is unnecessary in the case of a child of tender years and that the tender years of the child coupled with other circumstances appearing in the case such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unecessary but that is a question of fact in every case (Abdul quddus Vs. State (1983) 35 DLR (373) (para-21) = 1983 BLD 18).

Corroboration is not the *sine qua non* for a conviction in a rape case (Nandakishore Rath v. Nanda alias Ananta Cheran Behera & Anr. (State) 1991 (2) Crimes 715(Ori.). Corroboration of the prosecutrix in a case of rape is not always indispensable. The rule as to corroboration is one for the guidance of the Courts and is not a rigid rule of law (1985 P. Cr. L. J. 349; PLD 1979 Kar 147).

In rape cases, a corroboration is not always required. It is a rule of caution (Jatio alias Ajit Kumur v. State of H. P. ; 1990 (1) Crimes 315 (H. P.). Injury on the private parts of the victim has corroborative value. Her complainant to her parents and the presence of blood on her clothes are also testimony which warrants credence (AIR 1980 S. C. 1252; 1980 Cr LJ 926). So far as corroboration of the statement of the prosecutrix is concerned, it is looked upon as rule of caution and not as a rule of law (Rameshwar v. State of Rajasthan AIR 1952 SC. 54).

In an offence under section 376 Penal Code, 1860, corroboration may be insisted upon when the evidence of victim suffers from infirmities and the probabilities factor rendered their testimony unworthy of credence (Hari and another v. State of Mahdys Pradesh 1988 93) Crimes 64 (M. P.). It is now well settled that a woman, who has been raped, is not an accomplice. The rule is not that corroboration is essential before thare can be conviction in a case of rape, but the necessity of corroboration, as a matter of prudence, exept where the circumstances make it unsafe to dispense with it, must be present to the mind of the judge. In the present case, the corroboration of the testimony of the victim girl (P. W. 1) is afforded by the doctor (P. W. 7), who opined, after examination of the victim girl on 28th october 1976 that the victim girl was in the state of pregnancy more than six months. The evidence of the victim girl (P. W. 1) is corroborated by the medical testimony of P. W. 7) Therefore, it could not be said that there was necessity of corroboration of the evidence of the victim girl (Sachindra Nath Biswas V. State, (1985) 1 Crimes 505 (510) Cal).

Even where there is no corroboration of the statement of prosecutrix, the accused can be convicted on facts and circumstances (Gureharan Singh, AIR 1972 S. C. 2661; 1973 Cr LJ 179). Where the evidence of the victim does not suffer from any basic infirmity and the medical evidence fully supports the finding of the High Court there was an attempt to commit rape, it must be held that there is no reason to insist on corroboration (Bharwada Bhoginbhai Hirjibhai v. State of Gujrat, 1984 S. C. Cr. R. 25 (30, 31); AIR 1983 S. C. 753 (756-57); 1983 Cr LJ 1096).

Section 133 says that an accomplice shall be competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But the rule of practice is that it is prudent to look for corroboration of the evidence of an accomplice by other independent evidence. This rule of practice is based on human experience and is incorporated in illus. (c) to section 114 which says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Even though a victim of rape cannot be treated as an accomplice, on account of long line of judicial decisions, rendered in our country over a number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplic requiring corroboration (Rameshwar v. state of Rajsthan 1952 SCR 377= AIR 1952 SC 54; AIR 1972 SC 2661; AIR 1980 SC 1252).

When the evidence established that the girl was playing in broad day-light, that she was carried away by the accused and brought back crying after a time, that there was a first information lodged before the police shortly thereafter, that the medical examination of the accused's genitals indicated the presence of spermatozoa, it was held that the circumstances were sufficiently of corroborative of the guilty of the accused (AIR 1976 SC 1774).

Corroboration is not the *sine qua non* for a conviction in a rape case. In the Indian setup refusal to act on the testimony of a victm of sexual assault in the absence of corroboration as a rule is adding insult to injury on principle of the evidence of a victim of sexual assault stands at par with evidence if the injured witness who is least likely to exculpate the real offender. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unwrothy of credence, as a general rule, there is no reason to insist on corroboration, except from the medeical evidence, where having regard to the circumstances of the case medical evidence can be expected to be forthcoming subject to the following qualifications; corroboration may be insisted upon when a woman having attained majority is found in a compromissing position and there is likelihood of her having levelled such an accusation on account of the instinct of self-preservation, or when the probabilities factor is found to be out of the time (1983 Cr LJ 1096 (SC)= 1983 Cr LJ 194 (NOC) 194 (Punj); 1986 (2) Crimes 151 (Ori); AIR 1983 S. C. 753 (Para 11).

Where F. I. R. was lodged with delay and there was no evidence on record showing any struggle having taken place nor there were marks of injuries, except a few scratches on face of the prosecutrix. There were material contradictions in statement of prosecutrix as given in F. I. R. and in Court during trial. Coviction can not be based on uncorroborated statement of the prosecutrix (1985 SCMR 1170). Resistance is the best corroboration, e. g. tearing of clothes, infliction of personal injuries including injuries to private parts (25 Cr LJ 1274). Complaint by girl to mother is corroboration (1896) QBD 167; (1905) 1 KB 551). Complaint must be made at the earliest opportunity to afford corroboration of girl's testimony (1929) 1 KB 99; (1896) 2 QB 167; (1905) 1 KB 551).

In a Case of rape of a girl 21 years of age when no injury was reported by the doctor on her person or in her private part, testimony of prosecutrix in such circumstances requires independent corroboration (Man Bihari & others v. State of Bihar 1993 (2) Crimes 597 (Patna). The evidnece of the praosecutrix in a rape case is customarily received by Courts with some suspicion. In certain jurisdiction, it is the rule that the solitary evidence of the prosecutrix being a woman of full age is not accepted as sufficient, but requires corroboration by independent evidence, in order to be believed (PLD 1976 S. C. 326; PLD 1982 Kar. 240).

Where there is no independent eyewitness and the only evidence is that of the prosecutrix hereself and of those to whom it was reported, the Courts are not left with any objective test for gausing the truth of the story of the prosecutrix. Expert examination of the person of the prosecutrix and of the garment she had worn at the time and of the place where the rape took place is *sine qua non* in such cases (PLD 1963 Dhaka 908; 14 DLR 82. In Case of this kind, it is very necessary that before finding the accused persons guilty of rape, the Court should be satisfied that the woman's story is corroborated either by circumstantial evidence connecting the accused persons with the crime, or at least by some circumstance connected with the woman which would serve by itself to show that her story of forcible intercourse was true (12 DLR (SC) 165; PLD 1960 SC 325).

For conviction of the offender under section 376 Penal Code on the basis of statement of the prosecutrix, Courts should insist on some corroboration where she had not suffered any injury during the act of being subjected to rape or otherwise her statement has not been found wholly reliable (Charan Singh and another v. State of Haryana 1988 (3) Crimes 85 (P & H).

**13. Nature and extent of Corroboration.**—The principles relating to the need of corroboration of a prosecutrix in rape cases have been laid down in two decisions of the Indian Supreme Court, namely Raneswar s/o. Kalyan Singh v. State of Rajsthan AIR 1952 SC 54 and Sedheswar Ganguli Vs. State of Rajsthan AIR 1952 SC 54 and Sedheswar ganguli v. State of West Bengal (A. I. R. 1958 SC 143). In the first case, the Supreme Court made it clear that (1) the prosecutrix in a case of rape cannot be treated as an accomplice and consequently, the principle requiring corroboration in respect of an accomplice witness cannot have application in considering the evidence of prodsecutrix in a rape case; (2) that the Evidence Act now where provides that the evidnece of the prosecutrix in a rape case requires corroboration and that (3) as a matter of prudence Courts have insisted on the need of corroboration of the evidence of the prosecutrix. The eventual principle laid down by the Supreme Court was finally stated in paragraph 19 at page 57 as follows:-

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury case, must find place in the carge, before a conviction without corroboration can be sustained." It was further added.

The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

Dealing with the nature and extent of corroboration. Their Lordships observed:-

"It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear—

First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction.....

Secondly, the independent evidnece must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particularly the testimony of the accomplice or complainant that the accused committed the crime....

Thirdly, the corroboration must come from independent sources....

Forthly, the corroboration need not be direct evidence that the accused comitted the crime. It is sufficient if it is merely circumstantial evidence in connection with the crime."

Evidence of the prosecutrix in a rape case is not in need of any corroboration except from the medical evidence where such evidence is forthooming and the probabilities-factor in the case does not improbabilities her case (Adam Tirky v. State of Orissa 1993 (2) Crimes 33(Ori.).

The nature of the corroboration must necessarily depend on the facts of each particular case. Sometimes rape is clearly proved or admitted, and the only question is whether the accused committed the offence. At other times, the association of the accused on the complainant is admitted, and the question is whether rape was committed. where rape is denied the sort of corroboration one looks for is the medical evidnece showing injury to the private parts of the complainant, injury to the other parts of her body, which may have been occasioned in a struggle, seminal stains on her clothes or the clothes of the accused, or on the place where the offence is alleged to have been comitted, and in all case importance is always attached to the subsequent conduct of the complainant. Whether she makes a charge promptly or not is always relevant. Subsequent conduct, by itself although important, is not enough, because a witness cannot corroborate himself. In such cases the Judge is bound totell the jury that it is a rule of the Court not to act on the evidence of the complainant without some corroboration and where there is no corroboration to direct them that their proper course is to return a verdict of not guilty (1961 Cr LJ 689).

The nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon (AIR 1958 SC 143 =1958 Cr LJ 273). To insist on corroboration excpt in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and therby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and European countries. Our standard of deceny and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestaion and rape are staeadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remks to eveteasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if the Courts deal strictly with those who violate the societal norms. The statndard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the slay and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity (State of Maharashtra v. Chandraprakash Kewalchand Jain AIR 1990 SC 658 (659).

There is no doubt that a statement made by a victim girl or woman after the occurrence is legally admissible as corroboration. The value and weight to be attached to such corroboration is a different matter and in cases where the prosecutrix is an accomplice or is found/ to be coming out with a false and concocted story with an ill motive or at the instance of someone else it may be said that tainted evidence does not lose it taint merely by repetition (Abdul quddus Vs. State 35 DLR (1983) 373 (para-20) : 1983 BLD 18).

In Duli Chand v. State (1952 Cr LJ 1575 (SC).—The Indian Supreme Court relying on the case of R. V. Baskerville (1916) 2 KB 658; 86 LJKB 82), observed as under:

"The rule, which according to the case has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in Jury cases must find place in the charge, before a conviction without corroboration

can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the Case, such for example as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the Jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

"Further, when corroborative evdence is produced it also has to be weighed and in a given case, as with other evidence even though it is legally admissible for the purpose on hand, its weight may be nil."

"It may be that all mothers may not be sufficiently independent to to fulfil the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. "Independent" merely means independent of suorces which are likely to be tainted!".

The principle that have to be borne in mind by Courts when considering the evidnece of the prosecutrix, have been clearly laid down by a several decisions of the Supreme Couft. It has been held that the prosecutrix cannot be considered to be an accomplice. As a rule of prudence however, it has been emphasised that Courts should normally look for some corroboration of her testimony in order to satisfy itself that the prosecutrix is telling the truth and that a person, accused of abduction or rape, has not been falsely implicated. The view that, as a matter of law, no conviction without corroboration was possible has not een accepted. The only rule of law is the rule of prudence, memely the advisability of corroboration should be present in the mind of the judge. There is no rule of practice that the remust in every case be corroboration may be required when the Court is of the opinion that it is not safe to dispense with that requirement, it has also been laid down that the type of corroboration required must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence with which a person is charged (1973) 2 SCJ 740 = (1973) 1 SCC 533 = 1973 Cr LJ 673 = AIR 1973 SC 469 = 1973 SCD 1737 = AIR 1972 SC 2661 (1972) 2 SCC 749 = 1972 SCC (Cr) 793). But to this extent the rules are clear. Firstly, it is not necessary that there should be indpenendent confirmation of every material circumstances in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. Secondly, the independent evidence must not only make it safe to believe that the crime was comitted but in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identiy must extend to all the circumstances necessary to identify the accucsed with the offence. Thirdly the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But, of course, the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. Fourthly the corroboration need not be direct evidence that the accused committed crime. It is sufficient if it is merely circucmstantial evidence of this connection with the crime (1972 MLJ (Cr) 177 = (1962) 1 CrLJ 650).

It is accepted by the Indian Courts that the rule of corroboration in such case ought to be as enunciated by Lord Reading, C.J. in King Vs. Basherville (1916) 2 KB 658) :

"Where the case is tried with the aid of a jury as in England it is necessary that a judge should draw the attention of the jury to the above rule of practice regarding corroboration wherever such corroboration is needed. But where a case is tried by a Judge alone, as it is now being done in India, there must be an indication in the course of the judgment that the judge had this rule in his mind when he prepared the Judgment and if in a given case the Judge finds that there is no need for such corroboration he should given reasons for dispensing with the necessity for such corroboration. But if a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground. In the case of a grown up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is necessary that every part of the evidence of the victim should be confirmed in every detail by independence. Such corroboration can be sought from either direct evidence or circumstantial evidence for from both" (Sheikh Zakir Vs. State of Bihar, AIR 1983 SC 911 (914-915) = 1983 CrLJ 1285).

There is no rule of practice that there must in every case, be corroboration before a conviction can be allowed to stand (Tukaram Vs. State of Maharashtra, AIR 1979 SC 185=1978 CrLJ 1864; 1982 crLJ 2162 (2169-70) Orissa; AIR 1952 SC 54). It is not necessary that there should be independent corroboration of every material circumstances in the sense that the independent evidnece in the case, apart from the tesitmony of the complainant should in itself be sufficient to sustain conviction. All that is required is that there must be some additonal evidence rendering it probable that the story of the complainant is true and that it is reasonably safe to act upon it. The evidence, no doubt, should not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with the crime, corroboration may be by facts and circumstances (Krishan Chithan Vs. State of Kerala (1962) 1 CrLJ 650 (651-52); (1983) 35 DLR 373; 1985 PCrLJ 349; 1976 PCrLJ 364).

The nature of corroborative evidence should be such as to lead assurance that the evidence of the girl raped can be safely relied uon (Siddheshwar Ganguli, AIR 1958 SC 143 = 1958 CrLJ 273; AIR 1976 SC 1774=1976 CrLJ 1376).

The corroboration of evidence need not be by direct evidence of another person. It may be independent evidence of such a character that it connects the accused directly or indirectly with the crime that he s said to have committed (1983) 35 DLR 373). The accused was convicted where he was found running away from near the place of occurrence while the prosecutrix was standing in a half naked position without trousers on her person and complaining of having been revished (1980 PCrLJ 1023=PLJ 1980 AJ & K 130 SC).

The main evidence in all such cases is that of the victim herself. In practice a conviction for rape almost entirely depends on the credibility of the woman, so far as the essential ingredients are concerned, the other evidence being merely corroborative. It is not necessary that there should be independent corroboration of every material circumstance in the sense that the independent evidence in the case, apart from the tesitmony of the complainant, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rednering it probable that the story of the complainant is true and that it is reasonably safe to act upon it. The evidence, no doubt, should not only make it safe to believe that the crime was committed but must in some way resonably connect or tend to connect the accused with the crime. Corroboraton may be by facts and circumstnces (Krishanan Chithan (1962) 1 CrLJ 650 = (1961) 1 KLT 63).

Substantial corroboration of the prosecutrix's version cannot be insisted upon in all cases of rape. The Court must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. The inherent bashfulness, the innocent naivete and the femimine tendnecy to conceal the outrage of masculine sexual aggression are fctors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, had corroborative value. The presence of blood on her clothes and her complaint to her mother are also testimony which warranted credence. It would baffle belief in human nature that a girl sleeping with her mother and other children in the open yard would go back with injury to her private parts and blood on her garments unless she had been subjected to the torture of rape. To forsake such vital considerations and go by obsolescent demands for substantial corroboration of the prosecutrix's version would be to sacrifice commonsense in favour of an artificial concoction called judicial probability. The Supreme Court observed : " a socially sensitized Judge is a better statutory armour against gender outrage then long clauses of complex section with all the protections writ into it (Krishan Lal Vs. State of Haryana 1980 SCC (Cri) 667=1980 CrLJ 926(SC) = AIR 1980 SC 1252).

Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. No woman of honour will accuse anoher of rape since she sacrifices thereby what is dearest to her. The Court cannot cling to a fossil formula and insist on corroboative testimony, even if, taken as a whole the csae spoken to by the victim strikes a judicial mind as probable judicial response to human rights cannot be blunted by legal bigotry (Rafic vs. State of UP 1981 SC 559=1980 SCC (Cri) 947; 1980 CrLJ 1344 (SC); Nilambar Goudo, 1982 CrLJ (NOC) 172 (Ori); Bijoy Kumar Mohapatra V. State, 1982 CrLJ 2162 (Ori).

Insistence on corroboration is advisable but is not compulsory inthe eye of law. Court must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarakble set of facts or clearest motive were made out ? The inherent bashfulness, the innocent naivete and the faminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her compolaint to her parents and the presence of blood on her clothes are also testimony which warrants credence (Sedheswar Ganguli vs. State of W. Bengal, AIR 1958 SC 143 (148)=1958 CrLJ 273=1958 SCR 749 = 1958 SCJ 349).

**14. Conviction on uncorroborated testimony of prosecutrix.**- In the offence under section 376, Penal Code, the conviction can be safely recorded on the statement of victim of rape provided her evidence is worth credence and does not suffer from any infirmity and corroboration of medical evidence is not necessary (Cholu Mohammad Vs. State of Rajashtan 1993 (1) crimes 251 Raj). Conviction on a charge of rape on the uncorroborated testimony of the prosecutrix is legal (Madho Singh Vs. State of UP., AIR 1973 SC 469; AIR 1972 AC 2661; 1958 CrLJ 273).

It is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both (Sk. Zakar Vs. State of of Bihar, 1983 CrLJ 1285 (SC). Hardly a sensitized Judge who sees the conspectus of circumstances in its totality rejects the testimony of a rape victim unless there are strong circumstances militating against its veracity (Rafiq Vs.

State of UP, AIR 1981 SC 559; 1981 All LJ 139). In a rape case conviction can be based solely on the evidence of the prosecutrix if it is found to be true and reliable (Irom Chaoba Singh Vs. The state of Maniput 1991 (1) crimes 514 (Gau) HC). Lone testimony of victim lady can be made basis for conviction for offence of rape and no corroboration is necessary if such testimony is found true and free from suspicion (Sanya @ Sanyasi vs. State of Orissa 1993 (2) Crimes 927 Ori).

Corroboration is not the *sine qua non* for conviction in a rape case (Rameshwar Vs. State of Rajsthan AIR 1952 SC 54 (57) = (1952) 3 SCR 337 (386). In Imratlal Vs. State of MP 1987 CrLJ (MP) 557, the accused was charged with committing rape uon a girl of about 12 years of age. It was observed that in a rape case conviction of accused could be based solely on the evidence of prosecutrix. The testimony of the prosecutrix was corroborated by medical evidence and FIR. Held, that in such case conviction of accused was justified.

Evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. While corroboration in the form of eye witness account of independent witnesses might often be fothcoming in physical assault cases, such evidence could not be expected in sex offences. As a general rule there was no rule to insist on corroboration except from the medical evidence. Held, that appellant kidnapped the prosecutrix who was below 18 years of age and subjected her to rape against her will consequently appeal to be dismissed and conviction and sentenced to be maintained (Torah Sing Vs. State of MP. 1987 CrLJ (MP) 1986). Conviction on the basis of uncorroborated testimony of the victim of offence is sustainable (Kunhimon Vs. State, (1988) 1 Crimes (Ker) 75).

A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere syas that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under section 118 of Evidence Act and her evidence must receive the same weight as it is attahced to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured compolainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the change levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidene Act similar to illustration (b) to section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence requried to lead assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hositation in accepting her evidence. Therefore, ordinarly the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. Ordinarily the evidence of a prosecutrix must carry the same weight as is attahced to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is indpendent evidence lending

assurance to her accusation (State of Maharashtra Vs. Chandraprakash Kewalchand Jain AIR 1990 SC 658 (659).

The Indian Supreme Court in Bhoginbhai Hirijbhai Vs. State of Gujarat AIR 1983 SC 753 in para 11 has observed : "It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rule devised by the courts in the westrn world. We are, therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the probabilities factor does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where having regard "to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification :

Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the probabilties factor, is found to be out of tune."

If after taking into consideration all the circumstances, a conclusion is reached that the woman's statement has been honestly made and is in accordance with all probabilities, then the Court would not refuse to sustain the conviction of the accused on the ground that there should have been some corroboration (1985 PCrLJ 349; PLD 1960 SC 325).

Where there is no corroboration of the statement of prosecutrix the accused can be convicted on facts and circumstances (Geraharan Singh, AIR 1972 SC 2661 = 1973 CrLJ 174). Offences of kidnapping any gang rape was committed in broad day light. Prosecutrix who had enough opportunity to see accused persons indentifying them in identification parade. Medical evidence showing that she had injuries on her private parts. Evidence of prosecutrix appearing to be truthful need no corroboration. However, such corroboration provided by medical evidence and also FIR lodged by her. Order of acquittal set aside (State of Orissa Vs. Dambura Naiko, AIR 1992 SC 1161).

Where the prosecutrix had no grudge against accused nor had they ever annoyed her otherwise. No explanation was forthcomding as to why after all prosecutrix blamed the accused for such an offence. The fact that prosecutrix was used to sexual intercourse afforded no justification on the part of the accused to appease their lust on her. Conviction and sentence was maintained (1984 PCrLJ 1438 AIR 1992 SC 1413).

Where the solitary evidence of the child witness, victim of rape, was found to be free from any blemish and the testimony of her mother was corroborative of the fact that the child had named the accused to the mother immediately after the occurrence, conviction could be based on the sole testimony of the child witness (1981 All LJ 367).

Where the circumstances appearing on record of the case disclosed that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence without looking for corroboration. The standard of proof to be expected by it must take into account the fact that crimes like rape are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. The degree of decency and morality in public life hardly stimulates a woman more so a young girl to shake her reputation by levelling a false charge concerning her chastity (State of Maharashtra Vs. Chandraprash Kewal Jain AIR 1990 SC 658= 1990 CrLJ 889).

If a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground. In the case of a grown up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both (Sheikh Zakir Vs. State 1983 CrLJ 1285 SC).

**15. Presence of semen or blood on clothes.**—Mere absence of semen on the underwear of the girl and/or on the Dhoti of the accused does not show that the story of rape stated by the prosecutix is not true. Seminal omission is not necessary to establish rape. What is necessary is that there must be penetration. In the instant case, the prosecutrix has stated that the accused had inserted his male organ in her private parts. Therefore, the offence of rape was complete as there was penteration (1986 Cr LJ 956). The presence or absence of blood or semen would only be corroborative evidence. Therefore where in a case of rape the only evidence was the circumstances that semen was detcted on a piece of cloth which was recovered from the house of the accused, and that it was also discovered on the shalwar which was alleged to have been worn by the woman at the time, and the accused was a married young man and the woman was a grown up woman who admittedly passed the night at her husbnad's house before making the first information report. It was held that that was a wholly neutral circumstance which did not help the case of either side (AIR 1927 Lah 867). Where semen stains were found on the lungot of the accused aged 22 years and there was no evidence as to how old the stain was, the semen stain can not necessarily connect the accused with the offence of rape (Rahim Beg, AIR 1973 SC 343 = 1972 CrLJ 1260).

Allegation of gang rape cannot be accepted when nowhere semen and spermatoza are found in vagnal swab )Kaliram v. State of Maharashtra 1989 (3) Crimes 72(Bom). The report of the chemical analyst regarding presence of semen on the complainant's clothes is not sufficient to prove that the complainant was actually raped (AIR 1930 Lah 193); on the other hand the fact that it was not proved that clothes which the accused were wearing at the time of medical examination were stained with semen, did not show that the accused did not commit the offence of rape ( ILR (1952) 2 Rag; 817). Where there was no reliable evidence as to the commission of the offence and chaddar stained with semen, which was an important piece of evidence was not taken into possession by police to provide corroboration to statement of victim (1984 PCr; LJ 1381), or where no blood or semen was discovered on the body of the prosecutrix and there had been great delay in making the FFIR and there was enmity between the parties. All these circumstances combined to raise a doubt in favour of the accused to the benefit of which he was entitled (AIR 1916 Lah 292).

Where soon after the incident the witness had found the prosecutrix's clothes stained with blood and semen, it was held that it was not necessary for the lady doctor to have taken a smear from her vagina to see if sperms could be found and since the prosecutrix's version was further corroborated by her nephew, a boy aged about 17 years, who had accompanied her and had fled from the scence of occurrence to report about the matter, the accused was rightly convicted under S. 376 (Janardhan Tewary 1972 SCC(Cri) 176).

Where the accused was alleged to have raped a six year old girl and the medical examination of the accused soon thereafter showed the presence of sperms and blood on the genitals of the accused and blood in his dhoti, it was held that there

were sufficient corroborating materials to inescapably fix the guilt of the accused (Ram Krishna ggarwals, 1976 SCC (Cri) 144).

Mere absence of spermatozoa cannot cast doubt on the correctness of the prosecution case of rape when there is evidence of profuse bleeding (prithi Chand v. State of Himachal Pradesh 1989 (1) Crimes 384 (SC). The presence of spermatozos in the vagina is conclusive proof of sexual connection; but not a rape; their absence is no proof that connection had not taken place for they may have been removed by washing or by discharge. In a case of charge of rape where the prosecutrix is the witness with regard to the act of rape, if after taking into consideration all the circumstances the conclusion is reached that the woman's statement has been honestly made and is in accordance with all probabilities, then the court would not refuse to sustain the conviction of the accused on the ground that there should have been some corroboration (Saleh Muhammad Vs. The State, 18 DLR 67 WP).

Where the victim of the rape by the appellant was a deaf and dumb girl about 13 years of age and the incident had ben witnessed in part by the step borther of the girl's father (P. W. 4) who came upon the seene on hearing her cries and the matter was reported to the police the same night when the father of the girl had retruned from the city, it was held that the statements of PW 4 was amply corroborated by the blood stained salwar of the girl and the vaginal swabs showing seminal stains (Mange, 1979 SCC (Cri) 985).

The discovery of a blood stain of 'B' group on the accused's pant would not establish his involvement in rape or murder unless it was established that the accused's blood group was different (Shankarlal Gyarasilal Dixit, V. State 1981 SCC (Cri) 315). In an offence of rape of a married woman, when the evidence shows there was reistance from prosecutrix at the time of commission of offence and no seminical stains were found on her clothes, accused is entitled to be acquitted by being extended the benefit of doubt (The Public Prosecutor v. Nemala Satyanarayana 1992 (1) Crimes 1138).

**Failure of prosecution to sent blood stained clothes of prosecutrix to chemical examiner.-** Prosecution is duy bound to send blood-stained clothes of prosecutrix recovered by Investigating Officer for chemical examination. Where appraisal of evidence conducted by Courts below was found to be perfectly in accordance with legal norms and it did not suffer from any infirmity, failure of prosecution to send clothes of prosecutrix to chemical examiner would lose importance and would have no adverse effect on the case of prosecution (PLD 1987 SC (AJ&K) 9).

**16. Appreciation of evidence.**—In rape cases direct evidence in not easily available. Also exaggerated statements against an accused are made by interest parties to put up a false case. Generally, the accused if powerful and rich, easily buy off the prosecution witnesses and the offender by tempting inducements. It is in these circumstances that courts are called upon to judge cases of rape. It may be that in genuine cases the only evidence available is that of the girl raped in which case the evience of the girl has to be viewed in the absence of corroboration. It may also happen that the evidence of a number of witnesses deposing for or against the accused is available. In all such cases the duty of the Court is to shift the evidence and find out the real truth. No hard and fast rule can be laid as a guide. Where the FIR was lodged properly, medical evidnece, circumstances, and other relevant facts have to be assessed in order to arrive at the truth. Where all those cumulatively point to the guilt of the accused conviction is inescapable. But where it leaves a doubt in the mind of the judge, the benefit should go to the accused (AIR 1976 SC 174; AIR 1940 Cal 461; (1963) Cr LJ 715; 1965 Cr LJ 349).

Courts must be wary, circumspect and slow to interfere with reasonable and proper findings based on appreciation of evidence as recorded by the lower courts, before upseting the same and acquitting an accused involved in the commission of heinous offence of rape of hapless girl child (State of Himachal Pradesh v. Raghubir Singh 1993 (2) Crimes 888 (S. C.).

Contradiction on a non-material point in the prosecution case is no ground to reject the whole of the testimony of the witnesses (State of Karnataka v. Lakshmanaiah 199 (2) Crimes 1130). Prosecutrix for rape is a competent witness u/s 118 of Evidence Act. If her testimony inspires confidence and is trustworthy then there is no need of corroboration (Chiddan Ram v. State 199 (2) Crimes 1140 (1141).

Hymen was found reptured with fresh tear marks indicating complete penetration. Medical evidence read together with evidence of prosecutrix had left no room, of doubt about rape committed upon her, Defence version was rejected being wholly concocted and false. Evidence of prosecutrix was substantially true and could form basis for conviction of accused with howm she had absolutely no enmity. No case for reduction of sentence was made out. Conviction and sentence of accused were mainatined in circumstances (Aqeel Ahmed v. State 1992 P. Cr. LJ 42). Relantions of the victim with the accused were not strained. The relations of her husband with the accused were also not strained. In the circumstances there was no motive or reason for the prosecutrix or her husband to falsely involve the accused in the commission of a crime which would put her chasity at stake (State of Rajsthan v. shri Narayun, (1992) 2 Crimes 1155 (SC).

In state of Maharashtra v. Chandra Prakash Kewal Chand Jain (1990) 1 S. C. C. 550) the Court had emphasised that a woman who is a victim of rape is in the same position as an injured witness and her evidnece should receive the same weight. This is what the court observed in that case.

"A Prosecutrix in a sex offence cannot be put on par with an accompalice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particlars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence (State of Rajasthan v. Shri Narayan 199 (2) Crimes 1157)

It is very difficult for any person to rape single handed a grown up and an experienced woman without meeting stiffest possible resistance from her (Bharat v. Stat of M. P. 1992 (1) Crimes 880). It is wrong to start suspecting the evidence of aprosecutrix given in a case of rape on the apriori that she tacitly or expressly consented to sexual intercourse (Dayaram & Anr. v. State of M. P. 1992 (1) Crimes 886 (887).

In a case of rape it is, not discretion with the court whether to draw presumption or not contained in section 114 (a) of the Evidnece Act (Shatrughan & Anr. v. State of M. P. 1992 (1) Crimes 889).

In rape cases the Court must bear in mind human phychology and behavioural probabilty when assessing the testmonial potency of the victim's version. Why a girl would foist a rape charge on a stranger unless remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine agression are factors which are relevant to improbablise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also

testimony which warrants credence ( Krishanlal v. State of Haryama AIR 1980 SC 1252 = 1980 Cr LJ 926 ; 1980 SC Cri 667). Crime of rape are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must realise that ordinarily a woman, more so a young girl, will not state her reputation by levelling a false charge concerning her chastity (AIR 1990 SC 658).

The testimony of prosecutrix cannot be equated with that of an accomplice. There is no rule that corroboration is a must but as a rule of prudence the court should normally look for coroboration to satisfy his own conscience (AIR 1973 SC 469; AIR 1972 SC 2661; AIR 1958 SC 143; 1958 CrLJ 273; 1958 SCR 749; AIR 1952 SC 54). Evidence of the victim of a rape is to be treated like that of the evidence of an accomplice and in the case of grown up and married woman, corroboration must be insisted (AIR 1983 SC 91; 1983 CrLJ 1285 SC; AIR 1980 SC 1252). Excepting medical corroboration no other corroboration is necessary in a rape case unless the evidence of the prosecutrix suffers from any basic infirmity and improbability. Corroboration of a grown up woman must be insisted upon if she was found to be in a compromising position (1983 CrLJ 1096 (SC). Ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. Ordinarily the evidence of proof required must not be higher than is expected of an injured witness. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution in which cases it would be safe to act on her testimony if there is dindependent evidence lending assurance to the accusation (AIR 1990 SC 658). If the prosecutrix was used to sexual intercourse the allegation that he was compelled to sexual intercourse by threat or by some other means must get corroboration for conviction of the accused (AIR 1970 SC 1029). In case of rape where immediately after rescue of the victim girl, her vagnal swab was taken and on examination it found to contain sperm then even in absence of proof that the sperm is that of the accused it is still a corroborative evidence (AIR 1962 Cal 641; (1962) 2 CrLJ 751). It is however not proper that the rule of corroboration be extended to other sex offence (AIR 1942 Bom 71).

Prosecutrix of a backward community when corroborated by witnesses, medical corroboration was dispensed with (1983 CrLJ 1285 SC). It should be remembered that where the prosecutrix is used to sexual intercourse, material corroboration is absolutely necessary (AIR 1970 SC 54). When the prosecutrix herself leaves her father's house without any inducement by the accused who merely allowed her to accompany, the accused does not commit any offence (AIR 1973 SC 819 =1973 CrLJ 651). If she is a minor, her consent is wholly immaterial. It is not necessary that the taking or enticing must be shown to have been by force or fraud persuation by the accused which creates willingness on the part of the minor to go out of the keeping of the lawful guardian would be sufficient (AIR 1973 SC 819 = 1973 CrLJ 651; 1973 SC Cr. 428; AIR 1973 SC 2313; 973 CrLJ 154). Corroboration is n*ot a sine qua non* in a rape case. The rule which according to the cases has hardened one into law, is not that corroboration is essential before there can be a conviction but that necessity of corroboration is matter of prudence, except where the circumstances makes it safe to dispense with it, must be peresent in the mind of hte Judge (AIR 1952 SC 54; (1952) 3 SCR 377).

The Court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of shame and the fear of being shunned by a society and her near

relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often than not, treated as a sinner and shunned. It must, therefore, be realised that a woman who is subjected to sex-violence would always be slow and hesitant about disclosing her plight. The Court must, thereofre, evaluate her evidence in the above background (State of Maharashtra v. Chandraprakash Kewalchand Jain AIR 1990 SC 658 (660), AIR 1983 SC 753 Rel. on).

"Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or woman in India make false allegations of sexual assault.....The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rearely can one conceivably come across an exception or two and that too possibly form amongst the urban elites. Because: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be concious of the danger of being ostracised by the Society or being looked down by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world (4) She would face the rixk of losing the love and respect of her own busband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to hereself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promisouous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the crose-examination by consel for the culprit, and the rixk of being disbelieved, act as deterrent" (State of Maharashtra v. Chandraprakash Kewalchand Jain AIR 1990 SC 658 (666).

Where the prosecutrix in her evidence has clearly stated that the appellant had forcibly committed rape with her and her evidence finds corroboration from the evidence of the doctor and she has opined that the duration of the rupture of prosecutrix's hymen was about 7 to 8 days and the vaginal orifice was swollen and tender, it was held that the appellant was rightly been found guilty for the offence under Sec. 376, Penal Code, (Chironji v. State of Madhya pradesh, 1985 Cr. L. R. (M. P.). 153 (156). If a girl of 10 or 12 years who is a virgin and whose hymen is intact is subjected to rape by a fully developed man, there is likely to be injuries to the male organ of the man. Where no such injury is noticed by the Doctor, it would point to the innocence of the accused (Rahim Beg, V. State AIR 1973 SC 343 = 1972 CrLJ 1260). Prosecutrix carrying on profession of prostitute at relevant time. Very strong evidence required to substantiate offence of rape. Mere statement of woman that she was raped without any specific allegation that intercourse was without her consent not sufficient without corroboration (Samunder Khan Vs. The State, 15 DLR 115 (WP).

In a case of allegation of rape where there is no independent eye-witness and the only evidence is that of the prosecutrix herself and of those to whom it was reported, the Courts are not left with any objective test for gauging the truth of the story of the prosecutrix. Expert examination of the person of the prosecutrix of the garment, she had worn at the time and of the place where the rape took place is *sine qua non* in such cases (Motizuddin Mondal Vs. The State, 14 DLR 821; 12 DLR 165(SC).

Where the lady doctor would not say that the hymen had recent tears and the allegation of prosecutrix about her having been kidnapped have been found to be unreliable and underwear of the appellant was not seized and there was the absence of smegma on his glans penis, it was held that the acquittal could be justified (Kalya v. State of Madhya pradesh, 1985 Cr. L. R. 147 (152) (M. P.). Where victim in rape case found habituated to coitus & it was found not possible as to how many hours prior to her examination victim had intercourse, accused cannot be said to have committed offfence unless there is direct evidence (State v. Uppala Trimurthulu 1991 (2) Crimes 363 (AP).

Where the prosecutrix stated that the appellant threw her no the ground and after forcibly removing her salwar committed sexual intercourse with her without her consent. And when she tried to resist and cry the appellant gagged her mouth with her dupatta, and the doctor stated that per vaginal examination, it was very painful and the cause of the rupture of the hymen was rape. It was held that the appellant was rightly convicted for having committed the offences under Secs. 376 and 506, Penal Code (Bidhia @ Bidhi Chand v. State of Himachal Pradesh, 1985 (1) Crimes 599 (561, 562) H. P).

Absence of injuries on the person of the aggressor or the agressed is not a sure indication as to whether rape had or had not been comitted as in a case of helpless resignation, injuries might not have been caused on the aggressor or the aggressed woing to want of resistance (State of Orissa v. Purnachandra Sadangi, 1985 (2) Crimes 976 (977) (Orissa). In a case of rape simply because of the absence of the injuries on his private parts the accused could not take any benefit on that account (Jito v. State of Himachal Pradesh, 1990 Cr Lj 1434 (H. P.).

The semen stain on the langot of a young man exist because of a variety of reasons and would not necessarily connect him with the offence of rape (Rahm Beg v. State of Uttar Pradesh AIr 1973 SC 343 (349). If a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries no the male organ of theman. The absence of such injuries no the male organs of the accused would point to their innocence (Rahim Beg. v. State of Uttar Pradesh, AIR 1973 SC 343 (348).

In the instant case, the prosecutrix silently abided to have the intercourse with the appllant without putting up any resistance, except shouting. The Supreme Court held that the prosecutrix was not raped by the appellants, al though there can be no doubt that the appellants may have had sexual intereourse with her consent (Pratap Misra v. State of orissa, 1977 Cr. L. J. 817 (823) (S. C.). A radiologist after X-Ray Examination of the girl found that she was about 15 years of age. It was held that the question of consent was wholly irrelevant. Fact that no injury was detected on the private part of the girl or that she was found to have been used to sexual intercourse was immaterial (Harpal Singh v. State of Himachal pradesh, 1981 Cr. L. J. 1 (1) (SC).

Where the charge of rape is not supported by medical evidence, the accused cannot be convicted under this section merely because the prosecutrix was recovered from his possession (PLD 1978 Lah 320).

Where the case involves the honour of a minor girl and no parent will put the said honour at stake and it is not possible that the witness should have supported a false case it was held that the appellant could be convicted (Banuwari Lal v. State, 1986 (2) Crimes 37 (40) (Delhi); 1985 P. Cr.LJ. (142); Balwant sinsh v. State of Punjab 1987 CrL.R. (SC) 187). It is rarely that is girl or a woman in our society makes up a false story showing herself as the victim of sexual intercourse by a stranger or an outsider. The humiliation and indignation one has to suffer in the society throughout one's life on account of such involvement is unthinkable. No one likes to publicise that any female member of his family had lost her virtue, chastity or honour at the hands of stranger (Sattu @ Satya Narayan v. State of Rajasthan, 1989 (2) Crimes 583 (584), (595) (Raj); Stateof Maharashta v. Shandraprakash Kewalchd, Jain, AIR 1990 S. C. 658 (659); PLD 1978 Lah 962). Therefore, the Court would not ordinarily rely on the defence plea that the accused has been falsely substituted for the real offender (1980 PCrLJ 23).

In a case of rape the contention that a false case had been initiated against the accused due to enmity it had to be rejected if the evidence on this aspect was not at all convicing. the parents of a tender age girl could not at all be expected to set up such a case and there by mark the whole life of their child (Jito v. State of Himachal Pradesh, 1990 Cr.LJ 1434 (H. P.).

In the case of Promod Mahto v. State of Bihar (1990 S. C. Cr. R. 1 (3), the defence has not been able to explain how else Jaiboonnisa, an unmarried girl aged about 15 or 16 years, could have come to sustain the tell tale marks and injuries of rape on her person as were found by Dr. Abha Singh unless she had been raped by the appellants. Once it is established that the appellants had acted in concert and entered the house of the victim and thereafter raped Jaiboonnisa, then all of them would be guilty under Sec. 376, Penal Code, in terms of Expl. 1 to Cl. (g) of subsection (2) of Sec. 376, Penal Code, irrespective of whether she had been raped by one or more of them. Explanation has been introduced by the Legislature with a view to effectively deal with the growing meance of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty or gang rape and convict them under sec. 376 Penal Code.

In Jhalkan Vs. State, 1959 MPLJ (Notes) 196, the case for the prosecution was that the offence of rape was committed on the prosecutrix on strong ground and that she resisted by scratching the legs and things of the accused and then ran away crying. Neither the prosecutrix nor the accused bore any marks of injury. the prosecution failed to show why the prosecutrix did not disclose the cause of her crying at the first opportunity. Further, there was no evidence to show that the accused could completely overpower the prosecutrix. It was, therefore, held that there was a strong suspicion that the sexual intercourse might have been with the consent of the prosecutrix and the conviction was set aside.

It is very difficult for any person to rape single handed a grown up and an experienced woman without meeting stiffest, possible resistance from her (Pratap Misra, 1977 CrLJ 817= 1977 SCC Cri. R 447 (454). If the victim is unwilling to yeild to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally gives rise to an inference that she was a consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intercourse (1984 CrLJ (NOC) 74 Raj). Injury on the private parts of the victim has corroborative value. Her complaint to her parents

and the presence of blood on her clothes are also testimony which warrants credence (AIR 1980 SC 1252 = 1980 CrLJ 926).

It is no part of the duty of the defence to explain as to how and why in a rape case the victim and her mother have falsely implicated the accused. The evidence of prosecution witnesses cannot be accepted merely because an accused person has not been able to say as to why they have come forward to depose against him (Nilambar Coudo, 1982 Cri LJ (NOC) 172 (Ori).

However great the suspicion against the accused and however strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable dobt no the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. In instant case, it could not be established beyong doubt that the sexual intercourse was committed by the accused with the victim girl without her consent or against her will. Consequently the offence under S. 376 was not established (Joginder Singh, 1974 Cri LJ 117 (Punj).

**Discrepancies in evidence.-** Discrepancies on minor points is not a proof of the case being false. It may happen even with truthful witnesses. Such discrepancies are bound to be there as power of observations, perception and retention varies in case of each individual. Where evidence on material particulars is clear and convincing, misdescription or misstatement on such points is really of no significance (1987 PCrLJ 1445; PLD 1987 SC (AJ&K) 9; 1983 PCrLJ 761). Where the prosecutrix was of tender age, her mother was illiterate and so was the father, the variation in their statements were bound to occur but as the discrepancies were of a very minor nature these would not hit the basic case (Jito vs. State of Himachal Pradesh, 1990 CrLJ 1434 HP).

Accused was charged for committing rape on the prosecutrix. It was observed that discrepancy regarding clothes whether they were washed or not had no significance because complaint itself had been filed after about three and half months. Mother of prosecutrix was aged 65 and illiterate therefore discrepancy in calculation of days had also no bearing. A witness was liable to get confused or mixed up when interrogated later on. Held, that there was no reason only evidence of mother of prosecutrix should not be accepted (Gajanand Magan Lal Mehta vs. State 1987 CrLJ 374 Guj).

Presumption **of consent.**-The appellant is aged about 22 years while the prosecutix 17 years. It is not possible to accept that the accused could conveniently lift her and carry to a near by field in wheat crop unless, Sunderbai would have been passive. Sunderbai state that the fire-arm of one cubit in lenght was carried by the accused, hidden in the Payjama which was taken out only when he lifted her lower garments. Had the accused really carried this weapon, he could not have lifted her without tearing his payjama. The prosecutrix attempted to cry but the accused allegedly wrapped her mouth with a towel and there after consoled her by assuring that he was not likely to consume her. She further states that after comleting the act, the accused sat by her side and, started issuing threat, by inviting her attention to the weapon. The prosecutrix had then asked what kind of weapon it was, whereupon the accused told her that it was a gun. All these clarly show that Sunderbai was a consenting party (Chatrapal v. State of M. P. 1988 (2) Crimes 447 (M. P.).

**17. Marks of injury and violence.**— In the case of rape, according to Modis Medical jurisprudence the body, specially the face, breasts, chest, lower part of abdomen, limbs and back should have marks of violence such as scratches and bruises, as a result of struggle. Such marks are likely to be found on the bodies of grown up woman who are able to resist (Shan Khan Vs. The State, 18 DLR 91 (WP). Where there are no marks of resistance on aggressor and no marks of injury are found on private part of woman it is not proper to convict on the bare testimony of the woman in the absence of corroboration (AIR 1935 Lah 8 = 36 Cr LJ 628 = AIR 1924 Lah 669; 25 Cr LJ 74). If the injuries are not found on the body of the prosecutrix, then the inference should be drawn that the offence was committed with her consent (Pratap Mishara v. State of orissa 1977 CrLJ 817 (SC). But in the case of a married and grown-up woman, marks of violence may not be present in the internal parts (Ajmer Sing & anr. v. State of Haryana 1989 (1) Crimes 424 (P & H).

Absence of injuries does not negative a charge of rape (Gopinathan Singh & ors. State of Kerala 1989 (1) Crimes 219 (ker). The mere existence of the injury to the vagina does not necessarily and inevitably justify the inference that there had been rape (1938 Cr LJ 944). In a Case of a forcible intercourse with a girl incapacitated from putting up resistance due to drink serious injuries on vagna cannot be expected (AIR 1953 Raj 225 ; AIR 1955 NUC (Raj) 473).

In a case where a young girl of about twelve yars, was kept by the accused persons for a long period of over four months and she was repeatedly subjected to rape before being resuced by the police; there could be hardly any possibility of fresh injury to her private parte being detected after the lapse of such a long time 1985 (1) Crimes 524; AIR 1981 SC 361; 1981 Cr LJ 1).

If the victim is unwilling to yield to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was a consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intcourse (Babu v. State 1984 Cr LJ (NOC) 74 (Raj).

It would be too much to hold that whenever a prosecutrix is found to have sustained no visible injury in a case of rape, consent on her part should be presumed. It would amount to leaving the unprotected girls as the mercy of the wolves of the society (Idan Singh v. State 1977 Cr LJ 556 (Raj).

The absence of marks injury on victim of rape was not fatal in each case nor did the absence of such physical injuries on the prosecution warranted the presumption of consent on her part (Nawabkhan v. The State 1990 Cr LJ 1179 (MP). The ordinary symptoms of rape may not be visible in the case of a full grown wido (Goma Tukaram v. State of Maharashtra 1991 (1) Crimes 783 (Bomb. H. C.).

Thed absence of injuries either on the accused or on the prosecutrix shows the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party. May be, being frightened, she was unnerved or for fear of being assaulted she had not resisted (State of Karnataka v. Mehaboob 1987 CrLJ 940 (Karn).

Where in a rape case the medical evidence disclosed the presence of abrasion on the arepuce of the accused in the absence on any satisfactory explanation from the accused to account for the injury, the Court must hold it to be a corroborative piece of evidence relating to his participation in the commission of the offence (AIR 1957 orisssa 78 = 1957 Cr LJ 469).

The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious resistance she cannot be disbelieved (Sheikh Zakir, 1983 Cr LJ 1285 (SC).In order to attract section 376, it is not necessary that there should always be marks of vidence in the private parts or other aprts of the body of the girl (AIR 1953 Raj 255; AIR 1972 SC 2661). Rupture of the hymen and bruise around is sufficient to establish rape (AIR 1979 SC 1194).

Where the prosecutrix, a grown up girl aged about 16 years, was alleged to have been raped by the appellant in a field, it was held, on appeal against conviction, that the complete absence of any injury on the person of the girl showed that she was a consenting party and as the two had known each other, it was probable that on the day of the occurrence, she must have consented to sexual intercourse with the appellant. Hence, his conviction was set aside (Puttan, 1972 Cri LJ 270 (All); pratap Misra V. State 1977 CrLJ 817 (SC).

To constitute the offence of rape, the presence of marks of violence on the private parts or elesewhere on the person of the victim is unnecessary (1974) 1 SCJ 209; AIR 1972 SC 2661).

Where there was an eye witness evidence as to the time and date of the occurrence of rape and the doctor examining the victim of the act found that hymen of the victim was torn and ruptured, the mere circumstances that the doctor did not find redness or inflammation around bruises would not be sufficient to put the prosecution case out of court because the fact that there was a rupture of the hymen and a bruise around the hymen was sufficient to prove the act of rape (AIR 1979 SC 1194).

In Harpal singh and another v. State of Hmachal Pradesh (AIR 1981 SC 361), emphasis was laid on the circumstances that laid on the circumstances that no injury was detected on the private parts of girl and that she was found to have been used to sexual intercourse. Repelling the contention that it was a case of sexual intercourse by contsent, their Lordships observed that:

"This argument will be of no avail to the appellants if once it is proved that the girl was below 16 years of age, because in that case the question of consent becomes wholly irrelevant."

Where the prosecutrix aged 12/13 years was gagged and threatened and medical evidence clearly supported the commission of the sexual act. The girl was found in an unconscious condition by her mother, The mere want of injuries on marks of violence or her body did not prove that rape was not committed on her (1975 SCMR 69).

To constitute the offence of rape, The presence of marks of violence on the private parts or else where on the person of the victim is unnecessary AIR 1972 SC 2661 = (1974) 1 SCJ 209). The injury on the person of the victim, specially her private parts has corroborative value (AIR 1980 SC 1252=1980 CrLJ 926). But absence of corrborative evidence or absence of injuries on the person is not fatal in each case (AIR 1981 SC 559 = 1980 CrLJ 1344).

Accused were charged wth committing rape on the prosecutrix aged about 19/20 years. Plea that absence of any injury on the back of prosecutrix falsified the charge could not be accepted. It was observed that accused were four in number and she could not offer such resistance as would cause injuries. There were some red

abrasions on her right breast as was evident from medical report. Prosecutrix case therefore could not be disbelived (Balwant Singh vs. State of Punjab, AIR 1987 SC 1080 = 1987 CrLJ 971).

**18. Medical evidence.**—Where there was an eye-witness evidence as to the time and date of the occurrence of rape and the doctor examining the victim of the act found that hymen of the victim was torn and ruptured, the mere circumstances that the doctor did not find redness or inflammation around bruises would not be sufficient to put the prosecution case out of Court because the fact that there was a rupture of the hymen and a bruise around the hymen was sufficient to prove the act of rape (AIR 1979 SC 1194 = 1979 Cr LJ 939 = 1979 UJ (SC) 241 = 1979 Cr LR (SC) 98).

Prosecutrix was of 17/19 years at the time of the incident. On conviction the accused filed an appeal where evidence was reappraised. Medical report did not disclose her resistance at sexual intercourse. There were no injuries on her private part. There were no sign on it of a recent sexual intercorse. Stains of semen found on the clothes of the prosecutrix were of no consequence. Moreover, physical incapacity of the prosecutrix had handicapped the defence. Held, guilt was not proved (1985) 2 Crimes 986 (Ori).

Commission of rape may be proved by the evidence of medical officer and chemical examiner (NLR 1981 Cr. 103). But the mere existence of an injury to the vagina does not necessarily and inevitably justify the inference that there had been rape (AIR 1938 Rang 298). But it may serve to corroborate other evidence in the case. Therefore, it would be advisible to get the complainant medically examined. Where the presence of bruises on the person of the victim of rape could be used as a piece of corroborative evidence by the prosecution, an adverse inference can also be drawn against the prosecution that she was not got medically examined as there were no bruises on her person, and that she had made a false statement when she said that she had received bruises when she was thrown out from the tonga by the appellant (NLR A.C. 223). It cannot be said that medical evidence cannot help the case for the prosecution, because the complainant is pregnant at the time when the rape is alleged to have been committed (AIR 1930 Lah 193). It is however to be noted that the fact that she did not offer herself for medical examination cannot weigh against her (AIR 1935 Nag 69).

Where medical evidence shows that there were no marks of injuries or violence on her person, that she was used to sexual intercourse and there was complete absence of any material or sign suggersting fresh intercourse. If the appellant had sexual intercourse forcibly with her there would have been some redness, swelling or some other sign on her porivate parts. The absence of injuries clearly indicates that no struggle was put up by the prosecutrix. The accused may be acquitted (NLR 1983 AC 177; 1983 PCrLJ 1287). Where prosecutrix alleged that she was subjected to rape for 45 minutes ina sugar cane field. Abrasion on parts of her body or confusion on the sides of her things was not found. It was unsafe to maintain convicted on uncorroborated solitary statement of the prosecutrix (1983 PCrLJ 2203).

In the small children the hymen being situated high up in the canal, is not usually ruptured, by intercourse but may become red. Medical examination of vulva of prosecutrix showed redness, swelling and tenderness. Such signs of violence, it was held, go a long way to indicate rape having been committed on her. Therefore it cannot be said that as the hymen of the minor victim was not ruptured, she had not been subjected to rape (1983 PCrLJ 96 SC (AJ&K).

It cannot be accepted as a principle of universal application that in every case of alleged rape the prosecution must get the accused medically examined only to ascertain that he is not physically impotent or incapable of performing sexual intercourse (1969 PCrLJ 1333). But it is always desirable that the accused in a rape case should be medically examined as soon as possible (AIR 1944 Nag 245). In a case where the accused are charged with an offence under section 376, Penal Code and the accused deny the charge, it is the duty of the prosecution to secure medicald examination of the accused within the period of time when conclusive results could be achieved. Where evidence led by the prosecution in the case of such an offence is not enough to form the basis of conviction, the absence of medical examination would render it wholly insufficient (1947 ALL W.R. (H.C.) 407).

The delay of over 24 hours in examination of spegma can not yield conclusive results (AIR 1978 S. C. 1753).

The absence of smegma around the accused's corona glandis cannot by itself prove that he had sexual intercourse. The presence of spegma could perhaps exculude the possibility of recent sexual intercourse but its absence will not necessarily establish that the person has had a recent intercourse (SHankarlal Gyarasilal Dixit v. State 1981 SCC (Cri) 315). In a Charge u/s 376 where a medical examination of the male organ of the accused as to the existence of spegma round the corona glandis, the presence of which is proof against penetration, is lacking or not done, the accused is entitlled to say that, if a medical examination of his body had been conducted, he would have been in a position to show that the condition of those parts negatives the possibility of recent complete penetration or proves that there was no penetration. In rape case the medical examination of the male organ of the person accused of the offence of raping is very essential (Jalal v. Emperor; 'AIR 1930 Lah. 193; 31 Cr LJ 784).

The examination of the smegma upon the glans penis of the accused in a case of rape loses all importance after the expiry of 24 hours from the time of comission of the rape (Kohli Dr SP, Civil Surgeno, Ferozwpur v. High Court of Punjab 1979 SCC (Cri) 252). Where the accused denies the charge of rape, it is the duty of the prosecution to secure medical examination of the accused within the period of time when conclusive results could be achieved (1947 A. Cr. C. 172). A small abrasion over the base of the glans-penis and its bluish discolouration are also inconclusive circumstances (Shanakarlal Gyarsilal Dixit v. State 1981 SCC (Cri) 315).

Nor can the bruises on the accused's thigh establish his involvement in the crime (Shankarlal Gyarsilal Dixit v. State 1981 SCC (Cri) 315). The Chemical Examiner's report is not the only manner in which sexual act can be proved. The statement of the victim which is fully corroborated by medico-legal report and testimony of the Doctor is sufficient to prove the offence (NLR 1980 Cr. 529 Lah).

It is difficult for any medical expert to give the exact duration of time when the rape was committed. More particularly when there is the evidence of full fledged eye witnesses to the act of rape as to the time and date of the occurrence, the medical evidence can hardly be relied upon to falsify the evidence of the eye-witness because the medical evidence is guided by various factors based on guess and certain calculations (Manga v. State of Haryana, 1980 M. L. J. (Cr) 61 (62); Sheikh Zakir v. State of Bihar, 1983 Cr L. J. 1285 (1287, 1288 (SC). It is well-known in the medical world that the examination of smegma loses all importance after 24 hours of the perfomence of the sexual intercourse (1979 1 S. C. C. 212 (219).

In fixing the age of a girl the growth of the teeth, pubic and axillary hairs, the growth of the breast, height and weight of the girl, are all relevant considerations.

Ossification test might be a better or super test for determining the age, but Courts have acted on the opinion of the doctors arrived at without conducting any ossification tests and based on other factors indicated above (Krishana Chithan v. State of Kerala (1962) 1 Cr LJ. 650 (652) = 1961 Ker. L. T. 63 = (1961) 1 M. L. J. (Cr.) 785).

In the undernoted case it was contended on behalf of the appellants that as it does not transpire from the medical report as to the number of persons who had commited rape on the prosecutrix, the conviction of the appellants is illegal and should be set aside. This contention, is without any substance whatsover. The Supreme Court thought that on medical examination it is not possible to say about the number of persons committing rape on girl and accordingly, in her report Dr. Curachan Kaur has not expressed any opinion in the regard. The evidnece of the prosecutrix that all the appellants had committed rape on her is not inconsistaent with the medical report. In the circustances, there is justification for the finding of the High Court that the medical examination and the evidence show the involvement of more than one person in the act of rape. the contention made on behalf of the apellants was rejected (Balwant Singh v. State of Punjab, 1987 Cr. L. J. 971 (974) (SC) ; AIR 1987 SC 1080).

Where the doctor the doctor opined that the hymen of prosecutrix was intanct and her vagina admitted a tip of a finger with difficulty and there was no injury or mark of violence over the external genetalia and thighs, and it is further in her evidence that for all these days she remained in the locality where her house was situated and she further deposed that she caused injuries to appellant on his face and arms with her nails. But the doctor did not find any injury on the person of the appellant, it was held that the prosecutrix has concocted a false story and thus implicated the appellant (Pawan Kumarv. State of Haryans, 1985 (1) Crimes 201 (203) (P & H); Vipin Kumar v. State of Haryans, 1985 (1) Crimes 105 (106, 107) (P & H). Where the medical report does not corroborate the statement of prosecutrix and her petticoat was never sent to chemical examiner or serologist and the investigating officer was not even examined in the case, it wasd held that it was totally unsafe to sustain the conviction (Nankoo singh v. State, (1984) 1 Cr. L. C. 577 (580) (All).

Where the medical evidence on record does not indicate any signs of rape on prosecutrix and the doctor certified that even her hymen was intact but there was direct evidence of the minor girl that she had been raped by the appellant it must be held that the hymen being intact, would not conclusively negative rape having been committed on her (Azhar v. State, 1984 A. Cr. R. 493 (495).

**Medical examination of accused.**—In rape cases, the prosecution must get the male organ of the accused examined. If it was not examined the accused is entitled to say that if a medicolegal examination of the vital or the material partes of his body had been conducted, he would have been in a position to show that the condition of those parts negatived the possibility of recent complete penetration or proved that there was no penetration. It is the duty of the prosecution if, according to the medical jurisprudence, medical examination is capable of yielding conclusive results, to ensue that examination within a period of time when conclusive results could be achieved (1961) 1 Cr LJ 689). Where the accused denies the charge of rape, it is the duty of the prosecution to secure medical examination of the accused within the period of time when conclusive results could be achieved (1947 AWR (HC) 407=1947 A CrC 172).

According to the Medical officer, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there is likely

hood of injuries on the male organ. No injury was, however, detected by the doctor on the male organs of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innecence. The two accused must necessrily have the benefit of doubt. Their conviction is liable to be set aside (1972 UJ (SC) 839 = 1972 SCC (Cr) 827 = 1972 Cr a R 248 (SC).

It is the duty of the prosecutionto get the accused examined. If it is not done the accused is entitled to say that say that if a medical examination of the vital or the material parts of his body had been conducted, he would have been in a position to show that the condition of those part negatived the possibility of recent complete penetration or proved that there was no penetration. The agrument that as the medical examination had taken place more than twenty-four hours, after the occurrence, the result would have been inconclusive because the smegma accumulates if no bath is taken for twenty four hours is no answer to the plea of the accused. It is the duty of the prosecution, if according to the medical jurisprodence, medical examination is capable of yielding conclusive results, to cnsure that examination within a period of time when conclusive results could be achieved (AIR 1946 ALL 191; 1945 OWN (HC) 334; 47 Cr LJ 611; 1970 LW (Cr) 182; (1961) 1 Cr LJ 689). However, absence of injury on person of accused, and particularly penis, can not be sole ground for discrding prosecution evidence (1969 Cr. LJ. 585).

**Medical evidence not to be preferred to that of prosecutrix.**—In a case under section 376, penal Code, if the evidence of the prosecutrix stands corroborated, it cannot be rejected merely on the ground that her version does not get support from the medical evidence. It cannot be contended that the evidence of the doctor should be preferred to that of the prosecutrix )1965 Cut LT 909; Scee also 1979 ACC 26 (SC) Summary).

The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serius physical resistance she cannot be disbelieved. In the situation the non-production of a medical report would not be of much consequence if the other evidence on record was believable (AIR 1983 SC 911).

In a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence and such onus never shifts. But as has been observed in AIR 1981 SC 559 = 1980 Cr LJ 1344, the absence of injuries on the person of the victim girl they may not be fatal to the person and corroborative evidence may not be an imperative component of judicial credence in rape cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed from place to place, from age to age, from a given set of facts, oral and circumstantial may have to be drawn not with dead uniformity, but realistic diversity lest regidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds regarding the presence or absence of injuries on the person of aggressor or the aggrieved. The Court cannot cling to a fossal formula and insist on corroborative testimony, even if taken as a whole the case spoken to by the victim strikes a judicial mind as provable, (see also AIR 1980 SC 1252; 1980 Cr LJ 962).

**Non-production of medical report.**— Where the prosecutrix and her husband belonged to a back ward community living in a remote area they could not be expected to know that they should rush to a doctor immediately after the occurrence of the incident and in such a situation the non-production of a medical report would not be of much consequence if the other evidence was believable (Sheikh Zakir 1983 Cri LJ 1285 (SC).

**19. Delay in lodging FIR.-** Delay in filing FIR does not adversely affect the prosecution case where a reasonable explanation is given for it (1985 PCrLJ 1142). Where a girl of 14/15 years, was raped by her stepfather and she was afrid for her life so long as she lived in his house and the FIR was lodged three days after the occurrence when she left the house. The prosecution case, if otherwise proved, would not be adversely affected by the delay (1981 SCMR 448). In state of Rajasthan Vs. Narayan (AIR 1992 SC 2004) the Indian Supreme Court held that it would not be proper to throw over-board the prosecutions case only on the ground of delay. The court observed; "True it is that the complaint was lodged two days later but as stated earlier Indian society beeing what it is the victims of such a crime (rape) ordinarily consult relatives and one hesitant to approach the police since it involves the question of morality and chastity of a married woman. A woman and her relatives have to struggle with several situations before deciding to approach the police, more so when the culprit happens to be related. In such a case, therefore, the delay is understandable and hence merely on that account the prosecution version can bot be doubted."

Delay by father in making a complaint of rape on her daughter which involves disgrace in his family is not such as to create infirmity in the prosecution case (1970) 2 MLJ 422). A delay of about ten days with respect to the filing of the first information report in a case of alleged rape was explained as a result of deliberations in the family whether to take the matter which involved the honour of the family to Court or not was held to be reasonable and could be accepted as it was not uncommon that such considerations delay action on the part of the near relations of a young girl who had been raped (Happal Singh v. State 1981 SCC (Cri) 208). It was pointed out on behalf of the appellants that the FIR was delayed but as stated by witnesses it ws to save the honour of a minor girl that the parents never leaked out the information. Rather they went to the doctor of dispensary and there too stated that no one had raped their daughter within dispensary. The police got scent of the occurrence from news paper report. That is how the FIR was written (Harpal Singh vs. State of Himachal Pradesh, 1976 CrLJ 162 (166).

Where the reason for the delay in lodging the first information report was the desire of the parents of the girl who was ravished to save the honour of their daughter, such delay is not fatal to the prosecution case and the conviction can not be held illegal (AIR 1970 SC 1029 = (1970) CrLJ 991).

Where rape was committed on a married woman in the absence of her husband. The mere fact that FIR was filed on the return of the husband in the evening, would not adversely affect the case of the prosecution (1968 PCrLJ 218 SC). FIR was loded by the complainant three days after the commission of the offence and no reasonable explanation for the delay was forthcoming, the case of the prosecution became doubtful (PLD 1980 Pesh 139; 1983 PCrLJ 1287). Where the FIR was delayed and was in fact recorded after the accused had been arrested, it was not relied upon for corroborating the statement of the victim of the rape (1980 PCrLJ 1239).

Delay in reporting a crime to the police and its effects are to be examined in the light of its attending circumstances, in each case. In cases of rape and kidnapping there is generally an element of reluctancy on the part of parents in reporting the matter due to a desire to avoid the glare of undesired publicity. Therefore, delay in making FIR is understandable (PLD 1987 SC (AJK) 9). Immediately after the incident was narrated to the mother and other ladies, a decision was taken to await return of the father before deciding on the course of action. On the arrival of the father the Sarpanch was contacted, who advised that the

police should be informed about the incident. The sarpanch, however, stated that he would accompany them next morning since it was already dark. The girl was taken on the Palampur police station on the next morning and the FIR was lodged. Held, there was no delay in lodging the FIR (AIR 1989 SC 702 (705) = 1989 All Cr. R 175).

In state of Rajsthan v. Narayan (AIr 1992 SC 2994) the Indain Supreme Court held that it would not be proper to throw over-borad the prosecutions case only on the ground of delay. The court observed; "True it is that the complaint was lodged two days later but as stated earlier Indian society being what it is the victims of such a crims (rape) ordinarily consult relatives and one hesitant to morality and chastity of a married woman. A woman and her relatives have to struggle with several situations before deciding to approach the police, more so when the culprit happens to be related. In such a case, therefore, the delay is understandable and hence merely on that account the prosecution version can not be doubted."

For an offence of rape of a young girl of 14 years on 19-7-1984 at 11 A. M.; the female members could not have the courage to go to police station without the permission of the father of the girl who reached the house at 10 A. M., the next day and after pondering over the situation ultimately decided to lodge the F. I. R. Filling of such report could not be held to be delayed (1989 All. Cr. R. 215 (2118).

Where in a rape case there is undue delay of two days in lodging of FIR and no signs of violence have been found on person of accused or prosecutrix, the court would look in for necessity of corroboration, and in its absence accused cannot be convicted for rape without consent (Sheo Prasad v. State of M. P. 1988 (2) Crimes 376 (M. P.). Pratap Mishra v. State of orissa 1977 Cr. LJ 817 (SC) relied on). Dely in filing the F. I. R. was statisfactorily explained. Sexual intercourse was admittedly committed by the accused on the prosecutrix. The Doctor's evidence, was reliable. There was no evidence on consent having been given him so to do. The accused was arrested on being pointed out the flat. While the 1. O. Explained why the asociates of the accused could not be arrested, there is no reason also to disbelieve prosecutrix. Conviction by the trial court was maintained but sentence was reduced to 4 years from seven years (1986) 2 Crimes 417 (Del).

20. **Evidence and proof**.- In rape cases direct evidence is seldom available beyound the evidence of the raped woman (AIR 1955 (UNC) (Raj) 437), and in no cases it is more difficult to arrive at a confident verdict whether evidence is false or true than in cases in which woman allege that they have been outraged or that an outrage has been attemted on them. Not only one has to consider the possibility of deliberate faleshood but those who have to arrive at a verdict have to consider the possibility of unintentional mis-statements produced by hystrical conditions which are apt to be found in cases of this nature (AIR 1924 All 411; 81 Ind Cas 629 ; AIR 1946 All 265; 22 ALJ 162; 5 LRA Cr 65; 25 Cr LJ 931). Conviction under section 376, Penal Code, is justified when it is found that the evidence of the victim of rape was reliable and was also corroborated by the evidence of her father (to whom incident was narrated immediately after occurrence) and the medical opinion (Khiv Singh @ Khem Singh v. State of Rajasthan 1989 (1) Crimes 255 (Raj).

In AIR 1983 SC 753= 1983 Cr LJ 1096 it was held: "A girl or a woman in the tradition hound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her won family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being

shattered. If she is unmarried, she would apprehened that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built in assurance that the charge is genuine rather than fabricated" (1993 Cr. L. J. 767). Accused a police constable and a businessman victim and her husband belonging to labour class. Police constable beating husband of victim and threatening to put him in police remand. Both accused subsequently having sexual intercourse with victim. No suggestion that victim had consented to intercourse out of love or for money. No allegation that she was prostitute. Held, that victim was made to surrender under threat and duress. Mere plea of false implication by accused without showing that victim had animus against accused or they were used by someone else corroborates finding of guilt of accused (State of Maharastra Vs. Prokash AIR 1992 SC 1275).

Where the prosecution evidence is not sufficiently strong to warrant a conviction, it is unsafe to convict merely on the accusation of the woman who has been raped. It is not inconceivable that the real offender may in some cases be screened either because he has bribed the person aggrieved not to accuse him or because the offender is a member of the same family of the person aggrieved (1922 Cr LJ 475; 67 Ind Cas 827).

Offences of kidnapping and gang rape was committed in broad day light. Prosecutrix who had enough opportunity to see accused persons identifying them in indentification parade. Medical evidence showing that she had injuries on her private parts. Evidence of prosecutrix appearing to be truthful need no corroboration. However, such corroboration provided by medical evidence and also FIR lodged by her. Order of acquittal set aside (State of Orissa v. Damburu Naiko (AIR1992 SC 1161).

Accused a police constable and a businessman. Victim and her husband belonging to labour class. Police constable beating husband of victim and threatening to put him in police remand. Both accused subsequently having sexual intercourse with victim. No suggestion that victim had consented to intercourse out of love or for money. No allegation that she was prostitute. Held, that victim was made to surrender under threat and dures. Mere plea of false implication by accused without showing that victim had animus against accused or they were used by someone else corrobarates finding of guilt of accused (State of Maharastra v. Prokash AIR 1992 SC 1275). Where there was the evidence of the victim and her mother and the First Information Report lodged was prompt, and further the story had been corroborated by the playmate of the victim and blood was found on the genitals of the accused and on his clothing, it was held that the guilt was conclusively make out (1976 SCC (Cr) 244; 1976 Cr LR (SC) 144; 1876 UJ SC 283; AIR 1976 SC 1774).

In a case of rape there was no direct reliable evidence as to the commission of the offence, no blood or semen was discovered on the body of the prosecutix and there had been great delay in making the first information report and there was enmity between the parties. All these circumstances combined to raise doubt in favour of the accused to the benefit of which he is entitled (AIR 1916 Lah 292; 33 Ind Cas 630; 17 PWR 1916 Cr; 17 Cr LJ 150).

The conduct of a woman who has been raped is relevent only if she lodges a complaint. If she does not make statement with a view to make a complaint, then that statement will not be admissible in evidence under section 8 of the Evidence

Act. Even if it be held that those statements were in the mature of a complaint and are thus relevant and admissible under section 8 of the Evidence. Act. The point for consideration will be as to what would be the value of those statements; could they be used as the basis for conviction of the accused (1961 Cr LJ 137).

Even if it be held that those statements were admissible under section 8, Evidence Act, they could not be used as the basis for conviction of the appellant under section 376, Penal Code. They cannot be received as substantive evidence of the facts alleged in the Case. They can be used only as evidence of the credibility of the testimony of the complainant, namely the girl, about the facts alleged (1961) Cr LJ 137).

Where a statement is alleged to have been made to her father by a girl upon whom an offence under section 376, Penal Code, was comitted, in the absence of any definite and reliable evidence of the outrage and statement constituted together *res gestae* much value cannot be attached to this statement even if it is held to be admissible (32 Cr LJ 63; AIR 1930 Lah 337; 31 PLR 612; AIR 1938 All 49).

If the girl went to her relatives straight after the occurrence and complained on her own initiative, there is no doubt that her conduct would have a direct bearing upon and connection with the occurrence itself; but if she only answered questions her statement would be mere hearsay (AIR 1926 Pat 58).

If a woman is raped, and decides three days later to commit suicide, the rape is not the cause of her death or transaction resulting in her death, thought it may be the contingent motive, and a statement alleged to have been made by the woman soon after the occurrence cannot be admitted in evidence under section 32 (1), Evidence Act; such a statement can be admitted under section 6, Evidence Act, only if it is so connected with the rape as to form part of the same transaction. Statements made after ravishment by the woman raped are not part of *res gestae* (32 Cr LJ 751; 131 IC 456).

An inferecne adverse to the accused cannot be drawn from the fact that the complainant was very much ashamed and even committed suicide owing to the shame brought on her (1918 Cr LJ 155). In a case of gang rape it is not necessary to prove that rape was committed by each member of the gang (Promod Motho Vs. State of Bihar, 1990 SC Cr. R 1(3). Mere fact that the medical report did not indicate the number of persons committed the rape on the victim is not sufficient to acquit the accused (Balwant Singh vs. State of Punjab, AIR 1987 SC 1080 = 1987 CrLJ 971 (974).

Where the accused committed intercourse with '18 years' girl who did not disclose it out of fear and threat, it was held that her single testimony was sufficient as a witness of the victim being killed by the accused who raped her and killed before her an eight year boy who threntened him with discloure of his act (1977 Cr LR (MP) 109).

Where in a charge of rape, the girl, her mother and three disinterested eye witnesses testified for the prosecution, the girl was 14 years old and medical examination after four or five days no hymen was found, nor any injuries, but the clothe of the girl and the dhoti of the accused were found to be stained with blood, it was held that the direct evidence of the rape was so strong that it was impossible to discard it. The absence of the hymen and the absence of injuries were not sufficient to dispose of the statements of the girl, her mother and three eye-witnesses, only one of whom was shown have to had the very slightest reason for bringing a false case against the accused (36 Cr LJ 1095= 157 IC 147).

In practice, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are conscerned, the other evidence being merely corroborative. Her testimony is vital in a case where the woman is married and the medical evidence in no way corroborates the charge of rape. Even the presence of spermatozoa indicating semen found in the woman's genitals, or on her saree in the case of a married woman who has been several times a mother is by no means final (AIR 1942 Mad 285= 43 Cr LJ 756).

The fact that the prosecutrix, a girl aged 17 to 19 years then, had left the house and had been sitting on the railway platform at about midnight coupled with the medical evidence there was an old rupture on her hymen and that her vagina admitted two fingers easily which was suggestive of habitual sexual intercourse and that there was absence of any injury on her private part would tell its own tale and militate against a theory of rape and would indicate that if the appellant had sexual intercourse with the victim, it might have been with her consent. The doctor, who had examined the appellant had found no signs of recent sexual intercourse. Regard being had to the aforesaid evidene and the circumstances of the case, some stains of human semen noticed by the chemical examiner and the serologist on the clothes of the prosecutrix or on the under-garment of the appellant would be of no consequence in the absence of other evidence pointing to the guilt of the appellant. For the forgoing reasons, the order of conviction of the appellant was set aside (Jhadu Gouda vs. State of Orissa, 1986 (1) CrL.C. 11 (14) Ori).

In a case of rape of an innocent girl of tender age the evidene of the raped girl is of great value and when she makes a statement by way of disclosure immediately after the incident it is a strong piece of evidence of corroboration (Soonalul Bania, 1924 CrLJ 1214).

True, as has been observed in the case of Tukaram v. State of Maharashtra (AIR 1979 SC 185= 1978 Cr LJ 1864), in a case of rape, the onus was always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. But as has been observed in the case of Rafic v. State of U. P. (AIR 1981 SC 559= 1980 Cr LJ 1344), the absence of inuries on the person of the victim girl may not be fatal to the prosecution and corroborative evidence may not be an imperative component of judicial credence, in rape cases. Corroboration as a Condition for judicial reliance on the testimony of a prosecutrix was not a matter of law, but a guidence of prudence under given circumstances. Indeed, from place to place, form a given set of facts, oral and circumstantial may have to be drawn not with dead uniformity, but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds regarding the presence or absence of injuries on the person of aggressor of the aggressed. The Court cannot cling to a fossil formula and insist on corroborative testimony, even if, taken as a whole, the case spoken to by the victim strikes a judicial mind as proable.

The first and foremost circumstance that can be looked for in case of rape is the evidence of resistance which one would normally expect from a woman unwilling to yield to sexual intercourse forced upon her. Such a resistance may lead to the learing of clothes, the infliction of personal injuries and even injuries on her private parts. Where the statement of the victim girl was very convincing and was fully supported by circumstancial as well as medical evidence showing her having offered strong resistane to the accused. The accused must be convicted (1980 PCrLJ 1023 = PLJ 1980 AJ&K (SC) 130). In a case the prosecutrix and her husband belonged to backward comunty living in a remote area and as such, they could not be expected to know that they should rush to the doctor after the incident. The absence of injuries

on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering any serious physical resistence she cannot be disbelived. In this situation the non production of a medical report would not be of much consequence if the other evidence on record is believable(Sheikh Zakir Vs. State 1983 CrLJ 1285 (SC).

Prosecutrix is duty bound to send blood stained clothes of prosecutrix recovered by investigating officer for chemical examination where appraisal of evidence conducted by Courts below was found to be perfectly in accordance with legal norms and was suffering from no infirmity failure of prosecution to send clothes of prosecutrix to chemical examiner, held, would lose importance and would have no adverse effect on case of prosecution, in circumstances (PLD 1987 SC (AJ & K) 9).

In 1975 SCMR 69 it was held that mere absence of mark of injury of violence on prosecutrix would not imply non-commission of rape and nor possible for a girl of 12/13 years to falsely implicate in cases of such type.

In a case of pregnant lady sleeping in the night on the cot, two accused persons entered the hut, lifted her from the cot put her on the ground in a supine position and committed rape. Explaining the absence of injury, the Court observed, the rapists were two in number, and had pinned her on the ground and gagged her when the other ravished her. Further she did not put up stiff resistance to ensure no damage to the baby in womb (1986) 1 Crimes 733).

Where according to medical examination of the prosecutrix it is quite clear that she is a woman of easy virtue who has had sexual intercourse with many persons. If she had resisted at the time of rape then some marks of violence should have been found on her person but the evidence to that effect was lacking. Conviction of the accused was set aside (1977 PCrLJ 785). Where evidence on the record was inconclusive and there was no independent evidence in support of the statement of the prosecutrix and absolutely no evidence on the record of any struggle having taken place nor were there any marks of injuries, except a few scratches on the face of the complainant but none on other parts of her body or on the accused. Accused was acquitted (1985 PSC 562).

Where there is sufficient direct evidence of commission of rape, the mere omission on the part of investigating officer to send trousers of the prosecutrix for chemical examination for a finding as to the presence of seminal stains to support the charge of rape, would not justify rejection of other evidence on record (1980 PCrLJ 1023=PLJ 1980 AJ&K (SC) 138). Where prosecutrix was detained at police station for one night and no plausible explanation was available as to why she was not got examined medically on the day of her recovery. Positive result received from chemical examiner regarding vaginal swabs taken by lady Doctor were held to be of no value (1982 PCrLJ 625).

Where the prosecutrix immediately after the occurrence narrated the story to two witnesses. Evidence of such witnesses could be used as necessary corroboration to the statement of the victim. Resistance put up by the victim was proved by the injuries suffered by her in the struggle. Statement of the victim that she was raped by the accused, four in number, was further corroborated by medical evidence to the effect that she was subjected to repeated sexual intercourse (PLD 1979 Lah 155 = PLJ 1978 Cr. C 564). Where the ravished girl soon after the occurrence, commits suicide by setting fire to her body ultimately resulting in her death, the statements cannot be admissible under section 32 (1), as the rape on girl cannot be said to be

the cause of her death or transaction resulting in her death. It might have been the motive which led her to set fire to her body. The case is not covered by section 32, Illus (a) (1961 Cr LJ 137).

The statement of the girl to her mother and the neighbours shortly after the incident complaining against the accused is corroborative evidence under section 157 and Illustration (j) or section 8 of Evidence Act. Mere finding of spermatozoa on the quilt of the accused may not by itself have much evidentiary value but it is a strong piece of evidence when taken with the evidence given by the girl that the accused had raped her on the quilt (AIR 1940 Cal 461; 44 CWN 830).

In the Case of a rape of an innocent girl of tender age, the evidence of the ravished girl is of great value and where she makes a statement by way of disclosure immediately after occasion, it is a strong piece of evidence corroborating her credibillity and proving the consistence of her conduct and also as negating consent on her part (1924 Cr LJ 1214).

The previous statement of the complainant at about the time of occurrence is legally admissible and relevant as evidence of conduct under section 8 of the Evidence Act. It is also admissible as corroboration of the Evidence of the complainant in court under section 157 of the Evidence Act. What weight is to be attached to such a statement is, of course, a different matter. In some cases its weight may be nil, but in other cases, where corroboration is not essential to a conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. This depends upon the facts of each case (1963) 1 Cr LJ 310; AIR 1963 Orissa 58; 1963 Cut LT 540; AIR 1983 SC 911).

The accused who was convicted for an offence under Section 376, for rape on a girl of 4 years of age was acquitted in appeal. The offence was committed when the mother of the girl had gone out to wash clothes. The mother deposed that when she returned home she saw the girl answering call of nature outside in the open and on seeing her she began crying and on questioning, she told her that the accused had placed her on his lap and blood came out. The other circumstances in the case were that the private parts of the girl did show that she had been raped and further that the stains of blood and semen on the clothing of the accused strongly suggested that he could be the offender. It was held that all the circumstances put together would necessarily lead to the only conclusion that it was the accused who had committed the offence and hence the order of acquittal should be set aside. It was also held that though evidence of statements made to her mother of the girl could not be given evidence of her and the mother's conduct was relevant under second part of section 8 of Evidence Act. Further mere absence of semen on the clothing of the girl or in the vaginal swab or the request of the girl's father to the Doctor to give anti-tetanus injection to her did not mean that the rape was not committed (AIR 1965 Bom 154= (1965) 2 Cr LJ 349).

No semen was found on the swabs taken from the prosecutrix. The absence of injuries on her private parts or any other part of her body would negate any force used aginst her in dragging her or throwing her on the hard ground of the sugarcane field, which were essential in case of any resistance by her. The admission of two fingers in her vagina also believed her claim that she was a virgin. Anyhow with deformity delected in the organs of the appellant he could not have succeeded in accomplishing the sexual act without her consent. The accused was acquitted (1976 PCrLJ 719).

Where the medical officer clearly stated that death of the victim had not resulted from the sex act as the body of the deceased was developed enough to

withstand the act; and it was not ruled out by the medical evidence that the girl might have died of dread and fright; it would not be in consonance with principles of safe administraion of justice to hold the appellant guilty of murder. The accused was convicted under section 376 read with section 304 (NLR 1981 Cr 103 (Lah); AIR 1992 SC 2004).

Merely because the number of persons who committed rape on the prosecutrix could not be specified, the conviction of the appelants would not be illegal, specially where the evidence of the prosecutrix was consistent with the medical report, it would also be wrong to accept that because of the enmity of the father of the prosecutrix against the appellants they had been falsely implicated in the case (Balwant Singh 1987 Cri LJ 971 (SC).

Where is a case under section 376, Penal Code, the story of rape has been substantially corroborated by a number of witness and the circumstances and the medical evidence also partly supports the prosecution case, the evidence of the prosecutrix supported by other direct evidence also should be taken as conclusive in the case (1965 Cut LT 909).

Where there was the evidence of the victim and her mother and the F. I. R. lodged was prompt, and further the story had been corroborated by the playmat of the victim and blood was found on the genitals of the accused and on his clothing, it was held that the guilt was conclusively make out (1976) SCC (Cr) 244= 1976 Cr LR (SC) 144= (1976) UJ (SC) 283= AIR 1976 SC 1774). Where the accused committed intercourse with '18 years' girl who did not disclose it out of fear and threat, it was held that her single testimony was sufficient as a witness of the victim being killed by the accused who raped her and killed before her an eight year boy who threatened him with disclosure of his act (1977 Cr LR (MP) 109).

Consent of the prosecutrix in case of a rape is immaterial in view of section 375 fifthly as a raped woman is not treated an accomplice, Sexual intercourse in the instant case took place on account of a promise given to marry her. Where her evidence is corroborated by a medical report no further corroboration is called for (1985) 1 Crimes 505 (Cal).

In practice, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are concerned, the other evidence being merely corroborative. Her testimony is vital in case where the woman is married and the medical evidence in no way corroborates the charge of rape. Even the presence of spermatozoa indicating semen found in the woman's genitals, or on her saree in the case of a married woman who has been several times a mother, is by on means final (AIR 1942 Mad 285; 43 Cr LJ 756).

Although all mothers may not be considered to be independent witnesses for the purpose of corroboration of the testimony of prosecutrix, yet a mother merely by reason of her interest would not be dubbed as unreliable. It will depend on the facts and circumstances of each case and in some cases at least the mother may be regarded as an independent witness, for the purpose of corroborating testimony of the prosecutrix. Thus, a mother need not be discarded outright, but her testimony can be used in corroboration of the testimony of the prosecutrix in narrating the incident to her mother (1970 MPLJ 242). Failure to examine material witness throws complete doubt on prosecution case and the accused is entitled to the benefit of doubt in such a situation (Amar Dev vs. State of H.P. 1989 (2) Crimes 664 (668) (HP).

The previous statement of the complainant at about the time of occurrence is legally admissible and relevant as evidence of conduct under section 8 of the

Evidence Act. It is also admissible as corroboration of the evidence of the complainant in court under section 157 of the Evidnece Act. What weight is to be attached to such a statement is, of course, a different matter. In some cases its weight may be nil, but in other cases, where corroboration is not essential to a conviction, conduct of this kind may be more than enough in iteself to jurstify acceptance of the complainants story. This depends upon the facts of each case (1963) 1 Cr LJ 310; AIR 1963 Orissa 58; 163 Cut LT 540). If a woman is raped, and decides three days later to commit suicide, the rape is not the cause of her death or transaction resulting in her death, though it may be the contingent motive, and a statement alleged to have been made by the woman soon after the occurrence cannot be admitted in evidence under Section 6, Evidence Act only if it is so connected with the rape as to form part of the same transaction. Statements made after ravish ment by the woman raped are not part of *res gestae* (32 Cr LJ 751; 131 IC 456).

Even if it be held that those statements were admissible under section 8, Evidence Act, they could not be used as the basis for convictionof the appellant under section 376, P. C. They cannot be received as substantive evidence of the facts alleged in the case. They can be used only as evidence of the credibility of the testimony of the complainant, namely the girl, about the facts alleged (1961 Cr LJ 137).

Cases instituted under section 376, P. C. under Indian conditions are normally genuine as in most of the cases the complaints do not come forward to put forward the case (1984 SC Cr R 25).

Where the accused were alleged to have raped the prosecutrix, a pregnant woman in her fifth month, and the opinion of the doctors examined in the case was that if three persons had forcible intercourse with a pregnant woman one after the other the abortion which occurs would be immediated due to shock and not after some days as in the instant case and the opinion of medical experts show, that it is very difficult for any person to rape single handed a grown up and an experienced woman without meeting stiffest possible resistance it was held that the sbsence of any injuries either on the accused or the prosecutrix showed that she did not put up any resistance to the alleged rape committed by the accused and thus the irresistible inference would be that she was a consenting party which was also reinforced by other circumstances in the case (Pratap Misra, 1977 Cri LJ 817 (SC)= 1977 SCC (Cri) 447).

Where the prosecutrix, taken away by the relatives of his elder daughter's husband to look after her elder sister for some time, and on her failure to return to the village he wrote two letters to the accused requesting him to send the girl back but received no reply, and later on he learnt that the prosecutrix had been 'married' to the appellant and on hearing the same he lodged a report with the police alleging that the accused persons had kidnapped his daughter and forced her to have illicit intercourse with the appellant and when the girl was recovered from the house of the appellant, she stated that she had been forcibly raped by the appellant for several nights in the appellants house and the same was corroborated by the medical evidence in the case, it was held that the accused was guilty of rape (Bishnudayal Vs. State 1981 SCC (Cri) 283).

The expression of law that in a case of rape the statement made by the complainant immediately after the occurrence to her mother is admissible not as an evidence of truth of the charge but as corroborating the credibility of the complainant is confused and contrary to the well-settled position decided in Rameslwar Kalyam Singh v. State of Rajasthan (AIR 1952 SC 54). Where the girl soon

after the crime informed her parents that the accused raped her and caused injury and there was some admisson of the accused coupled with the injuries on the person of the accused and the blood stains on his dhoti, the accused was convicted for the offence of rape (Nath, AIR 1951 Ajmeer 60= 52 CrLJ 584).

"We must bear in mind human psychology and behavioural probablity when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts of clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual agression are factors which are relevant to improbabilise the hypothesis of false implication. The in jury on the person of the victim, especially her private parts and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other childern. in the open will come by blood on her garments and injury in her private parts unless she has been subjected to the torture of rape. And if rape has been committed, as counsel more or les conceded, why, of all persons in the world, should the victim hunt up the petitioner and point at him the accusing finger? To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common-sense in favour of an articicial concoction called "judicial" probability. Indeed, the Court loses its credibility if it rebels against realism. The law court is not an unnatural world." (Krishan Lal v. state of Horyana, AIR 1980 SC 1252; 1980 CrLJ 926).

21. **Punishment.**- In crimes of violence upon women a detrrent sentence is called for so as to prevent recurrence of such cases (Radhya Sham Vs. State of J&K 1988 (1) Crimes 291 (J&K).

The measure of punishment for an offence of rape under section 376 of the Penal Code should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of injured female. The fact that the family of the injured girl have condoned the offence on being paid a sum of money should not be taken into consideration in determining the heinousness of the offence, or of the punishment to be inflicted (1920 CrLJ 64 = 1924 CrLJ 1214).

When people convicted of heinous crimes are let off with minor sentences, the impression goes round that such crimes can be committed with impunity. It might even appear to the public at large as if crime is being patronised. This creates a sense of dismay and insecurity in the peace loving and law abiding citizens. Courts of law while punishing such convicts should award deterrent sentences so that it is manifest that society as well as the state do not countenance such crimes and react strongly through Courts of law (PLD 1986 SC 82). When such crime is committed by a person in authority e.g., a police officer, the Court's approach should not be the same as in any other case involving a private citizen (AIR 1990 SC 658 (660).

Where the accused was a young boy of 22 years and not a habitual offender sentence of 4 years R.I. was held to be harsh and reduced to 2 years (Phul Singh Vs. State AIR 1980 SC 249 = 1980 CrLJ 8).

Police officer committed rape on a young girl in her late teens. There was no room for sympathy or pity. Punishment must in such cases be exemplary. Sentence of 5 years R.I. and fine of Rs. 1000 was held proper (State of Maharashtra vs. Chandra Prokash Kewalchand Jain, AIR 1990 SC 658 (660). Considering that there is an alarming and shocking increase of sexual offences committed on children, such offenders who are menace to the civilised society should be mercilessly and inexorably punished in the severest terms (Madan Gopal Kakkad vs. Naval Dubey and

another 1992 (1) Crimes 168 (170). Where there are no special circumstances to call for the imposition of maximum sentence of imprisonment for life, the ends of justice would be met by awarding the minimum sentence of ten years R.I. as it is by itself a severe punishment (Pramod Mahto vs. State of Bihar, 1989 CrLJ 1479 (1481) (SC) = AIR 1989 SC 1475 = 1989 East Cr. C 463 = 1989 All Cr. R 622).

A sentence of six months rigorous imprisonment on an accused for a rape of a six year old girl is too short a term of mprisonment considering the beastliness of the crime (Ram Krishan Aggarwala Vs. State 1976 SCC (Cri) 244). When an offence of rape is proved, that too on girls of very tender age and innocent behaviour, the sentence of imprisonment should be imposed with severity. Sentencing the appellant only for three years just amounts to sending him to a picnic as was done by the trial Court in this case but since the stated had not challenged the sentence, it was not enhanced (Imratlal Vs. State MP 1987 crLJ 557 (MP). Sentence is a matter of discretion with the trial Court, unless the sentence awarded is so grossly inadequate, the High Court normally will not interfer and particularly so in cases where the state has not chosen to apply for enhancement of sentence (1966 CrLJ 210 Ker).

Where rape was committed on a girl of 7/8 years of age and that too belonging to weaker section of the society are Harijan, it was held that no liberal view could be taken and sentence of five yars' R.I. could not be reduced on the ground that the accused was of 19 years of age. It was further held that as the accused was of 18 years of age at the time of commission of the offence it would be in the interest of justice to enhance the sentence (1984 CrLJ 788 (Raj).

Where a boy of 13 committed rape on child of 2, sentence of four years was reduced to one already undergone (1977 CrLR (MP) 173).

Where even after the occurrence, the prosecutrix was living in the house of the appellant and give birth to a child from the baisson. In spite of the ample time granted, neither the appellant or any-lady else has produced any material or evidence in regard to these post-occurrence developments which, if established, could be taken into account in fixing the quantum of punishment (AIR 1981 SC 39 = 1980 CrLJ 1297).

Where prosecutrix though below 16 years, was a willing party and in fact proposal of her marriage with the accused was turned down by her mother only because she was too young, lenient sentence was held justified (1984 CrLJ 852 Bom).The accused lost his job in view of conviction and must have suffered humiliation in the society. The proceeding in the Court took about 7 years. The prospects of getting a suitable match for his own daughter have perhpas been marred on in view of the tigma. Taking into account the cumulative effect of these circumstances and an overall view of the matter, the ends of justice will satisfied of the substantive sentence imposed by the High court for the offence under section 376 read with section 511 is reduced from one of seven and half years R.I. to one of 15 months. R.I. (1983 CrLJ 1096 SC).

The accused aged thirteen years, was convicted for committing rape on a child of two years and was sentenced to four years's rigorous imprisonment. Taking into account all the circumstances of the case, the Supreme Court in appeal held that the ends of justice will be served by reducing the sentence of the appellant to one year's rigorous imprisonment and a fine of Rs. 2,000 (Kakoo vs. State of Himachal Pradesh, 1970 CrLJ 1545 (1545-46 (SC) = AIR 1976 SC 1991 = 1976 SCC (Cr) 27).

Where prosecutrix was unmarried but in habit of sexual intercourse. It was held that sentence of 3 years will meet ends of justice (1987 CrLR 26 MP).

A relative of the victim was a witness of rape. He lived opposite to the house of the accused. Medical examination showed signs of sexual intercourse with the victim who had no animosity with the accused who was sentenced to seven years's R.I. On appeal conviction was maintained. On the question of sentence Court found that the appellant was not monetarily well off and had small children. Long term would ruin the family. The sentence was reduced to three years R.I. (1984 (2) Crimes 490).

When a person in uniform commits a serious crime like rape on a young girl in her late teens, there was no room for sympathy or pity. The punishment in such cases must be exemplary. There was no justification in reducing the sentence awarded by the trial Court (State of Maharashtra vs. Chandra Prakash Kewal chand Jain, 1990 CrLJ 889 (SC) DB). Accused 25 years old, committed rape on a 10 years old helpless girl. It was held sentence of 10 years R.I. was not harsh (Gordhan vs. State 1987 CrLR (Raj) 797).

The factors like the character or reutation of the victim are wholly alien to the very scope and object of section 376 and can never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence with the aid of the proviso to section 376(2). Thus where the Supreme Court in its judgment (see AIR 1989 SC 937) had used the expression 'conduct' in the lexigraphical meaning for the limited purpose of showing as to how the victim had behaved or conducted herself in not telling anyone for about 5 days about the sexual assault perpetrated on her and it was observed that 'the peculiar facts and circumstances of the case coupled with the conduct of the victim girl do not call for the minimum sentence as prescribed under section 376(2)', it could be said that the Supreme Court neither characterised the victim, as a woman of questionable character and easy virtue nor made any reference to her character or reputation (State of Haryana, Vs. Prem Chand AIR 1990 SC 538).

22. C**harge.**- The charge should run as follows :-

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

That you, on or about the ..... day of..... at ..... committed rape on X and thereby committed an offence punishable under section 376 of the Penal Code and within my cognizance.

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

Where the accused instead of trying to prevent the crime or apprehend the criminal themselves by their conduct aided and abetted the comission of rape by keeping a watch so that some one else may not come and prevents it were liable to be convicted under section 376 read with section 109 in place of section 376 read with section 34 (Nawabkhan Vs. The State 1990 CrLJ 1179 MP).

In Babulal Vs. State of Madhya Pradesh (AIR 1960 MP 155 = 1960 CrLJ 612), the accused had caught hold of the girl and assaulted her with a stick. He felled her down on the ground forcibly, snatched her lugra and thereby made her naked. The cries of the girl attracted her uncle who came on the spot. On seeing him the accused ran away. Held, the facts did not show that the accused was determined to have intercourse at all events because as soon as he saw the uncle of the prosecutrix, he ran away. Further, he only made the girl naked. He did not expose nor attempted to expose his private part. It was not a case of attempt to commit rape but one under section 354, Penal Code.

In a case, dead hour of the night, when other family members including the prosecutrix were sleeping, the petitioner entered into house of the prosecutrix and

caught hold of her breast and even opened the lac of her salwar which she was wearing. On these facts and circumstances the Court cannot be said to have committed any illegality in framing a charge under section 376 read with section 511, Penal Code, along with the charge under section 456, Penal Code (Yusuf Ali vs. State (1988) 15 Reports (Raj) 289).

**Of Unnatural Offences**

377. **Unnatural offences.**-Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [1][imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liale to fine.

**Explanation.**-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

**Synopsis**

1. Scope and application.
2. Bestiality.
3. Act of committing intercourse between thighs.
4. Penetration.
5. Evidence and proof.
6. Corrobroation.
7. Punishment.

1. **Scope and application.**- Words used in section 377 of Penal Code are quite comprehensive and an act like putting male organ into victim's mouth which was an initiative not of sexual intercourse for the purpose of satisfying the sexual appetite would be an act punishable under this provision (Calvin Francis Vs. State of Orissa 1992 (2) Crimes 455).

This section punishes certain persons who have carnal intercourse against nature with human beings. The unnatural offences are sodomy and bestiality. Sodomy consists of connection per anum with any other person and bestiality consists in either the male or female human being with an animal and takes place usually through the vagina but it may also take place through the vagina, anus or any other part of the body fit to receive the male organ (1935 CrLJ 718). Where the male organ is inserted or thrusted between the thighs there is penetration to constitute an offence under section 377, Penal Code (1969 CrLJ 818). From a plain reading of the definition of the offence of sodomy as described in the section along with the explanation it reveals that one of the essential ingredients of the offence is among others, that penetration has been effected. Though the degree and extent of penetration is not necessary to be proved to constitute the offence under section 377 of the Penal Code, but some sort of penetration however little, must be strictly proved to support the charge of sodomy and the evidence must be very convincing (Nur Mohammad vs. The State 41 DLR (1989) 301 (Para 7) = 1989 BLD 314).

Where the accused was proved to have had carnal intercourse by placing his penis into nostril of a bullock, it was held that he was guilty of the offence under this section (Khandu vs. Empeor, AIR 1934 Lah 261= 35 CrLJ 1096). Putting the male organ into the mouth of a boy constitutes an offence under section 377, Penal Code (Lahana Vasantalal deochand Vs. State, AIR 1968 Guj 252 = 1968 CrLJ 1277).

In case of un-natural offences consent is hearldy of any consequence (State of MP Vs. Rampal Singh 1989 (2) Crimes 84 MP). Allegations in the prosecution case against accused that he put his penis into the mouth of a minor girl and also attempted to penetrate his penis in her private parts *prima facie* inculpates him for

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

offences under section 376, 377 r/w 511 Penal Code and not only for offence under section 354, Penal Code (Kertar Singh Vs. State 1993 (1) Crimes 569 Delhi).

The question for determination was whether the accused could have been convicted of the offence under section 377 read with section 511 of the Penal Code, on account of his act of putting his male organ in the mouth of the victim, if that act was done by him voluntarily. The contention was that no offence under section 377 of the Penal Code could be said to have been established on account of such an act, as it could not be said that there was any penetration and if there is no penetration, there would not be any carnal intercourse, just like a kiss, it being only done to stimulate a desire to have a carnal intercourse. It was held that under section 377 of the Penal Code, even mere penetration will be sufficient to constitute the carnal intercourses. There need not be necessarily a seminal discharge for constituting the carnal intercourse. Admittedly, this act of the accused was done voluntarily and orifice of the mouth is not naturally meant for having such carnal intercourse. It could, therefore, without any doubt, be said that this act will be against the order of nature. In the instant cse, it could hardly be said that the act was a preclude to sexual intercourse i.e. it was with a view to excite passion for having sexual intercourse. The accused voluntarily did not act in question by putting his male organ in the mouth of the boy and there was also a seminal discharge and the boy had to vomit it out. It is, therfore, evident that this act was the actual replacement of the desire of coitus (AIR 1968 Guj 252 = 1968 CrLJ 1277).

It is true that in the Penal Code, there is no such statutory definition of sodomy. The general words used are, "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be committing the offence under section 377 of the Penal Code," words used are quite comprehensive and an act like putting male organ into victim's mouth which was an initiative act of sexual intercourse for the purpose of his satisfying the sexual appetite, would be an act, punishable under section 377 of the Penal Code (AIR 1968 Guj 252=1968 CrLJ 1277).

2. **Bestiality.**- Bestiality consists of unnatural intercourse by either a male or female human being with an animal and is punishable under section 377, Penal Code. Intercourse usually takes place per vaginam. It may also take place through the anus or any other part of the body fit to receive male organ. Carnal intercourse with a bullock through nose is an unnatural offence and punishable under section 377, Penal Code (35 CrLJ 1096).

3. **Act of committing intercourse between thighs.**- The act of committing intercourse between the thighs is carnal intercourse against the order of nature. Therefore, committing intercourse by inserting the male organ between the thighs of another is an unnatural offence (1969 CrLJ 818 = 1968 Ker LJ 405).

4. **Penetration.**- What is sought to be conveyed by the explanation is that even mere penetration will be sufficient to constitute carnal intercourse, necessary to the offence referred to in section 377 of the Penal Code. Seminal discharge i.e. the full act of intercourse is not the essential ingredient to constitute an offence in question (1968 CrLJ 1277 = AIR 1968 Guj 252).

Where there was an entry of a male penis in the orifice of the mouth of the victim, it was held that as there was overlapping of a visiting member by the visited organism, an offence under section 377, Penal Code, was committed (1968 CrLJ 1277 = AIR 1968 Guj 252).

It must further be remembered that though penetration is necessary for an offence under section 377 yet it is not necessary that there should be actual

penetration per anus or in a legal sense attempt at such penetration. Where the accused catching hold of a boy of 11 or 12 years threw him down on the ground with his face upwards, formed a cavity between his things and then entered his male organ into the cavity and after discharge of semen got up. It was held that the accused was guilty of an offence under section 377 of the Penal Code. The entry of the male organ of the accused into the artificial cavity between the thighs of the boy amounted to penetration and to carnal intercourse. There was carnal intercourse as the visiting organ was enveloped by the visited organs namely the thighs of the boy (PLD 1961 Dhaka 477).

Where no penetration is proved at all, the mere presence of semen on the anus of the victim and on the clothes of the accused and the victim is not sufficient for conviction under section 377 (PLD 1951 Bal 22).

Attempt to commit unnatural offence : The offence made punishable under section 377 requires that penetration, however little, should be poroved strictly. An attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. A mere preparation for the act should not necessarily be construed as an attempt (1966 LN 27 Lah). Where the witnesses found respondent naked at that time while boy was also naked and lying on ground with face downward. Evidence showed only stage of preparation rather than an attempt or commit the offence (KLR 1985 Cr. C. 222).

The offence under this section requires penetration, however little. Hence, an attempt to commit this offence should be an attempt to thrust the male organ of the offender into the anus of the passive agent. A mere preparation for the operation is not enough. Where, therefore, the offender made every preparation to satisfy his lust by carnal intercourse but he spent himself before he could thrust his organ in, he cannot be held guilty of an attempt to commit this offence (Nowshirwan Irani Vs. Emperor, AIR 1934 Sind 206 = 36 CrLJ 718).

5. **Evidence and proof.**- Evidence to support a charge under section 377, Penal Code must be very convincing as it is very easy to bring such a charge but extremely difficult to refuse it. The guilt of a person accused of a crime has to be established by the evidence for the prosecution and not by the weakness of the defence (27 CrLJ 593 Lah). True it is that such a disgraceful act of perpetration of sodomy is not done in presence of others and hence the prosecution is not expected to produce eye witness regarding the commission of the offence. But the prosecution is not absolved to the burden to produce such materials or evidence which may lead support to the evidence of P.W. 1 leading to the inference that he was sodomised by the accused petitioner. Thus the P.W. 1 is that he went to the house of the accused-petitioner to fetch medicine, that he came back home crying or that there was any mark of assault on the anus of P.W. 1 have remained uncorroborated. Moreover, the prosecution has failed to produce any medicine report or doctor to prove the charge of the commission of unnatural offence to ascertain the condition of the person on whom the act of sodomy was said to have been perpetrated or, at any rate, to get some proof as to the condition of the anus of the victim immediately after the alleged act of unnatural intercourse (Nur Mohammad vs. The State 41 DLR (1989) 301 (para 12)= 1989 BLD 314). Medical report is very vital and the absence of medical report about sodomy casts a serious doubt on the prosecution case (Ibid).

Where in a case, there is a satisfactory evidence produced by the prosecution to establish the offence under section 377, Penal Code, against the accused and in the circumstances the *alibi* put forward by them cannot be accepted. It is easy to take the plea of *alibi* but very difficult to prove it. The alibi must show that the accused

were not physically present at the place and time where the offence was alleged to have been committed but were physically present elsewhere (1967 CrLJ 889= AIR 1967 J & K 73).

In a case under section 377, Penal Code, where the story by itself look quite unnatural it is not safe to convict a person on the bare testimony of the victim of the offence more especially when the medical evidence lends as corroboration to his version (1985) 1 Crimes 77 (HP).

A police officer was alleged to have committed sodomy on a minor boy within the premises of the police station. Prosecution story looked quite improbable. The defence plea was of false implication by the S.H.O. inimical to him. The medical evidence did not support the prosecution case. The victim has tendered a solitary testimony. It was found doubtful. The officer had put in about 22 years of police service. Benefit of doubt was givne to him (1985) 1 Crimes 77 (HP).

It should be noted that the other party to the offence in this case, if a rational being, would naturally be an abettor, and, according to the well established practice of the courts, his testimony should not, except in special circumstances, be acted upon, unless it is corroborated in material particulars (Ganpat vs. Emperor, AIR 1918 Lah 352= 39 CrLJ 946). But there is no inflexible rule that there can be no conviction on the uncorroborated testimony of the subject of the offence even if there is no reasonable doubt in the mind of the Judge asto the guilt of the accused. Though corrobroation is ordinarily required, it may be dispensed with in exceptional cases, and a conviction based on the uncorrborated testimony to the subject of the offence is not illegal (Emperor Vs. Kaku Moshgul, AIR 1941 Sind 33 (34-35) = 45 CrLJ 650).

6. **Corroboration.**- Conviction based on uncorrobroated testimony of the victim of the offence cannot be said to be illegal. It is only as a rule of prudence that corroboration may be sought (1968 CrLJ 1277 = AIR 1968 Guj 252).

7. **Punishment.**- In judging the depravity of the action for determining quantum of sentence, all aspect of the matter must be kept in view. Having examined all the relevant aspects bearing on the question of nature of offence and quantum of sentence, substantive sentence was reduced to R.I. for 6 months (1983 crLJ 632 = AIR 1983 SC 323 = 1982 CrLR (SC) 564).

Where the appellant was convicted under section 377 for having committed an unnatural offence upon a young boy who had come to his house to take a syringe, it was held that though the offence under section 377 implied sexual perversity, no force was used in the instant case and even though the notion of a permissive society or the fact that in some countries homosexuality has ceased to be an offence could not affect judicial thinking in our country, there could still be some scope for modification of sentence in this case by reducing the imprisonment period of 3 years awarded by the trial Court to one of six months (Fazal Rab Choudhury Vs. State 1982 SCC (Cri) 529=1983 CrLJ 632 SC).

Where the appellant, a highly educated and cultured invididual, was suffering from mental aberration when he committed the offence of sodomy and that, as a result of his conviction, he would suffer loss of service and serious consequences to his career, while confirming his conviction, the sentence was reduced to the period fo two months already undergone (Chitranjan Das Vs. State 1975 CrLJ 30 SC).