CHAPTER 1

INTRODUCTION

History of Criminal Law in India and Pakistan.—Under the Moghul rule the Muslim Criminal law was administered by the *Kazis* in the Courts of the country. The Quran was the repository of both Civil and Criminal law.

The English came to India for the purpose of trade and commerce. When they were very successful Queen Elizabeth granted, in 1600, a Charter incorporating the East India Company. The Charter gave the Company exclusive right of trading to all parts of Asia, Africa and America. It also empowered the Company to make laws. In 1609, James I renewed the Charter, and in 1661 Charles II gave similar powers while renewing it.

The Charter of 1668 vested the management of Bombay in the East India Company which regulated the proceedings of the Court on the line of English Courts. The Court of Judicature was established in 1672. It sat once a month for its general sessions and any cases that remained undisposed of were adjourned to "Petty Sessions" which were held after general sessions. This Court inflicted punishment of slavery in cases of theft and robbery. In ordinary cases of theft the offender had to pay monetary compensation, or else he was forced to work for the owner of the article stolen.

In 1683, Charles II granted a further Charter for establishing a Court of Judicature at such places as the Company might decide. In 1687, another Charter was granted by which a Mayor and Corporation were established at Fort St. George, Madras, in order to settle small disputes. By these Charters Englishmen who came to India were entrusted with the administration of both civil and criminal justice. In these Courts the powers exercised by the authorities were very arbitrary. Strange charges were framed and strange punishments were inflicted.

In 1726, the Court of Directors made a representation to the Crown for proper administration of justice in India in Civil and Criminal matters. Thereupon, Mayors' Courts were established for proper administration of justice. But the laws administered were arbitrary because the Mayor and Aldermen were the Company's mercantile servants, and they possessed very little legal knowledge. The law that was administered did not suit to the social conditions of either the Muslims or the Hindus.

In 1753, another Charter was passed under which Mayors were not empowered to try suits between the Indians ; and no person was entitled to sit as a judge who had an interest in the suit. English law was no more applicable to the Indians, and they were left to be governed by their own laws and customs.

In 1765, Lord Clive came to India for the third time and succeeded in obtaining the grant of *Dewani* from the Moghul Emperor. The grant of *Dewani* included not only the holding of *Dewani* Courts, but the *Nizamat* also, *i e.* the right of superintending the whole administration in Bengal, Bihar and Orissa.

In 1772, Warren Hastings took steps for proper administration of Criminal justice. A *Fouzdari Adalat* was established in each district for the trial of criminal offences. With these Courts the Company's European subjects had no connection, nor did they interfere with their administration. The *Kazi* or *Mufti* presided over these Courts. In addition to the district Courts a *Sudder Nizamat Adalat* was also established. This Court heard appeals against the decision of the district Courts. The officers presiding over these Courts were assisted by Muslim Law Officers. The scheme of justice adopted by Warren Hastings had two main features. First, he did not apply the English law to the Indian provinces ; and, secondly, Hindu and Muslim laws were treated equally. The administration of Criminal justice remained in the hands of *Nawabs,* and therefore, Muslim criminal law remained in force. These were the Courts in the Capital. In the rest of the country the administration of justice was in the hands of the *zemindars*. In Bengal and Madras, Muslim criminal

law was in force. In the Bombay Presidency, Hindu criminal law applied to the Hindus, and Muslim criminal law to the Muslims. The Hindu criminal law was a system of despotism and priestcraft. It did not put all men on equal footing in the eye of law, and the punishments were discriminatory.

In 1773, the Regulating Act was passed which affected the administration of criminal justice. Under that Act a Governor General was appointed and he was to be assisted by four Councillors. A Supreme Court of Judicature was established at Fort William, Bengal which took cognisance of all matters, civil, criminal, admiralty, and ecclesiastical. An appeal against the judgment of the Supreme Court lay to the King-in-Council. All offences which were to be tried by the Supreme Court were to be tried by a jury of British subjects resident in Calcutta. Any crime committed either by the Governor-General, a Governor, or a Judge of the Supreme Court, was triable by the King's Bench in England. The Charter of Justice that laid the foundations of the jurisdiction of the Supreme Court was dated March 26, 1774 and the justice administered in Calcutta remained so until the establishment of the High Court under the Act of 1861.

In 1781, an Amending Act was passed to remedy the defects of the Regulating Act. The Act expressly laid down and defined the powers of the Governor-General in Council to constitute provincial Courts of justice and to appoint a Committee to hear appeals therefrom. The Governor-General was empowered to frame regulations for the guidance of these Courts. The Muslim Criminal law was then applicable both to the Hindus and the Muslims in Bengal.

In 1793, towards the close of Lord Cornwallis' Governor-Generalship, fresh steps were taken to review the Company's Charter. Accordingly, the Act of 1793, which consolidated and repealed certain previous measures, was passed.

In the *mofussil* towns in Bengal the law officers of the *Zilla* and

City Courts, who were *Sudder Ameens* and principal *Sudder Ameens*, were given limited powers in criminal cases. They used to decide petty theft cases and criminal offences. They could fine up to Rs. 50 and award imprisonment, with or without labour, for one month only. An appeal from their decision lay to the Magistrate or Joint Magistrate. Offences for which severe punishment was prescribed were tried by Magistrates, who were empowered to inflict imprisonment extending to two years with or without hard labour. There were also Assistant Magistrates and Deputy Magistrates but they had not full magisterial powers. Offences requiring heavier punishment were transferred to the Sessions Judge. Death sentence and life imprisonment, awarded by the Sessions Judges, were subject to confirmation by the *Nizamat Adalat*. An appeal from the decisions of the Sessions Judges lay to the *Nizamat Adalat*. Such was the criminal administration in Bengal up to 1833.

In Madras, District *Munsiffs* had limited criminal jurisdiction. They could fine up to Rs. 200 or award imprisonment for one month. By Regulation X of 1816, Magistrates were empowered to inflict imprisonment for one year. There were also *Sudder Ameens* who tried trivial offences. Offences of heinous nature were forwarded for trial to the Sessions Judges. Offences against the State were referred to the *Fouzdari Adalat*. The *Fouzdari Adalat* was the Chief Criminal Court in the Madras Presidency, and was vested with all powers that were given to the *Nizamat Adalat* in Bengal.

The Administration of Criminal Justice in Bombay was on the pattern of Bengal and Madras Presidencies with certain minor changes.

The practice and procedure in Courts in Bengal, Madras and Bombay were prescribed by Regulations which were passed from time to time. In Bengal 675 Regulations were passed from 1793 to 1834; In Madras 250 Regulations were passed from 1800 to 1834; and in Bombay 259 Regulations were passed during the same period.

In 1833, Macaulay moved the House of Commons to codify the whole criminal law in India and to bring about uniformity. He told the House of Commons that the Muslims were governed by the Koran and in the Bombay Presidency the Hindus were governed by the Institutes of Manu. *Pandits* and *Kazis* were to be consulted on points of law, and in certain respects, the decisions of the Courts were arbitrary. Thus the year 1833 is a great landmark in the history of codification in India. The Charter Act of 1833 introduced a single Legislature for the whole of British India. The Legislature had power to legislate for the Hindus and the Muslims alike for Presidency towns as well as for *mofussil* areas.

Accordingly, the first Indian Law Commission was constituted of which Mr. (afterwards Lord) Macaulay was the President and Macleod, Anderson, and Millet were the Commissioners. They were given the responsibility to prepare a draft of the Penal Code. In preparing this code they drew largely from the English and the Indian laws and regulations and from Livingstone's Code of Louisiana and the Napoleon Code. The draft code was submitted to the Governor-General in Council on October 14, 1837. It was circulated to the Judges and the Law Advisers of the Crown. On April 26, 1845, another Commission was appointed to revise the code. This Commission submitted its report in two parts, one in 1846 and the other in 1847. Subsequently, it underwent a careful revision at the hands of Sir Barnes Peacock, then Chief Justice and other Judges of the Calcutta High Court who were the Members of the Legislative Council. In its final shape it was presented to the Legislative Council in 1856 and was passed on October 6, 1860. The Indian Penal Code, (Act XLV of 1860) came into operation on the 1st of January, 1862 which superseded all rules, widely divergent Regulations, and orders relating to Criminal Law in India. Though this Code is principally the work of Lord Macaulay who had hardly held a brief, and whose time was devoted to politics and literature, yet it is universally acknowledged to be a monument of codification and

an everlasting memorial to the high juristic attainments of its distinguished author.

The Criminal Law of India was codified in the Indian Penal Code and the Criminal Procedure Code. These Codes were adopted in Pakistan after Independence in August 1947.

The Pakistan Penal Code defines the offences and provides for their punishment. This Code is the substantive law and the Criminal Procedure Code is the procedural or adjective law. The Criminal Procedure Code was passed as Act XXV of 1861 and came into force on the same day as the Penal Code. This Act of 1861 was completely repealed by the later Act X of 1872, which again by Act X of 1882, which again by Act V of 1898, which with the later Amending Acts is now in force, whereas the Penal Code still remains the Act of 1860. The Criminal Procedure Code creates different grades of Courts and deals with the several proceedings of the Courts at the various stages of the inquiry or trial. Section 5(1) of the Criminal Procedure Code specifically lays down that all offences under the Pakistan Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code. The main object of the Code of Criminal Procedure is thus to supplement the Pakistan Penal Code by rules of procedure with a view to preventing offences and bringing the offenders to justice.

Crime.—The word 'crime' has not been defined in the Pakistan Penal Code. In its broad sense, however, it may be explained as an act of commission or omission which is harmful to the society in general. But all acts tending to prejudice the community are not 'crime' unless they are punishable under the law. According to Osborn, crime is an act or default which tends to the prejudice of the community, and forbidden by law on pain of punishment inflicted at the suit of the State. In its legal sense, therefore, crime includes such offences being acts or defaults which have been made punishable by the Pakistan Penal Code.

It is apparent from the above that there is nothing which

by itself is a crime, unless it has been declared by the Legislature as punishable. The authors of the Code observed :

"We cannot admit that a Penal Code is by any means to be considered as a body of ethics, that the Legislature ought to punish acts merely because those acts are immoral, or that, because an act is not punished at all it follows that the Legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in a passion, or breaks a window in a frolic ; yet we have punishment for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be a far worse man than the starving wretch who snatches and devours the rice ; yet we punish the latter for theft, and we do not punish the former for hard-heartedness."

Crime is, therefore, a relative conception. Different societies view different acts of commission and defaults as crime in different ages and according to different localities and circumstances. There are examples in History where heresy, *i.e.*, religious belief other than that recognised by the State, has been treated as an offence punishable with death, but no nation can today think of prescribing punishment merely for holding such views. Similarly, adultery is a civil offence against the law of matrimony in England and leads to divorce, the husband having claim to compensation from the co-respondent. But in Pakistan it is a crime within the meaning of section 497 of the Pakistan Penal Code and is punishable with imprisonment of either description for a term which may extend to five years, or with fine, or with both. The Code, however, absolves the wife from punishment as an abettor and excuses her infidelity on account of some peculiarities in the state of society in this country where, according to the authors of the Code, a women is sometimes married while still a child and is neglected for other wives

while still young. They were, therefore, reluctant to make laws for punishing the inconstancy of the wife, while the law admitted the privilege of the husband to polygamy. We may profitably quote here the observation of the framers of the Code :

"Though we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France ; they are married while still children ; they are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his *zenana* with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply rooted in manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law."

The recognition of a crime, therefore, varies with public opinion of a given society at a given time and there cannot be any rigid or absolute criterion to determine it. Ideas may change ; standards of ethical morality may differ, and with them may differ the recognition of any offence by the Legislature within the ambit of its Penal Code. It has, therefore, been rightly said that crime is not a static quantity, nor can it be considered in absolute terms. There is actually no such thing as a crime *in se* or crime by itself.

Tort or civil wrong may be distinguished from crime. Tort

differs from crime both in principle and procedure. In the first place, the former constitutes an injury or breach of duty to an individual or individuals concerning his or their private or civil rights, while the latter constitutes a breach of public rights and duties affecting the whole community considered as a community. In the second place, in tort the wrong-doer has to compensate the aggrieved party, but in crime he is punished by the State in view of the interests of the society. In the third place, in tort the action is raised by the aggrieved party, but in crime the State is supposed to be injured by wrong to the community and as such the proceedings are conducted in the name of the State, and the guilty person is punished by it. And, lastly, in tort or civil wrong intention on the part of the wrong-doer is immaterial, but criminal intention is an essential element in crime.

Although these two kinds of wrongs are clearly distinguishable, yet many crimes include a tort or civil injury ; but every tort does not amount to a crime, nor does every crime include a tort. For example, conversion, private nuisance, wrongful distress, etc., are merely torts. Similarly, forgery, perjury, bigamy, homicide, etc. are examples of crimes but not torts; whereas assault, false imprisonment, false charge, defamation, etc., are crimes as well as torts. In all cases where the same wrong constitutes both a crime and a tort, the criminal and civil remedies are concurrent. The wrong-doer may be punished criminally and also compelled in a civil action to pay damages to the injured person.

There is no limitation to prosecute a person for an offence. *Nullum tempus occurit regi* (lapse of time does not bar the right of the Crown). As a criminal trial is regarded as an action by the Government, it may be brought at any time. It would be odious and fatal, said Bentham, to allow wickedness, after a certain time, to triumph over innocence. No treaty should be made with malefactors of that character. Let the avenging sword remain always hanging over their heads. The sight of a criminal in peaceful enjoyment of the fruit of his crimes, protected by the laws he

has violated, is a consolation to evil-doers, an object of grief to men of virtue, a public insult to justice and to morals. The Roman law, however, laid down a prescription of twenty years for criminal offences as a rule. There is no period of limitation for offences which fall within the four corners of the Penal Code.

Presumption of Innocence.—In Criminal cases the presumption of law is that the accused is innocent. He stands before the Court as an innocent man till he is proved to be guilty. It is the business of the prosecution to prove him to be guilty and he need not do anything but stand-by and see what case has been made out against him. The prosecution is bound to prove the guilt beyond reasonable doubt, without any help from the accused. If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted. In matters of doubt it is safer to acquit than to condemn since it is better that several guilty persons should escape than one innocent person suffer.

This doctrine of criminal law is subject to certain modifications. Though it is true that the prosecution must prove every ingredient of the offence and associate it with the accused, the question would be regarding the nature of the proof required to be given by the prosecution. For example section 114 of the Pakistan Evidence Act, 1872 lays down : "The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Illustration (*a*) to the same section further lays down that the Court may presume that a person who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for the possession. In such circumstances, once the minimum proof is given by the prosecution it may be necessary for the defence to rebut such a proof; otherwise an adverse inference may be drawn by the Court. Again section 105 of the Pakistan Evidence Act states that it is incumbent on the accused to prove the existence of circumstances which bring the offence charged within any exception or proviso

contained in the Penal Code, and the Court shall presume the absence of such circumstances. If it is apparent from the evidence on record whether produced by the prosecution or defence, that a general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. For example, once the prosecution proves that A caused grievous hurt to B, if it is A's contention that he did it in self-defence it is for A to prove it. The doctrine of presumption of innocence does not compel a Court to believe that the accused is innocent as he might come under the protection of some of the exceptions. In such circumstances, if the defence cannot prove the exceptions, the accused will be convicted.

It may be noted that under the Pakistan Penal Code there are certain offences relating to trade mark or property mark and currency-notes, where the burden of proof of innocence is shifted on the accused under the following circumstances :—

(*i*) Any person selling goods marked with counterfeit trade mark or property mark shall be punished unless he proves that he acted innocently and that he had taken all reasonable precautions (s. 486).

(*ii*) Any person making a false mark upon any receptacle containing goods shall be punished unless he proves that he acted without intent to defraud (s. 487).

(*iii*) Any person using such false mark shall be punished unless he proves that he acted without intent to defraud (s. 488).

(*iv*) Any person making or using documents resembling currency-notes or bank-notes shall be punished and if his name appears on such documents it shall be presumed that he made the document until the contrary is proved (s. 489 E).

Mental Elements in Crime.

Mens rea.—It is one of the cardinal principles of the English Criminal Law that to constitute guilt there must be a guilty

intent behind the act itself and that a crime is not committed if the mind of the person doing the act is innocent. The principle is based on the maxim *actus non facit reum, nisi mens sit rea, i.e.* the act itself does not constitute guilt unless done with a guilty intent. Thus *mens rea* in the case of murder means malice aforethought ; in the case of theft an intention to steal and in the case of receiving stolen goods knowledge that the goods were stolen.

The maxim, therefore, connotes that the act itself does not make a man guilty unless his intention was to commit a crime. For example, a person shoots a jackal but actually killed a man behind a bush who was concealed from his view. No offence has been committed if he was not negligent and the act will be excusable as an accident. Similarly, A is working with a hatchet and the head flies off, killing a man who is standing by. There is no offence if he has taken proper precaution and the act is excusable as an accident. But if a person kills a man under circumstances which afford him no legal justification, he is guilty of murder.

It was held in the case of *Sherras* v. *De Rutzen*[1] that *mens rea* is an essential ingredient in every offence except in three cases : (1) Cases not criminal in any real sense but which in the public interest are prohibited under a penalty, *e g.* Revenue Acts ; (2) public nuisance ; and (3) cases criminal in form but which are really only a summary mode of enforcing a civil right.

The maxim has not so wide an application to the offences under the Penal Code ; because the definition of the various offences contain expressly a statement as to the state of mind which constitutes the mental element of a particular offence. Thus the definitions state whether an act, in order to constitute an offence, must have been done voluntarily, knowingly, intentionally, negligently, rashly, dishonestly, fraudulently or the like. In other words every ingredient of the offence is stated

1. (1895) 1 Q. B 918.

in the definitions. So *mens rea* will mean one thing or another according to the particular offence. The guilty mind may thus be a fraudulent mind or a dishonest mind, or a negligent or rash mind according to the circumstances of the case and each of these minds differs widely from the other. It is thus said that mental elements of different crimes differ widely. Similarly there are crimes (*e.g.* public nuisance) when the act itself constitutes a crime and no mental element is necessary to constitute the act a crime. The Chapter on general exceptions deals with the general conditions which negative *mens rea* and thus exclude criminal responsibility.

Intention.—Salmond defined intention as the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, inasmuch as they fulfil themselves through the operation of the will. An act is intentional if it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied.

Intention does not necessarily involve expectation. I may intend a result which I well know to be extremely improbable. So an act may be intentional with respect to a particular circumstance, although the chance of the existence of that circumstance is known to be exceedingly small. Intention is the foresight of a desired issue, however improbable—not the foresight of an undesired issue, however probable. If I fire a rifle in the direction of a man a mile away, I may know perfectly well that the chance of hitting him is not one in a thousand ; I may fully expect to miss him ; nevertheless I intend to hit him if I desire to do so. He who steals a letter containing a cheque, intentionally steals the cheque also if he hopes that the letter may contain one, even though he well knows that the odds against the existence of such a circumstance are very great.

Conversely, expectation does not in itself amount to intention. A Surgeon may know very well that his patient will probably die of the operation ; yet he does not intend the fatal consequence

which he expects. He intends the recovery which he hopes for but does not expect.

As a general rule, every man is presumed to intend the natural and probable consequences of his acts, and this presumption of law will prevail unless from a consideration of all the evidence the Court entertains a reasonable doubt whether such intention existed. This presumption, however, is not conclusive nor alone sufficient to justify a conviction and should be supplemented by other testimony. An accused must be judged to have the intention that is indicated by his proved acts. The burden of proving guilty intention lies upon the prosecution where the intent is expressly stated as part of the definition of the crime.

Mere intention to commit a crime, not followed by an act does not constitute an offence.[1] The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it or towards maturing and effecting it.

Motive.—Intention and motive invariably go together. An intention is the immediate desire and foreknowledge behind an act. Such a desire might be a means for another desire. Such ulterior intent is called the motive of the act. For example, the immediate intent of the thief is to appropriate another's money, while his ulterior intent or motive may be to buy food with it or to pay a debt. Every wrongful act may raise two distinct questions with respect to the intent of the doer. Firstly, whether the act is done intentionally or accidently. Secondly, if the act is done intentionally, why it is done. The first question refers to the immediate intention of the man and the second question refers to the ulterior intent or motive of the man.

A distinction exists between intention and motive. The law takes into account only a man's intention and not his motive. Motive is directed to the ultimate end, good or bad, which a person hopes to secure; his intention is concerned with the

1. *Queen v. Baku* (1899) I. L. R. 24 Bom. 287.

immediate effect of his acts. In judging a man's criminality, regard must be had to his primary and immediate intention and not to his secondary or remote intention, for in reality it is the motive which the law ignores. A person may act from a laudable motive, but if he intentionally causes wrongful loss, his crime is complete, irrespective of his motive. Thus where several Hindus acting in concert and under the influence of religious feeling forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing wrongful gain to themselves or wrongful loss to the owner of the cattle, but for the purpose of preventing the killing of the cows, it was held that they were guilty of rioting under section 146 of the Penal Code, however laudable and virtuous their object might be from the viewpoint of their own religion.[1] Similarly, where the creditors of A complained of their debts to B, the master of A, and B without referring to the Civil Court, took the law into his own hand and taking three cows of A without his consent handed them over to his creditors to satisfy their claims, B was held to have done it dishonestly and therefore guilty of theft.[2] So also the motive of the creditor seizing his debtor's goods to coerce him to pay up his debt was certainly not to cause permanent loss of the goods to the debtor and was not, therefore, criminal ; but he did cause him loss, however temporarily, and he did so intentionally. He was, therefore, held guilty of theft.[3] In short, in criminal cases, the end cannot justify the means, *i.e.* the motive does not justify the intention. Hence, a righteous motive is not a good defence when the intention of the person is criminal.

Though the prosecution is not bound to prove motive for the crime, absence of any motive is a factor which may be considered in determining the guilt of the accused. But if the actual

1. *Queen v. Raghunath Rai* (1892) I. L. R. 15 All. 22 ; Contra *Queen v. Ram Baran* (1893) I. L. R. 15 All. 299.
2. *Queen v. Madaree* (1865) 3 W.R (Cr.) 2.
3. *Queen. v. Srichuran Chungu* (1895) I. L. R. 22 Cal. 1017 F. B ; *Queen v Preonath Banerjee* (1866) 5 W. R. (Cr.) 69.

evidence as to the commission of the crime is believed, then no question of motive remains to be established. It is not the bounden duty of the prosecution to prove motive with which a certain offence has been committed. It is sufficient if the prosecution proves by clear and reliable evidence that certain persons committed the offence, whatever the motives may be which induced them to commit that offence. The question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor. But in cases of circumstantial evidence, absence of motive is a factor in favour of the accused.

Motive when relevant.—The following are the exceptions to the general principle that intention is relevant and motive irrelevant :—

(1) The first exception is to be found in the cases of criminal attempts. Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the essence of an attempt. For example, one might strike a matchstick with the intention of setting fire to a hay stack and thus cause wrongful loss to the owner. When the matchstick is struck and is taken near the hay stack, if he is prevented from setting fire, to assess whether he is a wrong-doer or not it would be necessary to examine his motive. His intentionally striking a match in itself is no wrongful act but if such intentionally striking of the match was done with the ulterior intent of setting fire to the hay stack, then it becomes an attempt to commit criminal mischief. Thus it is the motive that makes the act wrongful though the act in itself could not be wrongful.

(2) The second exception comprises of those cases in which a particular intent forms part of the definition of a criminal offence. For example, house trespass is an offence punishable under the Pakistan Penal Code. In this case the motive with which the house trespass was comitted becomes relevant. Another example is found in the case of the offence of forgery. This offence

contains two main ingredients : (i) The making of any false document and (ii) with the intent to cause damage or injury to the public or to any peson. Making of the false document is intentional, whereas the ulterior intent of making a false document is the motive. In all such instances the ulterior intent is the source, in whole or in part, of the mischievous tendency of the act and is therefore material in law.

(3) In civil liability, motive or the ulterior intent is seldom relevant ; but there are some exeptional cases where motive might become relevant as in the cases of civil wrongs of defamation and malicious prosecution.

Mistake of Fact.—In English law mistake of fact affords an exemption from liability only in the sphere of the Criminal law, while in the Civil law liability is commonly absolute. So far as civil liability is concerned, it is the general principle of law that he who intentionally interferes with the person, property, reputation, or other rightful interests of another does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstance which justified his act. In Criminal law the matter is otherwise. Absolute criminal liability for a mistake of fact is quite exceptional. An instance of it is to be found in the liability of a person who abducts a girl under the legal age of consent. Inevitable mistake as to her age is no defence ; he must take the risk. In the *Prince's case*[1] it was held that a person who kidnaps a girl under the legal age of consent, is guilty of kidnapping. Her consent is immaterial as a minor cannot give a valid consent. Even if the girl urged the accused to take her away from her parent and even the fact that she falsified her age and appeared to be more than eighteen, the accused was held guilty of having committed the offence of kidnapping. He who deals with the minor does so at his own risk and inevitable mistake as to her age is no excuse. He must take the risk for having involved himself with a minor and in an act which is *mala in se*.

1. (1875) L R. 2 C C. 154.

Under the Penal Code the mistake must be one of fact and not of law. Where, through a mistake, a man intending to do a lawful act, does that which is unlawful, the deed and the will act separately ; there is not that conjunction between them which is necessary to form a criminal act. But where an act is clearly a wrong in itself, and a person, under a mistaken impression as to the facts which render it criminal, commits the act, then he will be guilty of a criminal offence.

Mistake of Law.—Ignorance of law is no excuse. This proposition is based on the maxim *"Ignorantia juris neminem excusat."* When a person has committed a wrong he will not be allowed to say that but for his ignorance of the law he would not have committed it. The reasons for this rule, according to Salmond, are three in number : In the first place, the law is in legal theory definite and knowable. It is the duty of every man to know that part of it which concerns him ; therefore innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because in general they can and ought to know it. In the second place, it would be very difficult for a Court of law to decide whether the person is really ignorant or he is making it an excuse and a ground of defence for his guilt. In the third place, the law is in most instances derived from and in harmony with the rules of natural justice. A person committing a wrong may be ignorant that he is breaking the law, but he knows very well that he is violating a right.

According to Salmond there is no exception to this rule, whereas in practice there are certain exceptions : (1) Mistake of law can be pleaded as a defence under section 78 of the Penal Code.[1] This section provides that nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no

1. Ratan Lal & Dhiraj Lal, *The Law of Crimes*, 20th Ed. p. 136.

jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction. (2) Under section 379 of the Penal Code it was held that a mistake of law may be an excuse if the accused takes another man's property believing under a mistake of fact and in ignorance of law, that he has a right to take it. He is under such a circumstance not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss.[1]

Liability of master for acts of his servant.—The master is liable for the tortious acts of his servants done in the course of his employment and for the master's benefit, but in criminal law he who does the act is liable except where a person who is not the doer abets or authorises the act. There are, however, certain exceptions to this principle. The following are some of the cases in which the master is criminally responsible for the acts of his servant :—

(1) Statutory liability.—A statute may impose criminal liability upon the master as regards the acts or omissions of his servants. License cases form a class by themselves in which the master is generally held responsible. Where an Act imposed a penalty on any licensed person who supplied any liquor to a Constable on duty without authority from his superior officer, the defendant, who was a licensed victualler, was committed on proof that his servant had supplied liquor in violation of the clause.[2] Similarly, where the servant of a licensed vendor of opium sold opium to a boy under the age of 14 years, it was held that the licensee was liable under section 9 of the Opium Act.[3] So also, where the Manager of a licensed vendor of arms, ammunition and military stores sold certain military stores without previously ascertaining that the buyer was legally authorised to possess the same, the licensed vendor was held liable under section 22 of the Arms Act, though the goods were sold without his knowledge and consent.[4] In the case of license-holders,

1. *Queen v. Nagappa* (1890) I L R 15 Bom. 344.
2. *Mullins v. Collins* (1874) L. R. 9 Q. B. 292.
3. *Emperor v. Babu Lal* (1912) I. L. R. 34 All. 319.
4. *Queen v. Tyab Ali* (1900) I. L. R. 24 Bom. 423.

it has been repeatedly held that the responsibility is upon the licensee for acts done by his employees within the scope or in course of their employment, although contrary to his orders.[1] But in such cases the master is relieved from criminal responsibility if he can prove that he acted in good faith and had done all that was reasonably possible for him to prevent the commission of offences against the statute by his agents and servants. Similarly, if a servant does that for which he is not employed, or if he acts for his own personal benefit, the master will not be liable.[2]

(2) Public nuisance.—If a servant while carrying on some works for profit on behalf of the master causes a public nuisance, the master is liable to be indicted for it, though done by the former without the latter's knowledge and even contrary to his general orders.[3] If persons for their own advantage employ servants to conduct works, they must be answerable for what is done by the servants even though they are personally ignorant of the way in which the work is carried on and though there is a departure in the way in which it was understood to be carried on.[4]

(3) Neglect of duty.—If the performance of an act is neglected by the owner by entrusting it to unskilful hands, the owner is in certain cases criminally liable. Thus an Engineer was held guilty of manslaughter when he entrusted the management of a steam engine to an ignorant boy, who killed a man for want of skill to handle the engine.[5] Similarly a master who puts a servant whom he knows to be incompetent to manage an animal or a machine or to discharge any other duty upon which the safety of others depends is criminally responsible for the result as it is one which he ought to have known would probably follow.

1. *Commissioners of Police v. Cartman* (1896) 1 Q. B. 655.
2. *Boyle v. Smith* (1906) 1 K. B. 432 ; *Anglo American Oil Co. Ltd. v. Manning* (1908) 1 K. B. 536 ; See also *Uttam Chand v. Emperor* (1911) I. L R. 39 Cal. 344 ; *Emperor v. Behari Lal* (1911) I L. R 34 All 146.
3. *Stephens* (1866) 1 Q. B. 702.
4. *Medley* (1834) 6 C. & P. 292.
5. *Lowe* (1850) 3 C. & K 123.

This is the principle on which the proprietor of a newspaper is indictable for libel published in it, whether he knows the contents of such paper or not.[1] But if a skilful person is employed, the employer will not be liable in the absence of express malice.[2]

General Scheme of the Pakistan Penal Code.—In all there are 511 sections in the Pakistan Penal Code. We may divide the Code into two parts. The first part deals with the general provisions and the second part deals with the specific offences. The following tabular statement gives an outline of the scheme of the Pakistan Penal Code :—

General Provisions.

1. Territorial operation of the Code... { Intra-territorial / Extra-territorial } (Ch. I).
2. General Explanations... { Definitions (ss. 6-33 & 39-52A) / Joint liability in a crime (ss. 34-38) } (Ch. II).
3. Punishments... { Kinds of punishments. (ss. 53-70, 73 & 74) / Rules for assessment of punishment. (ss. 71, 72 & 75) } (Ch. III).
4. General Exceptions. (Ch. IV).
5. Abetment. (Ch. V).
6. Conspiracy. (Ch. VA).
7. Attempts. (Ch. XXIII).

Specific Offences.

1. Affecting the State... { State. (Ch. VI). / Army, Navy and Air Force. (Ch. VII).

1. *Empress v. McLeod* (1880) I. L. R. 3 All. 312.
2. *Srish Chandra Sircar v. Emperor* (1918) 17 All. L. J. 343.

2. Affecting the common weal	Public tranquility. (Ch. VIII). Public servants — Conduct of (Ch. IX). Contempt of authority of (Ch. X). Public justice. (Ch. XI). Public health, safety, convenience, decency and morals. (Ch. XIV). Elections. (Ch. IXA). Coin and Government Stamps. (Ch. XII). Weights and Measures. (Ch. XIII). Religion. (Ch. XV). Contracts of service. (Ch. XIX). Marriage. (Ch. XX).
3. Affecting the human body	Homicide, murder, abetment of suicide, causing miscarriage, injuries to unborn children, exposure of infants, hurt (simple and grievous), wrongful restraint and confinement, criminal force, assault, kidnapping, abduction, slavery, selling or buying minor for prostitution, unlawful labour, rape, unnatural offence. (Ch. XVI)
4. Affecting corporeal or incorporeal property	Theft, extortion, robbery, dacoity, criminal misappropriation, criminal breach of trust, receiving stolen property, cheating, fraudulent deeds and dispositions of property, mischief, criminal trespass, documents (forgery), trade and property marks, currency and bank notes. (Chs. XVII & XVIII).
5. Affecting reputation.....	Defamation. (Ch. XXI). Intimidation, insult and annoyance (Ch. XXII).

Extent of operation of the Pakistan Penal Code.—Section 1 declares that the Pakistan Penal Code is applicable to the whole of Pakistan.

Intra-territorial operation of the Code.—Section 2 deals with the intra-territorial operation of the Code. It lays down that "every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Pakistan." Under this section all persons irrespective of rank, nationality, caste or creed, are equally liable for offence committed within Pakistan. The Code is applicable to every person whether he is a foreigner or not. It is no defence on behalf of a foreigner that he did not know that he was doing wrong, the act not being an offence in his own country.[1]

What is the position if an offence is committed under this Code on water? So far as rivers are concerned, there is no difficulty as they are on land. Suppose a murder is committed on Buriganga river. The Dacca Court can try the offence. But what is the legal position if an offence is committed on the high seas? The answer is this that the territorial jurisdiction of our State, according to the Proclamation made by the President of Pakistan, extends into the high seas upto 12 nautical miles.[2] This is called its maritime territory. This jurisdiction is conferred on the State for its defence and security, to prevent smuggling and poaching fisheries, on its shore and to protect its coastline. And the Courts are empowered to try offences committed within that area. If an offence is committed on the high seas, but within 12 miles from the coast of Pakistan, it is punishable under the Pakistan Penal Code, as being committed within the territorial limits of Pakistan. For example an offence committed within the belt of 12 miles in the sea near Chittagong will be cognisable by the Chittagong

1. *Crown v. Esop* (1836) 7 C. & P. 456.
2. Proclamation dated December 29, 1966: Keesing's Contemporary Archives, January 28—February 4, 1967, p. 21845.

Court. Anything beyond that, will also be cognisable by our Courts under the Admiralty jurisdiction.

We have noted above that under section 2 every person is liable to punishment for an offence committed under the Code. But there are certain exceptions to this rule. The following persons are exempted from the jurisdiction of the Criminal Courts :—

(1) The President of Pakistan and the Governors of the Provinces.—Under article 116 of the late Constitution of Pakistan, 1962 the President and the Governors are exempted from Civil and Criminal proceedings.

(2) Foreign Sovereigns.—A foreign sovereign cannot be punished under the Code according to the rules of International Law.

(3) Ambassador.—An Ambassador being accredited as a representative of an independent sovereign or State is entitled to the immunity his sovereign would be entitled. An Ambassador does not owe even temporary allegiance to the sovereign to whom he is accredited. He is, for all judicial purposes, supposed still to be in his own country. If he commits a gross offence and makes an ill use of his character, he may be sent home and accused before his master. The immunity of diplomatic envoys extends not merely to their own person, but to their family and suite. The principle on which this immunity is based is that he should be free to perform official business on behalf of his country without interference or interruption.

(4) Alien enemies.—In respect of acts of war, alien enemies cannot be tried by Criminal Courts but they shall be dealt with by martial law. On the other hand, if an alien enemy commits a crime not connected with war, he is triable by ordinary Criminal Courts.

(5) Foreign army.—When armies of one State are sent by consent on the soil of a foreign State, they are exempted from the jurisdiction of the State on whose soil they are.

(6) War Ships.—Men-of-war of a State in foreign waters are exempted from the jurisdiction of the State within whose territorial jurisdiction they are. The domestic Courts, in accordance with the principles of International law, will accord to the ship and its crew and its contents certain immunities. The principle of International law is illustrated in a decision of the Supreme Court of U. S. A., in the case of *Schooner v. M. Faddon*.[1] In this case the Emperor Napoleon had commissioned a French ship. According to the laws of France it was a French Warship. The ship was in the American territorial waters. An American citizen M. Faddon claimed that the ship originally belonged to him and requested the Supreme Court to deliver the same to him. It was held that the Supreme Court of U. S. A. could not exercise jurisdiction over the warship. Though this case is an authority on a claim of a civil nature yet the principle of the case would be applicable to Criminal jurisdiction.

Besides the above persons, the Judges of the Supreme Court and the High Courts are not amenable to the provisions of the Code. Offences committed by them shall be inquired, tried and determined by a special procedure.

Extra-territorial operation of the Code.—The Pakistan Courts have jurisdiction to try offences committed beyond the limits of Pakistan either on the land or on the high seas by virtue of sections 3 and 4 of the Code. These sections deal with the extra-territorial operation of the Code by laying down that an offence committed outside Pakistan may be tried as an offence committed in Pakistan in the following cases :—

An offence committed by (a) any citizen of Pakistan in any place without and beyond Pakistan ; (b) any servant of the State, whether a citizen of Pakistan or not, within the territories of any acceding State or the tribal areas ; (c) any person on any ship or aircraft registered in Pakistan wherever it may be.

1 (1812) 7 Cranch 116.

Some illustrations will make the point clear : (a) A, a Pakistani subject commits a murder in Uganda. He can be tried and convicted of murder in any place in Pakistan in which he may be found. (b) B, A British subject, commits a murder in Kashmir. He can be tried and convicted of murder in any place in Pakistan in which he may be found. (c) C, A foreigner who is in the service of the West Pakistan Government, commits a murder in Junagadh. He can be tried and convicted of murder at any place in Pakistan in which he may be found. (d) D, A British subject living in Junagadh, instigates E to commit a murder in Lahore. D is guilty of abetting murder.

We may now consider the liability of a foreigner in Pakistan for an offence committed by him outside Pakistan. In such cases our Courts cannot try such foreigners. They may be extradited under the Extradition Act, 1903.

Extradition means the surrender of a fugitive offender by one State to another in which the offender is liable to be punished. The law of extradition is founded upon the broad principle that it is to the interest of civilized communities that crimes should not go unpunished. Mutual interest of States for the maintenance of law and order and the administration of justice demands that nations should co-operate with one another in surrendering the fugitive criminals to the State in which the crime was committed.

So far we have considered the extra-territorial jurisdiction of our Courts to try offences committed beyond the limits of Pakistan on land. Now we shall consider the jurisdiction of the Courts to try offences committed on the high seas. The jurisdiction of a Court to try offences on the high seas is known as its Admiralty jurisdiction. Our Courts have power to try offences committed on high seas. It is founded on the principle that a ship on the high seas is a floating island belonging to the nation whose flag she is flying. It extends over—(1) offences committed on Pakistan ships, (2) offences committed on foreign ships in Pakistan territorial waters and

(3) pirates. Piracy consists of any illegal act of violence, detention, or any act of depredation, committed for private ends, by those aboard a private ship or private aircraft and directed against a ship or persons or property in the high seas. A pirate is one who is a danger to the vessels of all nations. Irrespective of the nationality of the pirate, he is triable everywhere.

CHAPTER II

GENERAL EXPLANATIONS

[This Chapter is divided into two parts : (1) Definitions and (2) joint liability in crimes.]

Definitions.

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

Number.—Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number. (S. 9).

Man. Woman.—The word "man" denotes a male human being of any age ; the word "woman" denotes a female human being of any age. (S. 10).

Person.—The word "person" includes any Company or Association, or body of persons, whether incorporated or not. (S. 11).

The word "person" includes artificial or juridical persons. An idol is a person in the eye of law since it is capaple of holding property. But a corporate body cannot be indicted for offences like treason, murder, bigamy, perjury, rape, etc. which can be committed only by human individuals or for offences which are compulsorily punishable with imprisonment. Therefore, a corporate body or a company shall not be indictable for offences which can be committed only by a human individual or for offences which must be punished with imprisonment.[1]

The word "person" will also include a child born or unborn. Even if a child is unborn and within the womb of the mother, it is capable of being spoken of as a "person" if its body is developed sufficiently to make it possible to call it a child.[2]

1. *State of Maharastra v. Syndicate Transport Co.*, A. I. R. 1964 Bom. 195.
2. *Jabbar v. State* A. I. R. 1966 All. 590.

Public.—The word "public" includes any class of the public or any community. (S. 12).

Servant of the State.—The words "servant of the State" denote all officers or servants continued, appointed or employed in Pakistan, by or under the authority of the Central Government or any Provincial Government. (S. 14).

Government.—The word "Government" denotes the person or persons authorised by law to administer executive government in Pakistan, or in any part thereof. (S. 17).

Judge.—The word "Judge" denotes (1) not only every person who is officially designated as a Judge, but also (2) every person, who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or (3) who is one of a body of persons, which body of persons is empowered by law to give such a judgment. (S. 19)

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

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

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

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

Public Servant.—Section 21 gives a long list of certain types of persons who are styled as public servants. There are several sections in the Code which deal with public servants. For example, sections 161-171 deal with offences by or relating to

public servants. Sections 172 to 190 deal with contempts of lawful authority of public servants. Of all these the most important one is that of bribery by a public servant. Hence it is important to know whether a particular person is a public servant or not. If he is a public servant his rights and liabilities are greater than the rights and liabilities of an ordinary citizen who is not a public servant.

Under section 21 the following persons are public servants :—

(1) Every Covenanted servant of the State ;

(2) Every Commissioned officer in the Military, Naval or Air Forces of Pakistan ;

(3) Every Judge;

(4) Every officer of a Court of Justice whose duty, as such officer, is—

(*i*) to investigate or report on any matter of law or fact, or

(*ii*) to make, authenticate, or keep any document, or to take charge or dispose of any property, or

(*iii*) to execute any judicial process, or

(*iv*) to administer any oath, or

(*v*) to interpret, or

(*vi*) to preserve order in the Court, and

(*vii*) every person specially authorised by a Court of Justice to perform any of such duties ;

(5) Every juryman, assessor, or member of a *panchayet* assisting a Court of Justice or public servant ;

(6) Every arbitrator or other person to whom any cause or matter has been referred for decision or report by, (a) any Court of justice, or (b) by any other competent public authority ;

(7) Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(8) Every officer of the Government whose duty, as such officer, is —

(*a*) to prevent offences, or

(*b*) to give information of offences, or

(*c*) to bring offenders to justice, or

(*d*) to protect the public health, safety or convenience ;

(9) Every officer whose duty, as such officer, is—

(*i*) to take, receive, keep or expend any property on behalf of the Government, or

(*ii*) to make any survey, assessment or contract on behalf of the Government, or

(*iii*) to execute any revenue-process, or

(*iv*) to investigate or report on any matter affecting the pecuniary interests of the Government, or

(*v*) to make, authenticate or keep any document relating to the pecuniary interests of the Government, or

(*vi*) to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and

every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty ;

(10) Every officer whose duty, as such officer, is —

(*i*) to take, receive, keep or expend any property, or

(*ii*) to make any survey or assessment, or

(*iii*) to levy any rate or tax for any secular common purpose of any village, town or district ; or

(*iv*) to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district ;

(11) Every person who holds any office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Illustration.—A Municipal Commissioner is a public servant.

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

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

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

Section 21 has been discussed in several cases and it has been held that the following persons are public servants :—

(1) Minister.[1]

(2) Cotton Inspector appointed by the Director of Agriculture.[2]

(3) *Ansars* in certain area provided the Government by a notification has embodied them in the District Police Force.[3]

(4) President of the Union Board.[4]

(5) Person gratuitously performing the duty of the nature mentioned in clause (10) of section 21.[5]

(6) A peon in the Passport Office.[6]

(7) A Collecting Agent appointed by a liquidator for realization of debts due to a Co-operative Society.[7]

(8) Head Treasurer.[8]

(9) Railway servants.[9]

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1. *Sheik Mojibur Rahman v. State* (1963) 15 D.L.R. 549 ; *Abul Monsur v. State* (1961) 13 D.L.R 353 : 19 1 P.L.D. (Dacca) 753.
2. *Tufail Md. v. Crown* (1954) 6 D.L.R. (W.P.) 143.
3. *Haroon Malakar v. Crown* (1953) 5 D.L.R. 24.
4. *Khabiruddin v. Crown* (1955) 7 D.L.R. 166 (168).
5. *Zainal Abedin v. State* (1957) 9 D.L.R. 640.
6. (1955) P.L D. (Lah) 540 : 19. 5 P.L.R. (Lah) 1032.
7. *Nurul Islam v. State* (1960) 12 D.L.R. 105 : 1960 P.L D. (Dacca) 431.
8. 1950 P.L.D. 361 ; 1955 P.L.D. (Sind) 230.
9. *State v. Ali Akhtar* (1966) 18 D.L.R. 684.

The following persons are not public servants :—

(1) Railway servant in respect of offence of cheating.[1]

(2) *Dafadar* and *Chowkidar*.[2] They are only public servants for the limited purposes laid down in rule 45 of the Rules framed under the village Self-Government Act *i.e.* public servants for the purposes of section 68 (2) of the Criminal Procedure Code.[3]

(3) The Cashier of a Central Co-operative Bank. [4]

(4) Secretary of a Central Co-operative Bank. [5]

(5) *Poddar* of a Bank.[6]

(6) President of a Co-operative Society.[7]

(7) The *Poddar* of a Treasury.[8]

(8) Member of the Union Board.[9]

(9) The clerk of the office of the Union Board.[10]

(10) *Chowkidar* of a Government godown.[11]

(11) The Secretary of a District Soldiers', Sailors' and Airmen's Board.[12]

(12) Managing Director of a Jute Mill.[13]

(13) *Nikha* Registrar. [14]

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1. *Md. Halim v. State* (1963) 15 D. L. R. 282.
2. *Loknath v. Crown* (1955) 7 D. L. R. 344.
3. *Ibid ; Ahmed Kabir v. State* (1957) 9 D. L. R. 323.
4. *Salimullah Khan v. Crown* (1954) 6 D. L. R. 527.
5. *Abdul Wahab v. State* (1957) 9 D. L. R. 442.
6. *Mujibor Rahman v. State* (1962) 14 D. L. R. 785.
7. *Ibid.*
8. *Ibid.*
9. *Manindra v. State* (1960) 12 D. L. R. 84.
10. *Asgar Ali v. State* (1959) 11 D. L. R. (S. C) 219 : 1959 P. L. D. (S. C). 242.
11. *Suresh Chandra Chakma v. State* (1962) 14 D.L.R. 730.
12. *A. K. M. Shamsul Huq Choudhury v. State* (1960) 12 D. L. R. 485 ; 1961 P. L. D. 753.
13. *Al-haj Abdur Rob v. Mobarakullah* (1968) 20 D. L. R. 876.
14. *Abdus Sattar v. State* (1967) 19 D. L. R. 862..

Moveable property.—The words "moveable property" are intended to include corporeal property of every description, except land and thing attached to the earth or permanently fastened to anything which is attached to the earth. (S. 22).

The earth or the soil and the component parts of it, including stones and minerals, when severed from the earth or land to which they are attached, are moveable properties under this section.[1] "Hall ticket" entitling a candidate to sit for an examination as well as "examination paper" are property within the meaning of section 415 of the Pakistan Penal Code.[2]

Wrongful gain.—"Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled. (S. 23).

Wrongful loss.—"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled. (S. 23).

Gaining wrongfully.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. (S. 23).

Losing wrongfully.—A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property. (S. 23).

Section 23 contains the definitions of four terms. The expressions "wrongful gain" and "wrongful loss" occur many times in the Chapter on offences against property. The causing of wrongful gain or wrongful loss is a very important ingredient in the offences of theft, breach of trust, criminal misappropriation, etc.

The word "wrongful" means prejudicially affecting a party in some legal right. To constitute either wrongful loss or gain, the property must be lost to the owner or the owner must be wrongfully kept out of it. Thus forcible and illegal removal

1. *Queen v. Shivram* (1891)I.L.R.15 Bom. 702 ; *Suri Venkatappaya* v. *Madula* (1904) 1. L. R. 27 Mad. 531 F. B.
2. *Amanat Ali* v. State, 1957 P. L. D. (Lahore) 207.

of the debtor's property by the creditor to enforce payment of a debt was held to cause a "wrongful loss" to the debtor and "wrongful gain" to the creditor.[1] When the owner is kept out of possession with the object of depriving him of the benefit arising from the possession, even temporarily, the case will come within the definition. Thus, if A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration, he takes it dishonestly *i. e.* causes wrongful loss to Z and wrongful gain to himself and commits theft. But where the owner is kept out of possession temporarily, not with any such intention, but only with the object of causing him trouble in the sense of mental anxiety and with the ultimate intention of returning the thing to him without exacting or expecting any recompense, the detention does not amount to causing wrongful loss. Thus, where the accused had removed a box belonging to his master and left it concealed in the cow-shed to give a lesson to his master, it was held that no theft was committed, as there was no "wrongful loss" to the owner.[2] Similarly where a person purchased rice from a famine Relief Officer at the rate of 16 seers per rupee on condition that he should sell it at the rate of 15 seers per rupee. But instead of selling it at the rate agreed upon, he sold it at 12 seers per rupee, it was held[3] that no wrongful gain or wrongful loss had been caused to anyone within the meaning of this section. The rice having been sold to the accused and he having paid for it, it was not unlawful for him to sell it at such price as he thought fit.

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

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1. *Queen v. Sri Churan Chungo* (1895) 22 Cal. 1017 F. B.
2. *Nabi Baksh v. Queen* (1897) I. L. R. 25 Cal. 416.
3. *Queen v. Lal Mohamed* (1874) 22 W. R. Cr. 82.

The term "dishonestly" is used in the Code to mean an intention to cause a wrongful gain or loss of property. There are three essential ingredients which must be present to constitute dishonesty in law, namely,—(a) intention, (b) employment of unlawful means, and (c) acquisition of property to which one has no right.[1]

Fraudulently.—A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. (S. 25).

The expression "intent to defraud" implies conduct coupled with an intention to deceive and thereby to injure. The word 'defraud' involves two conceptions, namely, (i) deceit, and (ii) injury to the person deceived, *i.e.* an infringement of some legal right possessed by him, but not necessarily deprivation of property.[2] Mere deceit is not fraud. While, on the other hand, the word 'defraud' does not necessarily imply the deprivation or intended deprivation of property as a part or result of the fraud, on the other hand, every intentional misleading is not necessarily defrauding within the meaning of section 25. "Intending to defraud" means something more than mere deceiving. A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage and which, if done, would be to the loss or detriment of B, A intends to defraud B.[3]

The word "defraud" as used in section 25 does not necessarily import deprivation of property, actual or intended, as a part of the fraud. In other words, fraudulent act need not necessarily be a dishonest act, though such may often be the case. A person who uses a false certificate with the intention of being permitted to appear at an examination, which, but for such certificate, he could not have appeared at, acts fraudulently and commits an offence under section 471 of the Penal Code.[4]

1. Dr. Sir Hari Singh Gour, *The Penal Law of India*, Seventh Ed., Vol. I, p. 110.
2. *Surendra v. Emperor* (1910) I. L. R. 38 Cal. 75.
3. *Kotamraju v. Emperor* (1905) I. L. R. 28 Mad. 90 at 96.
4. *Queen v. Abbas Ali* (1896) I. L. R. 25 Cal 512 F. B.

Similarly, a person who uses a false certificate with the intention of being admitted to a Law Class which, but for such certificate, he could not have been admitted to, acts fraudulently and commits an offence under section 471 of the Penal Code.[1]

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, is sufficient to support a conviction.[2] In order to prove an intent to defraud, it is not at all necessary that there should have been some person defrauded, or who might possibly have been defrauded. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person has a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque either to try his credit, or to imitate his handwriting, there would be no intent to defraud, though there would be parties who might be defrauded; but where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded.[3]

Distinction between "fraudulently" and "dishonestly".— There is a real distinction between the meaning of the terms "fraudulently" and "dishonestly." The former denotes an intent to deceive; the latter has the restricted meaning of causing wrongful gain or wrongful loss. A fraudulent act need not necessarily be dishonest, though it is generally so. Thus the production of a forged bond by a person in a suit with the intent to make the Court to believe that he was entitled to recover money upon the basis of the particular document produced, though may not be dishonest within the meaning of section 24, may yet be fraudulent within the meaning of section 471 of the Penal Code.[4]

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1. *Reg v. Soshi Bhushan* (1893) I. L.R. 15 All. 210.
2. *Dhunum Kazee*, (1882) I. L. R. 9 Cal. 53.
3. Per Maule J. *in Nash's case* (1852) 2 Den. C. C. 493, 499.
4. *Kedar Nath Chatterjee v. King Emperor* (1901) 5 C. W. N. 897.

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

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

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk, or servant is a clerk or servant within the meaning of this section. (S. 27).

Under this section property in the possession of a person's wife, clerk, or servant, is deemed to be in that person's possession. Thus, a third person who dishonestly deprives a man's wife of his goods in her charge takes them out of the husband's possession and thus steals from him.[1] Similarly, if the wife, during her husband's absence, dishonestly converts his property, left in her charge, to her own use or to that of another, she is guilty of theft.[2] Any Government property, in the possession of a Government servant should be deemed to be in the possession of the Government, and if a criminal, by cheating a Government servant, induces either him or another Government officer to deliver to him certain property belonging to the Government the act of the criminal is covered by section 415 of the Pakistan Penal Code.[3]

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

Explanation 1.—It is not essential to counterfeiting that the imitation should be exact.

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1. See Illustration 'O' to s. 378.
2. *Queen v. Butchi* (1893) I. L. R. 17 Mad. 401.
3. *Md. Rashid v. State* (1960) 12 D. L. R. (S. C) 207.

Explanation 2.—When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised. (S. 28).

For a thing to be termed "counterfeit," there shall be some sort of resemblance sufficient to cause deception. If there is no such resemblance, it cannot be said to be "counterfeit," *e. g.*, a counterfeit currency note which would not deceive even a villager.[1] The word 'counterfeit' does not connote an exact reproduction of the original. The difference between the counterfeit and the original is not, therefore, limited to a difference existing only by reason of faulty reproduction.[2] Deception need not actually take place ; but the intention to practise deception by causing one thing to resemble another is enough.

The thing conterfeited may be a coin or a piece of metal. Its value is immaterial. The counterfeited coin may be more valuable so far as money value is considered than the coin for which it is intended to pass. If coins are made to resemble genuine coins and the intention of the makers is merely to use them in order to foist a false case upon their enemies, those coins do not come within the definition of counterfeit coins.[3]

The word "counterfeit" occurs in offences relating to coin provided in Chapter XII and offences relating to property marks and currency notes in Chapter XVIII.

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

Explanation 1.—It is immaterial by what means or upon

1. *Emperor v. Jwala,* (1928) I. L. R. 51 All. 470.
2. *Local Government v. Seth Motilal Jain* (1938) Nag. 192.
3. *Velayudham Pillai* (1938) I. L. R. Mad. 80.

what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed. (S. 29).

A writing, which is not legal evidence of the matter expressed, may yet be a document if the parties framing it believed it to be, and intended it to be, evidence of such matter.[1] An agreement in writing, which purported to be entered into between five persons, was signed by only two of them; it was held that it was a document within the meaning of this section though it was not signed by all the parties thereto.[2] Letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger of a forest, are documents.[3] The word 'document' does not necessarily mean paper. Ordinarily it is, but not necessarily so. Anything upon which any matter is written, inscribed or printed is a document. It is not necessary that the thing so inscribed should be capable of being read. It would be enough if it can be heard. Thus, a gramophone record or a talkie film is document. In fact some films are called documentaries. Currency notes are included in the definition of 'document.'[4]

Section 29 provides some illustrations showing that the following are documents :—

(i) A writing expressing the terms of a contract, which may be used as evidence of the contract, (ii) a cheque upon a banker, (iii) a power-of-attorney, (iv) a map or plan which is

1. *Queen v. Sheefait Ally* (1868) 2 B. L. R. (Cr) 12.
2. *Ramaswami Ayyar v. King* (1917) I. L. R. 41 Mad. 589.
3. *Emperor v. Krishtappa* (1925) A. I. R. 1925 Bom. 327.
4. *Shyama Charan v. S. D. M. Belonia* (1962) A. I. R. Tripura, 50.

intended to be used or which may be used as evidence, and (v) a writing containing directions or instructions.

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

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

Illustration.—A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security." (S. 30).

A valuable security is a document of value, that is to say, a document which of itself creates or extinguishes legal rights or at least purports to create or distinguish them. A valuable security is not only a document which is, but also one which purports to be, a document described in this section. Thus a document which has not been stamped and is not consequently receivable in evidence in the Civil Court may be a valuable security.[1] A valuable security includes a document which on the face of it is a valuble security though in fact it is not so.[2] Account books containing entries not signed by a party[3] as well as a copy of valuable security[4] are not valuable security.

Distinction between document and valuable security.—Document is the genus of which valuable security is a species. All valuable securities are documents, but all documents are not valuable

1. *Queen v. Ramasami* (1888) I. L. R. 12 Mad. 148.
2. *Fatik Talukdar v. State* (1956) 8 D. L. R. 414.
3. *Hari Prasad* (1953) A. L. J. 318.
4. *Gobinda Prasad v. State* A. I. R 1962 Cal. 174.

securities. Only those kinds of documents which create, extend, transfer, restrict, extinguish or release any legal right are termed "valuable securities." Law attaches greater significance to a valuable security than to a document. Thus forgery of an ordinary document is punishable less severely than the forgery of a valuable security.

Will.— The words "a will" denote any testamentary document. (S. 31).

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

Act. Omission.—The word "act" denotes as well a series of acts as a single act : the word "omission" denotes as well a series of omissions as a single omission. (S. 33).

Voluntarily.—A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing these means, he knew or had reason to believe to be likely to cause it. (S. 39).

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

Offence.—Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter VA and in the following sections namely, sections 64-67, 71, 109, 110, 112, 114-117, 187, 194, 195, 203, 211, 213, 214, 221-225, 327-331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, and under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing

punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine. (S. 40).

Special Law.—A "special law" is a law applicable to a particular subject. (S. 41).

Local law.—A local law is a law applicable only to a particular part of the territories comprised in Pakistan. (S. 42).

The difference between the local law and the special law is that the former applies to a particular locality, whereas the latter deals with a particular topic or subject.

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

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

Life.—The word "life" denotes the life of a human being unless the contrary appears from the context. (S. 45).

Death.—The word "death" denotes the death of a human being unless the contrary appears from the context. (S. 46).

Animal.—The word "animal" denotes any living creature, other than a human being. (S. 47).

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

Year. Month.—Whenever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar. (S. 49).

Section.—The word "section" denotes one of those portions of a Chapter of this Code which are distinguished by prefixed numeral figures. (S. 50).

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

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

This section does not define "good faith." It gives merely a negative definition by saying that "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." The phrase "due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. The belief must be a reasonable belief, not an absurd belief, that is, there must be some reasonable ground for it. When a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention, but that he exercised such care and skill as the duty reasonably demanded for its due discharge.[1]

The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acted. The law does not exact the same care and attention from all persons regardless of the position they occupy.[2] The degree of care and attention will vary with the degree of danger which may result from the want of care and attention. Where the peril is the greatest, the greatest caution is necessary. Thus a *Kabiraj* operated on a man for internal piles by cutting them out with an ordinary knife. The man died from haemorrhage. The *Kabiraj* was charged and convicted under section 304A of the Penal Code for causing death by doing a rash and negligent act; it was held that as the prisoner was admittedly uneducated in matters of surgery, his understanding to perform a dangerous operation was not an act done in good faith *i. e.* done with due care and attention, although he had performed similar operations on previous occasions.[3] Similarly a Police officer seeing a horse resembling one which his father had lost a short time previously, tied up in a person's premises, seized

1. *Gaya Din* (1934) I.L.R. 9 Luck. 517.
2. *Bhawoo Jivaji v. Mulji Dayal* (1888) I:L.R. 12 Bom. 377 at 393.
3. *Sukaroo Kabiraj v. Emperor* (1887) I. L. R. 14 Cal. 566.

it and arrested the person without making further enquiries, it was held that he had not acted in good faith.[1] In another case the accused seeing a stooping child in the early morning at a place supposed to be haunted and believing him to be a spirit or demon caused his death by inflicting blows, before he discoverd his mistake, it was held that the accused was guilty of an offence under section 304A, for though he was under a mistake of fact, he had acted without due care and caution and as such could not be held to have acted in good faith.[2]

An arrest merely on the report of apprehension of a breach of the peace is not an act of good faith.[3]

Good faith how far a defence.—The plea of good faith, if once established, will be a good defence in the following cases, namely—(1) Act done in good faith pursuant to a judgment or order of Court (s.78). (2) Act done by a person believing himself, in good faith, to be justified by law in doing it (s.79). (3) Act done in good faith for benefit of another (s.92). (4) Communication made in good faith (s. 93) and (5) a person believing himself in good faith to have a lawful right to obstruct a private way over land or water does not commit the offence of wrongful restraint (s. 339, Exception).

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

Joint liability in crime.—Sections 34, 35, 37 and 38 of the Pakistan Penal Code lay down the rules relating to joint liability in crime. Section 34 states : "When a criminal act is done

1. *Sheo Surun v. Md. Fazil Khan* (1868) 10 W. R. (Cr.) 20.
2. *Hayat* (1887) P. R. No. 11 of 1888.
3. *Ahmed v. Crown* (1954) 6 D. L. R. (WP) 149.

by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The object of this section is to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all.[1] The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, support and protection to the preson actually engaged in committing the crime.

The underlying principle of this section is that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.[2] It is a well recognized canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible, as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object, each and every man becomes responsible for the acts of each and every other in execution and furtherance of their common purpose. As the purpose is common, so must be the responsibility.[3] All are guilty of the principal offence, not of abetment.

This section does not create or define an offence. So it is not a penal provision. It simply lays down a principle of common liability or constructive criminality under which all are held liable for the acts of one of them. It does not lay down any general formula or prescribe a standard to suit a combination of all possible circumstances in relation to a criminal act.

1. *Mepa Dana* (1959) 62 Bom. L. R. 269, S. C.
2. *Waryam Singh v. Crown* (1941) I. L. R. 22 Lahore 423 at 426.
3. *Ganesh Sing v. Ram* (1869) 3 B. L. R. (P.C) 44, 45.

The essential ingredients to be proved in order to fix joint responsibilily are that (i) a criminal act was done ; (ii) the said act was done by several persons ; (iii) several persons did it in furtherance of the common intention of all and (iv) the person sought to be so held liable had participated in some manner in the act constituting the offence.

Section 34 deals with the doing of separate acts, similar or diverse, by several persons ; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.[1] A furtherance of a common design is a condition precedent for convicting each of the persons who take part in the commission of a crime and the mere fact that several persons took part in a crime in the absence of a common intention is not sufficient to convict them of the crime. Mere presence of persons at the scene of an offence is not *ipso facto* sufficient to render them liable for the crime.

To establish guilt under section 34 it is necessary to prove a common intention as distinguished from a common object as in section 149 and it must be shown that the criminal act was committed in furtherance of that intention. The gist of the offence under section 34 consists in the unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone.[2]

Common intention is an intention to commit a crime actually committed and every one of the accused should have participated in that intention. It implies a pre-arranged plan and acting in concert pursuant to the plan. So it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan.[3] To constitute common intention it is necessary

1. *Barendra v. Emperor* (1924) I.L.R. 52 Cal. 197 P.C : 52 I. A. 40 at 51.
2. *Abdul Latif v. Crown* (1956) 8 D. L. R. 238 at 239 ; *Md. Yakub v. Crown* (1955) 7 D. L. R. 75.
3. *Sadar Ali v. Crown* (1957) 9 D. L. R. (F. C) 7.

that the intention of each one of them be known to the rest of them and be shared. The pre-arranged plan may be made shortly or immediately before the commission of the crime and a long standing conspiracy is not required for the applicability of this section. The common intention may also develop in the course of events, although such intention may not have been present in the mind of the accused at the commencement of the incident.[1] Common intention can be formed on the spur of the moment[2] and can be inferred from the surrounding circumstances.[3] It is wrong to say that section 34 does not apply in the case of a sudden fight or chance encounter.[4] The common intention can be established as an inference from the fact of participation in the commission of the offence. [5]

The words "in furtherance of common intention of all" in section 34 do not require that all participants in the joint act must either have common intention of committing the same offence or the common intention of producing the same result by their joint act. It is enough if all of them intend that the joint act be performed.[6]

It cannot be said that a deaf and dumb person cannot form an intention common with another person to commit an offence, but, before such an inference is drawn, the evidence with regard to it must be very cogent.[7]

When the essential ingredients mentioned above are satisfied each of such persons will be liable for the entire criminal act in the same manner as if he alone has done it irrespective of the fact whether he was present at the time or

1. *Sadar Ali v. Crown, Supra* ; *Sanaullah v. Crown* (1954) 6 D. L. R. (Lahore) 90.
2. *Md. Akbar v. State* (1961) P.L.D (Lahore) 348.
3. *Bahar v. Crown* (1954) 6 D. L. R. (F. C) 205 ; *Md. Akbar v. State* 1961 P. L. D (Lahore) 348.
4. *Md. Akbar v. State* P. L. D. 1961 (Lahore) 348.
5. *Tera Mia v. Crown* (1955) 7 D. L. R. 539.
6. *Fazar v. Crown* (1952) 4 D. L. R. 99.
7. *Md. Aslam v. Crown* (1954) 6 D. L. R. (W. P.) 133.

not. Before a person can be saddled with constructive liability, it must be satisfactorily proved by the prosecution that the person so convicted had common intention of doing that particular act with the person actually doing it.[1] It is not sufficient to prove that an offence is a likely consequence of a common intention.[2]

The leading case under this section is *Barendra Kumar Ghose v. King Emperor.*[3] In this case the accused was charged under section 302 read with section 34 of the Pakistan Penal Code, with murder of a Postmaster. At the trial the evidence showed that while the Postmaster was in his office counting money, three men, of whom the accused was one, fired pistols at him after having called upon him to hand over the money; he was hit in two places and died. The trial judge directed the jury that if they were satisfied that the Postmaster was killed in furtherance of the common intention of all three men, then the accused was guilty of murder, whether he fired the fatal shot or not. It was held by the Privy Council that upon the true construction of section 34 of the Code, especially having regard to sections 33, 37 and 38, the direction was correct.

In the case of *Mahbub Shah v. King Emperor*[4] it was held that a similar intention is to be distinguished from the common intention. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. (See the facts and decisions of the case at the end of the book).

The second principle of joint liability is enunciated in section 35 which runs thus :

1. 1950 P.L.D. (Peshwar) 60 ; *Khalil v.* State, 1960 P. L. D. (Karachi) 38.
2. *Khalil v.* State, 1960 P.L.D. (Karachi) 38.
3. (1924) I.L.R. 52 Cal. 197 P.C.: 52 I.A. 40.
4. A.I.R. 1945 P.C. 118 : 72 I.A. 148.

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

Section 34 deals with a case where an act is done by several persons in furtherance of the common intention of all. Section 35 enacts that when an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each person is liable only to the extent of his own knowledge or intention. If several persons having one and the same criminal intention or knowledge jointly commit murder or an assault, each is liable for the offence as if he had acted alone; but if several persons join in an act each having a different intention or knowledge from the other, each is liable according to his own criminal intention or knowledge and he is not liable further. Thus if A and B unite in assaulting and resisting C, a public servant in the execution of his duty, A not knowing C's character, may be guilty only of an assault; but B, if he knowingly resists C, may commit the offence of obstructing a public servant in the discharge of his public duty.

If an act which is an offence in itself and without reference to any criminal knowledge or intention on the part of the doer is done by several persons, as if several persons commit a nuisance by carrying on an offensive trade, each of such person is liable for the offence. This section deals with those cases where acts are crimes by reason only of a particular intent or knowledge In such cases in order to convict a person assisting the individual who actually performs the act it must be shown that he had the particular criminal intent or knowledge.

The third principle is laid down in section 37 of the Code which runs thus :

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

The following illustrations will make the meaning of this section clear :—

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

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

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

Section 37 enacts that when an offence is committed by several acts, each person intentionally committing one of those acts singly or jointly with others, commits the offence. We have seen before that if several persons combining both in intent and in act commit a crime jointly, each is guilty of the same as if he had done the whole ; and so it is, if each person

has his several part to do, the whole contributing to one result. It is immaterial what particular share is allotted to each or whether the object be accomplished jointly by all present at the same time and place, or each performs his own part separately. Where all concur in effecting the criminal result, each does the act so far as his own part extends, and, as to the residue, may be regarded as causing it to be done by means of a guilty agent. All the persons concerned stand in the mutual relation of principals and agents to each other. If several persons make a joint attack on a man with heavy sticks and fracture his skull and inflict a number of other injuries on him, all are equally guilty even though it may not be possible to prove which of them actually inflicted the fatal blow.[1]

The fourth principle of constructive liability is laid down in section 38 which runs thus :

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

Section 38 provides that persons jointly engaged in a criminal act may be guilty of different offences owing to difference in their intentions. Section 34 treats of acts done with a common intention, whereas this section treats of acts done with different intentions. This section is the converse of section 34. Under section 34 several persons act in furtherance of a common intention so that their liability is joint, irrespective of the nature or extent of their contribution to the crime. Under the present section several persons combine to commit a crime, but not in furtherance of a common intention. Therefore, as the intention differs, so does their criminal responsibility. Thus A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will toward Z and intending to kill him, and not having been subject to the provocation, assists

1. *Ghulam Hussain v. King* A. I. R. 1924 All. 78.

A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

Sections 34-38 lay down the principles similar to the English law of principals in the first and second degree. Under the English law, persons who are in any way connected with the preparation of a crime are divided into two classes : (1) Principals, and (2) accessories. Those who take part in the actual execution of the crime are called principals. Principals are of two kinds : (i) Principals in the first degree or those who actually commit the crime. (ii) Principals in the second degree or those who aid or abet in the actual commission of the crime.

Those who counsel, procure, or command the commission of the crime and those who in any way assist the criminal after the crime with a view to shield him from justice are called accessories, the former being 'accessories before the fact,' and the latter 'accessories after the fact.'

Principals are dealt with in the Penal Code under sections 34-38. There is no distinction in our Penal Code between "principals in the first degree" and "principals in the second degree." The law with regard to the "accessories before the fact" is to be found in sections 107 to 120 (abetment) and "accessories after the fact" are treated in scattered sections *viz.*, sections 130, 136, 137, 157, 212, 216 and 410-414.

CHAPTER III

OF PUNISHMENTS

Object of Punishment.—The principal object of punishment is to prevent offences and to reform the criminals. There are, four different theories of punishment, *viz.*, deterrent, preventive retributive and reformative.

Deterrent.—The object of criminal justice in awarding punishment, according to this theory, is to deter people from commiting crime. The infliction of punishment serves as a check on others who are evil-minded. But this theory is not absolutely correct for a hardened criminal becomes accustomed to the severity of the punishment and no amount of deterrence prevents him from indulging in crime.

Preventive.—This theory aims at preventing a repetition of wrong-doing by disabling the offender. This is done by such penalties as imprisonment, death, exile or forfeiture. This form of punishment also fails to achieve the desired end as the persons who visit jail once are habituated to it.

Retributive.—According to this theory the offender should be made to suffer in proportion to the injury caused to the victim, *viz.*, a tooth for a tooth or an eye for an eye. It is a barbarous form of punishment and ignores the causes of the crime, and it hardly attempts to remove it.

Reformative.—The object of punishment must not be to wreck vengeance but to reform the criminal so as to prevent him from committing further crime. Crime like all other diseases should be properly diagnosed and treated scientifically. Crime is a malady and the aim of every punishment should be the reformation of the offender by prescribing proper treatment. According to this theory, crime is like a disease. This theory maintains, "you cannot cure by killing."

Kinds of Punishments.--Under section 53 of the Pakistan Penal Code the punishments to which offenders are liable are :

1. Death ;
2. Transportation ;
3. Imprisonment, which is of two descriptions *viz.*
   (*i*) Rigorous, that is with hard labour, (*ii*) Simple ;
4. Forfeiture of property ;
5. Fine.

Besides these five kinds of punishments, two other forms of punishments have been added by subsequent enactments *viz.* (6) whipping and (7) detention in reformatories.

1. Death.—Death sentence may be awarded in seven cases under the Penal Code. They are—

(*i*) Waging war against Pakistan (s. 121). (*ii*) Abetting mutiny actually committed (s. 132). (*iii*) Giving or fabricating false evidence upon which an innocent person suffers death (s. 194). (*iv*) Murder (s. 302). (*v*) Abetment of suicide of child or insane person (s. 305). (*vi*) Attempt to murder by life-convicts (s. 307). (*vii*) Dacoity with murder (s. 396).

In the above seven cases the Court is not bound to award sentence of death. In English Law, sentence of death is compulsory for the offence of murder, but under the Pakistan Penal Code an accused in a murder case may be sentenced to death or transportation for life. But there is only one case in which sentence of death must be inflicted. It is when murder is committed by a person who is already undergoing sentence of transportation for life. (S. 303).

Commutation of sentences.—Commutation of sentence means to minimise the sentence. Under sections 54 and 55, the appropriate Government may, without the consent of the offender, commute—(*i*) a sentence of death for any other punishment and (*ii*) a sentence for transportation for life, for a term not exceeding 14 years.

The appropriate Government mentioned above means—(*i*) in case of death—the Central Government or the Provincial Government (s. 54) and (*ii*) in case of transportation for life—the Provincial Government (s. 55)

In calculating fractions of terms of imprisonment, transportation for life shall be reckoned as equivalent to transportation for 20 years. (S. 57).

2. Transportation.—Transportation for life must be inflicted for unlawful return from transportation (s. 226) and to a thug (s. 311). Such punishment may be inflicted for (1) certain offences under Chapter XII or Chapter XVII after previous conviction (s. 75), (2) waging or attempting to wage war or abetting waging of war against Pakistan (s. 121), (3) conspiracy to commit offences punishable by section 121 (s. 121-A), (4) collecting arms etc. with the intention of waging war against Pakistan (s. 122), (5) sedition (s.124-A), (6) waging war against any Asiatic Power in alliancer with Pakistan (s.125), (7) voluntarily allowing prisoner of State of war to escape (s.128), (8) aiding escape of, rescuing or harbouring such prisoner (s.130), (9) abetment of mutiny, if mutiny is committed in consequence thereof (s. 132), (10) giving or fabricating false evidence with intent to procure conviction of capital offence; if innocent person be thereby convicted and executed (s.194), (11) giving or fabricating false evidence with intent to procure conviction of offence punishable with transportation or imprisonment (s.195), (12) intentional omission to apprehend on the part of public servent bound to apprehend person under sentence or lawfully committed (s.222), (13) resistance or obstruction to lawful apprehension of another person (s.225), (14) unlawful return from transportation (s.226), (15) import or export of counterfeits of Pakistan coin (s.238), (16) counterfeiting Government stamp (s.255), (17) murder (s.302), (18) culpable homicide not amounting to murder (s.304), (19) abetment of suicide of child or insane person (s.305), (20) attempt to murder by life-convicts (s.307), (21) causing miscarriage without woman's consent (s.313), (22) death caused by act done with intent to cause miscarriage ; if act done without woman's consent (s.314), (23) voluntarily causing grievous hurt by dangerous weapons or means (s.326), (24) voluntarily causing grievous hurt to extort property, or to constrain to an illegal act (s.329), (25) kidnapping or abducting in order to murder (s.364), (26) habitual dealing in slaves (s.371),

(27) rape (s.376), (28) unnatural offences (s.377), (29) extortion by threat of accusation of an offence punishable with death or transportation, etc. (s.388), (30) putting person in fear of accusation of offence, in order to commit extortion (s.389), (31) dacoity (s.395), (32) dacoity with murder (s.396), (33) for belonging to a gang of dacoits (s.400), (34) criminal breach of trust by public servant, or by banker, merchant or agent (s.409), (35) dishonestly receiving property stolen in the commission of a dacoity (s.412), (36) habitually dealing in stolen property (s.413), (37) mischief by fire or explosive substance with intent to destroy house, etc. (s.436), (38) mischief described in section 437 committed by fire or explosive substance (s.438), (39) house-trespass in order to commit offence punishable with death (s.449), (40) grievous hurt caused while committing lurking house-trespass or house-breaking (s.459), (41) lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them (s.460), (42) forgery of valuable security, will, etc. (s.467), (43) making or possessing counterfeit seal, etc. with intent to commit forgery punishable under section 467 (s.472), (44) having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine (s.474), (45) counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material (s.475), (46) fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security (s.477), (47) counterfeiting currency-notes or bank-notes (s.489-A), (48) using as genuine, forged or counterfeit currency-notes or bank-notes (s.489-B).

Transportation for any shorter term may be inflicted under sections 121-A and 124-A. Transportation for not less than 7 years and not more than the term for which the offender might be imprisoned, may be inflicted under section 59.

3. Imprisonment.—Imprisonment is of two kinds : (*i*) rigorous and (*ii*) simple. In the case of rigorous imprisonment the offender is put to hard labour, such as, grinding corn, digging earth, drawing water, cutting fire-wood, bowing wool, etc. In the

case of simple imprisonment, the offender is confined to jail and is not put to any kind of work.

An offender is punished with rigorous imprisonment without the alternative of simple imprisonment, in the cases of—

(*i*) giving or fabricating false evidence with intent to procure conviction of capital offence (s. 194),

(*ii*) house-trespass in order to commit offence punishable with death (s.449).

The following offences are punishable with simple imprisonment only :—

(*i*) Public servant unlawfully engaging in trade (s.168), or unlawfully buying or bidding for property (s. 169).

(*ii*) A person absconding to avoid service of summons or other proceedings from a public servant (s.172) or preventing service of summons or other proceeding, or preventing publication thereof (s.173), or not attending in obedience to an order from a public servant (s.174).

(*iii*) Intentional omission to produce a document to a public servant by a person legally bound to produce such document (s.175), or intentional omission to give notice or information to a public servant by a person legally bound to give (s.176) or intentional omission to assist a public servant when bound by law to give assistance (s.187).

(*iv*) Refusing oath or affirmation when duly required by a public servant to make it (s.178), or refusing to answer a public servant authorised to question (s.179), or refusing to sign any statement made by a person before a public servant (s.180).

(*v*) Disobedience to an order duly promulgated by a public servant if such disobedience causes obstruction, annoyance, or injury (s.188).

(*vi*) Escape from confinement or custody negligently suffered by a public servant (s.223), or omission to apprehend, or sufferance of escape, on the part of public servant in cases not otherwise provided for (s.225-A).

(*vii*) Intentional insult or interruption to public servant sitting in judicial proceeding (s. 228).

(*viii*) Continuance of nuisance after injunction to discontinue (s. 291).

(*ix*) Wrongful restraint (s. 341).

(*x*) Defamation, printing or selling defamatory matter known to be so (ss. 500-502).

(*xi*) Uttering any word or making any sound or gesture, with an intention to insult the modesty of a woman (s. 509).

(*xii*) Misconduct in a public place by a drunken person (s.510).

Maximum and minimum terms of imprisonment.—The maximum term of imprisonment that can be awarded for an offence is 14 years (s. 55), and the minimum term is 24 hours (s. 510). It is discretionary with the Court to determine the term of imprisonment within the bounds laid down by the Pakistan Penal Code. The punishment varies with the evil consequences of a criminal act, motive and character of the offender. Circumstances which aggravate an offence such as the manner in which the offence is committed, and the number of previous convictions to the credit of the offender necessitates the infliction of a longer term of imprisonment, while circumstances, such as the minority or old age of the offender, provocation, absence of bad intention, self-protection, etc., call forth for a lenient view. In two cases, however, the Pakistan Penal Code has prescribed a minimum term of imprisonment of 7 years (ss. 397 & 398) where the offence of robbery or dacoity is attended with certain aggravating circumstances, *viz.*, use of deadly weapon, or causing of grievous hurt or attempting to cause death or grievous hurt or where in an attempt to commit robbery or dacoity the offender is armed with any deadly weapon.

Solitary confinement.—Solitary confinement may be inflicted for offences punishable with rigorous imprisonment. The offender may be kept in solitary confinement for any portion or portions of his term of imprisonment, not exceeding 3 months in the whole according to the following scale (s. 73) : –

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

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year,

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

Section 74 of the Code further limits the scope of solitary confinement by providing that in executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

A sentence of solitary confinement for more than three months cannot be passed even if a person is convicted at one trial of more than one offence. Such confinement is awarded for offences under the Code only. Even then it cannot be awarded where imprisonment is not part of the sentence or where the imprisonment is in lieu of fine. It may be awarded in a summary trial. Solitary confinement must be imposed at intervals. A sentence inflicting solitary confinement for the whole term of imprisonment is illegal, though the sentence is awarded for not more than fourteen days.[1]

4. **Forfeiture of property.**—The punishment of absolute forfeiture of all property of the offender is now abolished. Sections 61 and 62 of the Pakistan Penal Code dealing with such forfeiture were repealed by Act XVI of 1921.

There are, however, 3 offences in which the offender is liable for forfeiture of specific property. They are—

(*i*) Whoever commits, or prepares to commit, depredation on the territories of any power at peace with Pakistan shall be liable, in addition to other punishments, to forfeiture of any property used, or intended to be used in committing each depredation or acquired thereby. (S. 126).

1. *Nayan Suk Mether* (1869) 3 B.L.R: 49.

(*ii*) Whoever knowingly receives property taken as above mentioned or in waging war against any Asiatic Power at peace with Pakistan shall forfeit such property. (S. 127).

(*iii*) A public servant, who improperly purchases property, which, by virtue of his office, he is legally prohibited from purchasing, forfeits such property. (S. 169).

5. **Fine.**—The Pakistan Penal Code prescribes the sentence of fine in the following cases :—

(*i*) A person in charge of a merchant vessel negligently allowing a deserter from the Army or Navy or Air Force of Pakistan to obtain concealment in such vessel, is liable to a fine not exceeding Rs. 500. (S. 137).

(*ii*) The owner or occupier of land on which a riot is committed or an unlawful assembly is held, and any person having or claiming any interest in such land, and not using all lawful means to prevent such riot, or unlawful assembly is punishable with a fine not exceeding Rs. 1,000. (S. 154).

(*iii*) The person for whose benefit a riot has been committed not having duly endeavoured to prevent it. (S. 155).

(*iv*) The agent or the manager of such person under like circumstances. (S. 156).

(*v*) False statements in connection with an election. (S.171-G).

(*vi*) Illegal payments in connection with an election. (S.171-H)

(*vii*) Failure to keep election accounts. (S.171-I).

(*viii*) Voluntarily vitiating the atmosphere so as to render it noxious to the public health, is punishable with a fine of Rs. 500. (S. 278).

(*ix*) Obstructing a public way or line of navigation is punishable with a fine not exceeding Rs. 200. (S. 283).

(*x*) Committing a public nuisance not otherwise punishable, is punishable with a fine not exceeding Rs. 200. (S. 290).

(*xi*) Publication of a proposal regarding a lottery, is punishable with a fine not exceeding Rs. 1,000 (S. 294-A).

Imprisonment in default of fine.— Section 64 of the Pakistan Penal Code authorises a Court to award a sentence of imprison-

ment in default of payment of fine and expressly enacts that such imprisonment shall be in excess of any other imprisonment to which the offender may have been sentenced. Hence when the sentence of imprisonment in default of payment of fine is ordered to run concurrently with the substantive term of imprisonment for the offence it is a violation of the mandatory provisions of the law bearing on the matter.[1]

Where an offence is punishable with imprisonment and fine the imprisonment in default of payment of fine must not exceed one-fourth of the maximum term of the offence (s.65). The extra imprisonment may be simple or rigorous. It will be of the same description prescribed for the offence (s.66). For example where simple imprisonment is prescribed for the offence, rigorous imprisonment cannot be ordered in default of payment of fine.[2] When the offence is punishable with fine only the imprisonment in default of payment of fine shall not exceed (a) 2 months when the amount of the fine does not exceed Rs. 50 ; (b) 4 months when the amount does not exceed Rs. 100, and for any term not exceeding 6 months in any other case (s.67). Such imprisonment must be simple. If the prisoner pays the fine, imprisonment will terminate (s.68), if he pays a portion of it, the imprisonment will be reduced proportionately (s.69). Thus A is sentenced to a fine of one hundred rupees and to 4 months' imprisonment in default of payment. Here, if seventy five rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues in imprisonment, A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonments, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

1. *State v. Krishna Pillai*, A.I.R. 1953 T. C. 233 ; *Qutub v. State* (1959) 11 D. L. R. (WP) 45.
2. *Shafiq Ahmed v. State*, 1959 P. L. D. (Lahore) 851.

Under section 70 of the Pakistan Penal Code fine may be levied or realised within 6 years or at any time during the imprisonment if it is more than 6 years. Death of the offender does not discharge him from liability. His property will be liable for such fine.[1] Even if the offender has undergone imprisonment in default of payment of fine he still remains liable for the fine.

6. **Whipping.**—Under the Whipping Act 1909, offenders are liable to whipping as an alternative or additional punishment for certain offences. Sections 3 and 4 of the said Act enumerate the specific offences, which may be punished with whipping in lieu of or in addition to any other punishment ; but juvenile offenders can be whipped for any kind of offence. They will be whipped on the palm of the hand in the way of school discipline; others on the bare buttock with a light ratan ½ inch thick. Females are not to be whipped, nor males above the age of 45 years. In France, Germany and United States corporal punishment has been abolished. The mode of executing the sentence is provided in sections 390—395 of the Criminal Procedure Code, 1898.

7. **Detention in reformatories.**—Under section 8 of the Reformatory Schools Act, 1897 juvenile offenders sentenced to transportation or imprisonment may be sentenced or detained in a Reformatory School for a period of 3 to 7 years.

A Magistrate should first pass a sentence of imprisonment and then direct that instead of undergoing the sentence, the offender should be sent to a Reformatory School for such a period as the Act and Rules framed thereunder direct.

Pardoning of Sentence.— Under section 55-A of the Pakistan Penal Code, the President of Pakistan can grant pardons, reprieve, respite or remit punishment.

Rules for assessment of punishment.— Sections 71 and 72 of the Pakistan Penal Code lay down two rules for assessment of punishment. They lay down what is known as the law of cumulative punishment. The first part of section 71 runs as follows :—

1. *Daktar Ali v. Sukramain Das* (1954) 6 D. L. R. 29.

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

Illustrations. — (*a*) A gives Z 50 strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for 50 years, one for each blow. But he is liable only to one punishment for the whole beating.

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

In the case of *Hafizuddin v. State*,[1] it was held that separate sentences for offences which are not completely different and distinct offences but component part of another offence, are bad in law.

The second part of section 71 states : "Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

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

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

If the two counts are by themselves separate offences, the accused can be convicted and sentenced separately on both those counts.[2] But separate sentences under sections 147 and 426[3] and under sections 379 and 411[4] of the Penal Code are not valid. In the case of *Md. Sadiq v. State*[5] the accused was found guilty under section 409 of

1. (1968) 21 D. L. R. 172 ; see also *Rewail v State* (1956) 8 D. L. R. 569.
2. *Rewail v. State* (1956) 8 D. L. R. 569 ; *Amir Hossain v. Crown* (1957) 9 D. L. R. 71 ; 1 P. L. R. (Dacca) 10.
3. *Mamatazuddin v. Crown* (1956) 8 D. L. R. 95.
4. 1950 P. L. D. (Baluchistan) 14.
5. (1968) 21 D. L. R. (W. P.) 12 ; *Fazlul Haque v. State* (1959) 11 D. L. R. 316.

the Penal Code and section 5 (2) of the Prevention of Corruption Act, 1947, it was held that in view of section 71 of the Code double punishment is prohibited.

The second rule of assessment of punishment is laid down in section 72 which provides that where it is doubtful as to which of the several offences a person is guilty, he is punished for the offence for which the lowest imprisonment is provided.

Enhanced punishment for subsequent offences.—There is a class of hopeless criminals. It is impossible to improve or reform them. The incorrigible old offenders do not care for sentences of 4 to 5 years. The theory of reformative punishment is inapplicable to them. To them sentences of 2 years or 3 years are like waters on duck's back. They have to be dealt with very strictly. Only long term of imprisonment can, if not cure them, or reform them, at least rid society of these pests.

Section 75 of the Pakistan Penal Code deals with enhanced punishment to be awarded in case of, what is known as, "old offenders." It states : "Whoever, having been convicted,—

(*a*) by a Court in Pakistan of an offence punishable under Chapter XII and Chapter XVII of this Code with imprisonment of either description for a term of 3 years or upwards, or

(*b*) by a Court or tribunal in any Indian State acting under the general or special authority of the Central Government, of an offence which would, if committed in Pakistan, have been punishable under those Chapters of this Code with like imprisonment for the like term,

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to 10 years."

To bring the offence within the term of this section, the following conditions must be fulfilled : –

(*i*) The offence of which the accused has been previously convicted and of which he is subsequently charged with must be

(*a*) under either Chapter XII and Chapter XVII of this Code and

(*b*) punishable with imprisonment for 3 years or more.

(*ii*) The previous conviction must have been by a Court in Pakistan or by a Court or tribunal in any Indian State acting under the general or special authority of the Central Government.

(*iii*) The subsequent offence must have been committed after the previous conviction.

This section does not create a substantive offence, but only imposes a liability to enhanced punishment provided the above conditions are fulfilled.

When the accused pleads guilty to the charge of previous conviction, that amounts to admission of guilt under section 255A of the Criminal Procedure Code and, therefore, the previous conviction need not be proved under section 511 Cr. P. C.[1]

1. *Qaim Din v. State* (1958) 10 D.L.R. (W.P.) 69.

CHAPTER IV

GENERAL EXCEPTIONS

[Chapter IV deals with the subject of exceptions to criminal liability and enumerates the facts or circumstances which negative or reduce criminality. Throughout the Code, every definition of an offence, every penal provision and every illustration of such definition of the penal provision shall be understood subject to the exceptions contained in this Chapter, though these exceptions are not repeated in such definition, penal provision or illustration (s. 6). Under section 105 of the Pakistan Evidence Act, the burden of proving the existence of circumstances which bring the case of an accused within any of the general or special exceptions in the Code is upon the accused and the Court shall presume the absence of such circumstances.]

Exceptions to criminal liability.—The following acts are exempted from criminal liability under the Pakistan Penal Code :

1. Act done by a person bound, or by mistake of fact believing himself bound, by law (s. 76).
2. Act of judge when acting judicially (s. 77).
3. Act done pursuant to the judgment or order of Court (s. 78).
4. Act done by a person justified, or by mistake of fact believing himself justified, by law (s. 79).
5. Accident in doing a lawful act (s. 80).
6. Act likely to cause harm, but done without criminal intent, and to prevent other harm (s. 81).
7. Act of a child under seven years of age (s. 82).
8. Act of a child above seven and under twelve of immature understanding (s. 83).
9. Act of a person of unsound mind (s. 84).
10. Act of a person incapable of judgment by reason of intoxication caused against his will (s. 85).
11. Act not intended and not known to be likely to cause

death or grievous hurt, done by consent (s. 87).

12. Act not intended to cause death, done by consent in good faith for person's benefit (s. 88).
13. Act done in good faith for benefit of child or insane person, by or by consent of guardian (s. 89).
14. Act done in good faith for benefit of a person without consent (s. 92).
15. Communication made in good faith (s. 93).
16. Act to which a person is compelled by threats (s. 94).
17. Act causing slight harm (s. 95).
18. Things done in private defence (ss.96—106).

We may now proceed to discuss the exceptions to criminal liability.

1. Act done by a person bound, or by mistake of fact believing himself bound, by law.—Section 76 provides that "nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it." Thus (a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence. (b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z, A has committed no offence.

Section 76 excuses a person who has done what by law is an offence, under a misconception of facts leading him to believe in good faith that he was commanded by law to do it. This section is of special importance in regard to the Military and Police acting under their superiors' commands and in respect of private persons assisting the Police. For necessarily or manifestly illegal act, however, neither the orders of a parent nor a master will furnish any excuse. The maxim "*respondeat superior*" (act done by the order of the superior) has no application in such a case. The official is bound to exercise his own judgment and unless the actual circumstances are of such a character that he may have

reasonably entertained the belief that the order was one which he was bound to obey, he will be responsible for his act. In the case of *A. Sattar v. State*[1] it was held that protection might be claimed by a police constable under this section for opening a fire, under the orders of superior officer, and killing a man thereby, if he could reasonably think that the officer had good reasons for ordering to fire into a disorderly crowd but no such protection could be sought if there was no riot in progress nor was there any evidence to show that the police party was in danger from the crowd. Mere defiant attitude of a crowd is not a justifiable ground for the police party to fire in self-defence.[2] A military man acting on illegal command of his officer cannot get the benefit of this section.[3]

2. **Act of Judge when acting judicially.**—Section 77 provides that "nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law."

Under this section a Judge is exempted not only in those cases in which he proceeds irregularly in the exercise of a power which the law gives to him, but also in cases where he, in good faith, exceeds his jurisdiction and has no lawful powers. It protects Judges from criminal process just as the Judicial Officers Protection Act, 1850, saves them from Civil suits.

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

This section is a corrolary to section 77. It affords protection to officers acting under the authority of a judgment or order

1. (1953) 5 D. L. R. 184.
2. *Jahir v. State* (1961) 13 D. L. R. 857.
3. *Sube Khan v. State*, 1959 P. L. D. (Lahore) 541.

of a Court. The ministerial officers of Courts of Justice and other persons are protected by this section against criminal liability for what they do in execution of the orders or decrees of the Judge. It is the duty of such persons ordinarily not to question or dispute judicial orders, but to obey them so long as they remain in force. Unless it is known that a judgment or order is a mere nullity for want of jurisdiction of the Court which makes it, those who act under it are protected. Any error or mistake whether of fact or law in executing the judgment or order may also be pleaded as a defence under this section.

4. Act done by a person justified, or by mistake of fact believing himself justified, by law.—Section 79 provides that "nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it."

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

This section excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was bound or justified by law to do it. But in order to entitle a person to claim the benefit of this section it is necessary to show the existence of a state of facts which justify the belief in good faith that the person was bound or justified by law to do as he did. His mistake, in short, must be a mistake entertained in good faith on a question of fact.[1] In the case of *Bhawoo Jivaji v. Mulji Dayal*,[2] the accused, a police constable, saw the complainant early one morning, carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen, he went up

1. *Taj Din v. Crown* 1955 P. L. D. (Lahore) 356.
2. (1888) I. L. R. 12 Bom. 377.

to the complainant and questioned him. The complainant gave answers that were not satisfactory and refused to allow the constable to inspect the cloth and a scuffle thereupon ensued between the two. The complainant was arrested by the constable, but was released by the Inspector of Police. The complainant then prosecuted the constable for wrongful restraint and confinement, and the Magistrate convicted the constable of the said offence. The High Court held that the conviction was wrongful as the constable acted under a *bona fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant to clear up his suspicions was an indication of good faith, and he was, therefore, protected by this section.

Distinction between section 76 and section 79.--Under section 76 a person believes himself to be bound by law to do a particular act, whereas under section 79, he similarly believes himself to be justified by law to do it. That is to say, under section 76 a person believes that he is under a legal obligation to do the act which is the subject of the charge ; while under section 79 he believes that he has legal justification in doing it. The distinction thus lies between a real or supposed legal obligation and a real or supposed legal justification in doing the particular act. Under both the sections there must be a *bona fide* intention to advance the law, manifested by the circumstances attending the act which is the subject of the charge and the party accused cannot allege generally that he had a good motive, but must allege specifically that he believed in good faith that he was bound by law to do as he did, or that being empowered by law to act in the matter, he had acted to the best of his judgment exerted in good faith.[1]

5. Accident in doing a lawful act.—Section 80 provides that "nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution."

1. First Report, s. 114, p. 219.

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

The essential ingredients to constitute a justifiable plea of accident or misfortune are--(i) that the act was done by accident or misfortune ; (ii) that it was done without any criminal intention ; (iii) that it was the doing of a lawful act ; (iv) in a lawful manner ; (v) by lawful means ; and (vi) with proper care and caution.

The burden of proving these conditions is on the accused who wishes to bring his case within the purview of this section.[1]

In a Bombay case[2] where two persons went out to shoot animals and agreed to take up certain position in the jungle and lie in wait, but after a while the accused heard a rustle and believing it to be an animal fired in that direction but the shoot killed his companion, it was held to be one of pure accident, although the gun used was an unlicensed one. But where the accused was engaged in a fight in which a woman intervened, whereupon the accused aimed a blow at her, but it accidently killed the infant she was carrying, it was held that section 80 afforded no defence, as the accused had attempted to assault the woman which was in itself a wrongful act.[3]

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

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

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1. *Jalal Din v. Crown* (1953) 5 D. L. R. (W.P.) 58.
2. *Timmappa* (1901) 3 Bom. L. R. 678.
3. *Jageshar v. Emperor* (1923) 74 I. C. 533.

Illustrations.—(*a*) A, the Captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only 2 passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down C.

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

The principle upon which section 81 is based is that when, on a sudden and extreme emergency one or the other of two evils is inevitable, it is lawful so to direct events that the smaller only shall occur. In other words this section permits the infliction of a lesser evil in order to avert a greater evil.

The application of this section depends upon—(i) the presence of the particular motive specified in the section, *viz.* preventing or avoiding of other harm to person or property; (ii) the existence of good faith; and (iii) the absence of criminal intention.

Section 81 affords protection only where harm is caused without any criminal intention for the purpose of preventing or avoiding other greater harm. A man, therefore, cannot intentionally commit a crime in order to avoid other harm. In the case of *Reg v. Dhania Daji*[1] a person placed poison in his toddy pots knowing that if taken by a human being it would cause injury, but with the intention

1. (1868) 5 B. H. C. 59.

of thereby detecting an unknown thief who was in the habit of stealing his toddy and the toddy was drunk by and injured some soldiers who purchased it from an unknown vendor, it was held that the person was rightly convicted under section 328 for causing hurt by means of poison, etc. and that section 81 was no defence. Similarly, a *prima facie* thief of a loaf of bread cannot exempt himself under section 81 from liability on the plea that although he took the loaf, thereby injuring the baker, he took it for the purpose of avoiding other harm, *e.g.*, starvation to himself and his family. As he intends to take and he takes by unlawful means causing thereby wrongful gain to himself and wrongful loss to the baker he is guilty of theft. His case is excluded from the protection afforded by section 81 by reason of his criminal intention.

The leading English case on the subject is *Dudley & Stephens*.[1] In this case three shipwrecked sailors in a boat were without food for 7 days and two of them killed the third, a boy, and fed on his flesh under such circumstances that there appeared to the accused sailors every probability that unless they, then or very soon, fed upon the boy or one of themselves, they would die of starvation. It was held that they were guilty of murder.

7. Act of a child under 7 years of age.—Section 82 provides that "nothing is an offence which is done by a child under seven years of age."

An infant under the age of seven years is by presumption of law *doli incapax* and cannot be endowed with any discretion. He cannot distinguish right from wrong and if he is prosecuted the very fact that he is below 7 years is a sufficient answer to the prosecution. The law is that nothing is an offence which is done by a child under 7 years of age.

8. Act of a child above 7 and under 12 of immature understanding.—Section 83 lays down that "nothing is an offence which in done by a child above 7 years of age and under 12, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."

1. (1884) 14 Q. B. D. 273.

Where the accused is above 7 but below 12 years, the incapacity to commit an offence only arises if the child has not attained sufficient maturity of understanding to judge of the consequence of an act and such non-attainment has to be pleaded and proved. It is not necessary for the prosecution to lead positive evidence to show that an accused person below 12 years of age had arrived at sufficient maturity of understanding within the meaning of this section. It would be permissible to arrive at that finding even on a consideration of the circumstances of the particular case.[1]

In a Madras case[2] a child of 9 years of age stole a necklace worth Rs. 2-8-0 and immediately afterwards sold it to the accused for 5 annas, the child was discharged under this section, but the accused was convicted under section 411, because the act of the child was theft and the accused was, therefore, rightly considered of receiving stolen property.

This section does not fix any limit or the degree of understanding to be attained by an infant of over 7 and under 12 years in judging the nature and consequence of the act, which must be determined upon the nature of evidence and the view that the Court takes of such evidence.

According to English law an infant between the age of 7 and 14 years is presumed to be *doli incapax* and it is left to the jury and the Court to decide whether at the time of the offence the accused had a guilty knowledge that he was doing wrong.

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

Section 84 lays down that a person is exonerated from criminal liability of doing an act by reason of an unsoundness of mind, if he, at the time of doing the act, is either incapable of

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1. *Abdul Sattar v. Crown* (1949) 1 P. L. D. (Lahore) 372.
2. *Queen v. Begarayi Krishna* (1883) I. L. R. 6 Mad. 373.

knowing—(a) the nature of the act, or (b) that what he is doing is either wrong or contrary to law. The accused is not protected if he knew at the time of doing an act what he was doing was wrong, even though he did not know that it was contrary to law, and also if he knew that what he was doing wa contrary to law even though he did not know that it was wrong.

In order to bring the case within the exemption under section 84 it has to be clearly established that at the time of committing the offence the accused was labouring under a defect of reason which had been caused by unsoundness of mind with the result that he was rendered incapable of knowing the nature of the act, or that he was doing what was wrong or contrary to law. Insanity at trial and at the time of commission of the offence must be considered separately. A plea of insanity at the time of trial will not help the accused.[1]

In a Lahore case[2] it was held that killing the wife and trying to kill the son without any reason at all with previous and subsequent history of abnormal behaviour are evidence of unsoundness of mind.

In the case of *State v. Balashri Das Sutradhar*,[3] the following principles were laid down regarding special plea of unsound mind when raised by an accused under this section :—

(1) If the accused raises any special plea or claims exoneration on the basis of any special or general exceptions he must prove his special plea or the existence of conditions entitling him to claim the exoneration.

(2) The prosecution must prove its case beyond any reasonable doubt.

(3) If after an examination of the entire evidence the Court is of opinion that there is a reasonable possibility that the defence put forward by the accused may be true or that the

1. *Atta Muhammad v. State*, 1960 P. L. D. (Lahore) 111.
2. *Gholam Yusaf v. Crown* 1953 P. L. D. (Lahore) 213.
3. (1961) 13 D. L. R. 289 : 1962 P. L. D. (Dac) 469.

evidence casts a doubt on the existence of the requisite intention or *mens rea* which is necessary ingredient of a particular offence, this will react on the whole prosecution case entitling the accused to the benefit of doubt.

(4) Legal insanity as contemplated in section 84 is different from medical insanity. If the cognitive faculty is not impaired and the accused knows that what he is doing is either wrong or contrary to law he is not insane.

The leading English case on the subject is *Reg v. McNaughten*.[1] The fact of this case is as follows :—

For many years Mr. McNaughten suffered from what is known to doctors the "persecution mania." Mr. McNaughten thought a gang of persons followed him about and prevented him from getting situations. One day at the Charing Cross Railway Station he shot one Mr. Drummond, thinking him to be Sir Robert Peel, the Prime Minister of England, who, he thought was responsible for all his misfortunes. The witnesses who were examined stated that the prisoner at the time of the act was impelled by an act of uncontrolable impulse, while others stated that he was insane. The Solicitor General in summing up the case before the jury said, "the object of the Crown is to ascertain whether at the time the prisoner committed the crime, he was to be regarded as a responsible agent, or whether all control of himself was taken away." The jury acquitted the prisoner on the ground of insanity.

In this case it was laid down that (i) every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved, and (ii) to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such a disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know if he was doing what was wrong.

1. (1843) 4 St. Tr. (N.S) 847 : 10 Cl. & F. 200.

(iii) If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time, contrary to the law of the land he is punishable.

Insanity must be proved by the accused unless proved from prosecution evidence.[1] The burden of proving insanity is cast upon the accused by section 10 of the Evidence Act ; and under section 84 of the Pakistan Penal Code he must prove that at the time of committing the act or crime his cognitive faculties were impaired, that because of the insanity he was incapable of knowing the nature of the act or that what he was doing was wrong or contrary to law.

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

Under this section a person will be exonerated from liability for doing an act while in a state of intoxication if he, at the time of doing it, by reason of intoxication, was (i) incapable of knowing the nature of the act, or (ii) that he was doing what was either wrong or contrary to law ; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Voluntary drunkenness is no excuse for the commission of a crime. But if a man is made drunk through stratagem or the fraud of others, or through ignorance, or through any other means against his will, he is excused. Under this section, the accused can raise the plea of being intoxicated only if the liquor had been administered to him without his knowledge or

1. *Atta Muhammad v. State*, 1960 P. L.D. (Lahore) 111.

against his will.[1] In the case of *Director of Public Prosecutions v. Beard*,[2] the accused ravished a girl of 13 years of age and, in furtherance of the act of rape, placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence was the plea of drunkenness. It was held that the drunkenness was no defence unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it, inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other ; and that the accused was guilty of murder.

Section 86 of the Code further provides that a person voluntarily drunk will be deemed to have the same knowledge and liable for the consequences as he would have had if he had not been intoxicated. This section attributes to a drunken man the knowledge of a sober man when judging of his action, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

11. Act not intended and not known to be likely to cause death or grievous hurt, done by consent.— Section 87 provides that "nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above 18 years of age, who has given consent, whether express or implied, to suffer that harm ; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm." Thus A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such

1. *Charna v. State*, 1959 A. L. J. 83.
2. (1920) A. C. 479.

fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

Section 87 lays down that a person, who causes injury to another person above 18 years of age, who has given his consent, whether express or implied, to suffer the harm, by doing an act which is not known by the doer to be likely to cause death or grievous hurt, does not commit an offence. By this section ordinary games such as fencing, boxing, football and the like, are protected.

The principle of this section is based upon the maxim *volenti non fit injuria*. It means that he who consents suffers no injury. The rule is founded upon two simple propositions: (1) that every person is the best judge of his own interest, and (2) that no man will consent to what he thinks harmful to himself. Every man is free to inflict any suffering or damage he chooses on his own person and property; and if, instead of doing this himself, he consents to its being done by another, the doer commits no offence. A man may give away his property, and so another who takes it by his permission does not commit theft. He may inflict self-torture or he may consent to suffer torture at the hands of another.

This section does not permit a man to give his consent to anything intended, or known to be likely to cause his own death or grievous hurt.

12. Act not intended to cause death, done by consent in good faith for person's benefit.—Section 88 provides that "nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm." Thus A, a Surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under the painful complaint, but not intending to cause Z's death and intending, in good faith Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

Section 88 protects Surgeons and surgical operations. Persons not qualified as medical practitioners cannot, however, claim the benefit of this section as they can hardly satisfy a Court that they had undertaken the operation in good faith as defined in section 52, for good faith means a conscientious belief that they had skill to perform the operation, while the supposition is that they were unskilled and ignorant.

Distinction between section 87 and section 88.—Section 88 differs from 87 in the following respects : (i) Under section 88 any harm may be inflicted except the intentional infliction of death. (ii) There is no provision as to the age of the consenting person in this section. (iii) The act done must be for the benefit of the person consenting thereto. (iv) The act must be done in good faith.

Section 87 justifies the infliction of harm short of grievous hurt by consent, the benefit of the person harmed by the consent being wholly immaterial. Section 88 enacts that the consent justifies any harm short of intended death, even though the harm may result in death, provided it was caused for the benefit of the person harmed and in good faith.

13. Act done in good faith for benefit of child or insane person, by or by consent of guardian.—Section 89 provides that "nothing which is done in good faith for the benefit of a person under 12 years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person : Provided—

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

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to

cause death, for any purpose other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity;

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

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

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

Section 89 empowers the guardian of an infant under 12 years or an insane to consent to the infliction of harm to the infant or the insane person, provided it is done in good faith and is done for his benefit. Persons above 12 years are considered to be capable of giving consent under section 88. The consent of the guardian of a sufferer, who is an infant or who is of unsound mind, shall have the same effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.

Under section 90 of the Penal Code, consent obtained by a false representation which leads to a misconception of facts will not be a valid consent. In the case of *Queen v. Poonai Fattemah*,[1] the accused, who professed to be snake charmers, persuaded the deceased to allow themselves to be bitten by a poisonous snake, inducing them to believe that he had power to protect them from harm. It was held that the consent given by the deceased allowing themselves to be bitten did not protect the accused, such consent having been founded on a misconception of fact, that is, in the belief that the accused had power

1. (1869) 12 W. R. (Cr.) 7.

by charms to cure snake-bites, and the accused knowing that the consent was given in consequence of such misconception. It was held that the accused is guilty of murder under the fourth clause of section 300 of the Penal Code.

14. Act done in good faith for benefit of a person without consent.—Section 92 of the Pakistan Penal Code provides that "nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit." There are, however, certain restrictions. In the first place, it will not extend to the intentional causing of death, or the attempting to cause death. In the second place, it does not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death, or grievous hurt or the curing of any grievous disease or infirmity. In the third place, it does not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt. And, lastly, it does not extend to the abetment of any offence.

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

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

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed.

There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

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

Mere pecuniary benefit is not benefit within the meaning of this section.

15. Communication made in good faith.—Section 93 provides that "no communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person." Thus A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

The communication under section 93 must be (i) made in good faith; and (ii) for the benefit of the person to whom it is made.

16. Act to which a person is compelled by threats.—Section 94 lays down that "except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint." This section will not, however, save a person, who, of his own accord or by reason of a threat of being beaten, joins a gang of dacoits. But if he is seized by a gang of dacoits and forced by threat of

instant death to do a thing which is an offence by law. For example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it under pains of instant death will be entitled to the benefit of this section.

It is thus clear from the above, a person is excused from the consequences of any act, except murder and offences against the State punishable with death, done under fear of instant death ; but fear of hurt or even of grievous hurt is not a sufficient justification.

The English law is wider than section 94. Under the English law, except in cases of treason or homicide, a person who is forced to commit an offence by fear of death or of grievous bodily harm is excused.

17. Act causing slight harm.—Section 95 provides that "nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper wouldc omplain of such harm."

The maxim *de minimus non curat lex* (law does not care about trifles) is the basis of this section. This section is intended to exempt from criminality offences which from their triviality do not deserve the name of crime. The authors of the Code explained this section in the following terms :—

"Clause 73 (this section) is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer

in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice ; for if the Code is silent on the subject, the Judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law or by wresting the language of the law from its plain meaning."

In the case of *Jayakrishna Samanta, v. Emperor*[1] a Deputy Magistrate went to a place to inquire into a petition made by the residents for funds to enable them to dig a well and in the course of a discussion with the people assembled he remarked that as some of the residents were well-to-do men, they must make the well themselves, whereupon the accused persons who were present there said to the Deputy Magistrate : "Then why do you make an inquiry, go away quitely." It was held that the accused were not guilty of any offence as their statement came within the purview of section 95.

As to what acts are trivial and what not is a question of fact. Thus this section applied where a person was convicted for taking pods almost valueless, from a tree standing on Government waste land, and where the plaintiff complained of the harm caused to his reputation by the imputation that he was travelling with a wrong ticket. But where a blow was given across the chest with an umbrella by a dismissed police-man to a District Superintendent of Police because his application to reconsider his case was rejected[2] ; where the accused tore up a paper which showed a money debt due from him to the prosecutor, though it was unstamped and therefore not legal security[3] ; and where a respectable man was taken by the ear,[4] it was held that this section did not apply.

1. (1916) 18 Cr. L. J. 17.
2. *Govt. of Bengal v. Sheo Gholam Lalla* (1875) 24 W. R. (Cr.) 67.
3. *Ramasami*, (1888) I. L. R. 12 Mad. 148.
4. *Shoshi Bhusan v. Walmsley*, (1888) 1 C. W. N. cxxxiv.

18. Things done in private defence.—The law relating to the right of private defence is laid down in sections 96 to 106 of the Pakistan Penal Code. An act done in the exercise of the right of private defence is not an offence. Subject to certain limitations the law gives a right to every person to defend his body or property, or the body or property of another person against unlawful aggression. He may protect his right by his own force or prevent it from being violated. It is a right inherent in a man but the kind and the amount of force is minutely regulated by law. This use of force to protect one's person and property is called the right of private defence.

The right of private defence is based on the principle that it is the first duty of man to help himself.

Right of private defence of body.—Section 97 lays down that every person has a right subject to the restrictions contained in section 99, to defend his own body, and the body of any other person, against any offence affecting the human body.

Under section 100 of the Code the right of private defence of the body extends to the voluntary causing of death or any other harm to the assailant if the offence occasioning the exercise of the right be of any of the following descriptions :—

(1) An assault causing reasonable apprehension of death.

(2) An assault causing reasonable apprehension of grievous hurt.

(3) An assault with the intention of committing rape.

(4) An assault with the intention of gratifying unnatural lust.

(5) An asasult with the intention of kidnapping or abducting.

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

In any other case the right of private defence of the body extends to the infliction of any injury to the assailant other than death (s. 101).

In case of such an assault as provided in clause (i) of section 100 mentioned above, if the defender be so situated that he

cannot effectually exercise the right of private defence without risk of harm to an innocent person, his right of private defence extends to the running of that risk (s. 106). Thus A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

The right of private defence under section 100 is not available when the person invoking such plea is in such an advantageous position over his deceased opponent that the latter was in the condition of being completely overpowered and disarmed by him.[1] Even in a sudden quarrel and a sudden fight if unfair advantage is taken by using knife on a helpless opponent directly to cause fatal injuries on the neck, the plea of self-defence cannot be justifiably raised.[2] The right of private defence against unauthorised arrest is exercisable only when there is immediate danger of restraint.[3] Killing is not justified even in the case of strong provocation by the opponent.[4] In view of the Explanation to Exception 4 of section 300 of the Penal Code it would be immaterial which party offers the provocation or commits the first assault. But before this exception is applied the essential conditions laid down in it must exist. This exception applies only to those cases, where on a sudden quarrel, both the parties begin to fight upon an equal footing. In such cases, it is immaterial, which party offers the provocation or commits the first assault, because the combat is mutual. It does not, however, mean that if on a sudden quarrel a person attacks another with some weapon, then the person attacked, if he kills his assailant, cannot avail of the plea of self-defence. In a case of this nature the person attacked cannot be held guilty of any offence because under the provision of

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1. *State v. Manzoor* (1966) 18 D. L R. (SC) 444.
2. *Ibid.*
3. *Hamida Banu v. Ashiq Hossain* (1963) 15 D. L R. (SC) 65.
4. *State v. Manzoor, Supra.*

section 100 of the Code, he is perfectly justified in killing his assailant. But if both the persons simultaneously take out their weapons and attack each other then Exception 4 to section 300 of the Code would apply.[1]

Under section 98 physical or mental incapacity of the person against whom the right is exercised is no bar for the purpose of exercising the right of private defence. This section states that "when an act, which would otherwise be a certain offence is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence." Thus (a) Z, under the influence of madness, attempts to kill A ; Z is guilty of no ffoence. But A has the same right of private defence which he would have if Z were sane. (b) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

Now the question is when the right of private defence will commence and how long it will continue. The answer is found in section 102 of the Code. It states that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed ; and it continues as long as such apprehension of danger to the body continues. It is clear from the wording of the section that the right commences and continues as long as danger to body lasts. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable appre-

1. *Karim v. State* (1906) 12 D. L. R (W. P.) 92 : P. L. D. 1960 (Lahore) 990.

hension of such danger. There must be an attempt or threat, and consequent thereon an apprehension of danger, but it should not be a mere idle threat. There must be reasonable ground for the apprehension.

The right of private defence is subject to the restrictions contained in section 99 of the Code. Under this section there is no right of private defence (i) against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done, by a public servant or by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law ; (ii) in cases in which there is time to have recourse to the protection of the public authorities.

It follows from the above that the right of private defence of the body or property can be exercised against a public servant in the following cases :—

(a) When the act of the public servant reasonably causes apprehension of death or grievous hurt. (b) When the public servant does not act in good faith under colour of his office. (c) When the person exercising the right neither knows nor has any reason to believe that the assailant is a public servant or acts by the direction of a public servant.

In the case of *Ahmad v. Crown*,[1] it was held that where the arrest is not justified under section 99, the person concerned would have the right of private defence which extends to the infliction of any harm, short of death, provided they did not cause more harm than was necessary for the defence. The protection afforded under this section to public servants is not lost even if they make any mistake in the exercise of their functions.[2] This section applies to cases where there is excess of jurisdiction as distinct from a complete absence of jurisdiction. It applies where an official does wrongly what he might have

1. (1953) 6 D. L. R. (W. P) 149.
2. *Crown v. Fateh Md.* (1951) 3 D. L. R. 205

done rightly but not to cases where the act could not possibly have been done rightly.[1] Thus where a *Naib Tahshilder* issued warrant of arrest against the accused in a *bona fide* mistake that revenue was due from them, while it is not due, it might be a case of exceeding the jurisdiction and the accused had no right of private defence.[2] In the case of *Feroz Khan v. State*[3] the police illegally detained a person. While the person was slipping away, the police pursued to catch him but he resisted. The police resorted to violence to meet his resistence. It was held that no right of self-defence is available to the police.

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence (s. 99). The measure of self-defence must always be proportionate to the quantum of force used by the assailant and which it is necessary to repel. The right of private defence is only a right of protection and not of aggression. Such a right cannot extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. If under the guise of such a right the limits prescribed by law for the exercise of that right are exceeded and more harm than is necessary is caused then the act would become an offence. The extent of force which would be justifiable depends uopn the circumstances of each case. The nature of attack, the danger apprehended, imminence of danger and the real necessity of inflicting harm by retaliation for the purpose of self-defence are matters to be taken into consideration in deciding whether the right of self-defence has been exceeded. But once it is proved that the person acted in self-defence it is not to be weighed in golden scales. Thus in *Emperor v. Mammun*,[4] the accused five in number went out on a moonlit night armed with clubs, and assaulted a man who was cutting rice in their field, and in such a manner, that he received six distinct fractures of the bones of the skull

1. *Crown v. Fateh Md.* (1951) 3 D. L. R. 205.
2. *Ibid.*
3. (1960) 12 D. L. R. (SC) 266 : P. L. D. 1960 (SC) 344.
4. (1916) 18 Cr. L. J. 367.

besides a number of other wounds and died on the spot. When charged with the offence of murder the accused pleaded that they had exercised the right of defence of their property. It was held that under section 99 there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. Moreover, under the same section the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In the instant case the accused were five in number as against only one opponent. Even unarmed, they were enough in number, but they all were armed with clubs and the deceased was unarmed. Instead of complaining to the Police or pushing the deceased out of the field, they caused him several fatal injuries and quite unnecessarily. In fact, they could not plead the right of private defence of property—they far exceeded it. The accused were therefore guilty of murder as they inflicted more harm than was necessary for the purpose. Where the accused is actuated by desire to punish the deceased and not for the purpose of defence, it is a case of exceeding the right of private defence.[1]

The law does not require that a person should not exercise his right of private defence if by running away he can avoid injury from his assailant. The law also does not require that a person placed in such circumstances should weigh the arguments for and against an attack in golden scales. It would be unnatural to expect to do so and the law in fact does not require any such thing. An interesting case on the point is that of *Kala Sing v. Emperor*.[2] In this case the deceased was a strong man of a dangerous character, brutal natured and reputed to have killed a man previously. He picked up a quarrel with the accused who was a weakling, came with a stick, threw the accused on the ground, pressed his neck and beat him. When the accused was extricated from the deceased's grip he took up a light hatchet and struck 3 blows on the head of the deceased who died 3 days later. It was

1. *Md. Sharif v. Crown*, P. L. D. 1954 (Lahore) 170.
2. (1933) 34 Cr. L. J. 1175.

held that the whole conduct of the deceased was aggressive and the circumstances were sufficient to raise a strong apprehension in his mind that otherwise he would be killed.

Right of private defence of property.—Under section 97 of the Pakistan Penal Code every person in possession of property, moveable or immoveable, is entitled to defend his possession against any one who tries to evict him by force or to steal from him or to do an act which has the effect of causing injury to it. It states that every person has a right, subject to the restrictions contained in section 99, to defend the property, whether moveable or immoveable, of himself or any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass or an attempt to commit such offences.

Under section 103 of the Code the right of private defence of property extends, subject to the limitations mentioned in section 99, to the voluntary causing of death, or of any other harm to the wrong-doer, if the offence, the committing of which or the attempting to commit which, occasions the exercise of the right, be an offence of any of the following descriptions, *viz.* robbery, house-breaking by night ; mischief by fire to building, tent or vessel used as a human dwelling, or as a place for the custody of property ; or theft, mischief of house-trespass causing apprehension of death or grievous hurt. Under section 104 if the offence be theft, mischief or criminal trespass, *i.e.*, not of any of the descriptions mentioned above, the right does not extend to the voluntary causing of death, but does not extend to the voluntary causing to the wrong-doer of any harm other than death.

The right of private defence of property does not justify the causing of death in all cases in which theft, mischief or house-trespass is being committed. It is only when the act which amounts to the offence is such as *per se* to cause a reasonable apprehension that death or grievous hurt will result, that the causing of death is justified.

Under section 105 the right of private defence of property commences when a reasonable apprehension of danger to the

property commences. The right of private defence of property against theft continues till (i) the offender has effected his retreat with the property, or either (ii) the assistance of the public authorities is obtained, or (iii) the property has been recovered. The right of private defence of property against robbery continues as long as (i) the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or (ii) as long as the fear of instant death, or of instant hurt or of instant personal restraint continues. The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief. The right of private defence of property against house-breaking by night continues as long as the house-trespass which has begun by such house-breaking continues.

The right of private defence of property is subject to the restrictions contained in section 99 of the Code. Under this section there is no right of private defence (i) against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant or by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law; (ii) in cases in which there is time to have recourse to the protection of the public authorities; (iii) nor does the right of private defence extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. If the accused exceeds deliberately the right of private defence of property, he is responsible for the harm or injury caused.[1]

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1. *Sultan Muhammad v. Crown* P. L. D. 1955 (Lahore) 575.

CHAPTER V

OF ABETMENT

Chapter V deals with the law of accessories as it is known in English law. Accessories are the persons concerned in the crime otherwise than as principals. They are of three kinds : (i) Accessory before the fact ; (ii) Accessory at the fact ; and (iii) Accessory after the fact.

Where several persons take part in the commission of an offence, each of them may contribute to the doing of the criminal act in the different degrees. One who is the actual perpetrator of crime is termed principal in the first degree. An accessory before the fact is one who directly or indirectly procures by any means the commission of any felony and who is not actually or constructively present at its commission. An accessory at the fact, also known as a principal of the second degree, is one by whom the actual perpetrator of the crime is aided and abetted and who is actually or constructively present at the scene of offence. Section 114 deals with these classes of abettors. An accessory after the fact is one who, knowing that a felony has been committed and not being the wife of the felon, in any way secures or attempts to secure the escape of the felon, whether by harbouring him or otherwise. He is the person who knowing a felony to have been committed receives, relieves, comforts or assists the felon.

This Chapter deals only with such offenders who are accessories before or at the fact.

Crime may assume any of the following shapes :—

(i) One person may persuade another to do an illegal act or aid in the commission of an offence. This is known as abetment.
(ii) Two or more persons may agree to do an unlawful act or a lawful act by unlawful means. This is known as conspiracy. It is not necessary that the abettor should concert the offence

with the person who commits it ; he may as well engage in the conspiracy in pursuance of which the offence is committed. (iii) Two or more persons may directly participate in the commission of an illegal act.

Abetment of a thing.—A person abets the doing of a thing, who (i) instigates any person to do that thing ; or (ii) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or (iii) intentionally aids, by any act or illegal omission, the doing of that thing.[1]

The words "instigate" and "aids the doing of an act" require a little explanation. The former means to goad or urge forward or to provoke, incite, urge or encourage to do an act. A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes, or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing. Thus A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

A person is said to aid the doing of an act who either prior to or at the time of its commission does any thing in order to facilitate the commission of that act, and thereby facilitates the commission thereof. Abetment cannot refer to any act done after the commission of the offence.[2]

Who is an abettor.—Section 108 of the Pakistan Penal Code defines an abettor as a person who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

1. *Md. Ashraf Ali v. State* (1956) 9 D. L. R. 41 ; S. 107.
2. *Abdul Latif v. Crown* (1956) 8 D. L. R. 238.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. Thus (a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder. (b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

The following illustrations will make the point clear :—

(*a*) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(*b*) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby, causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(*c*) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(*d*) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A, B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence. Thus A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder ; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. Thus A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison ; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.

Punishment for abetting.—(1) Where no express provision is made in the Pakistan Penal Code for the punishment of any particular abetment for an offence, the abettor shall be punished with the punishment provided for the offence. (S. 109).

Illustrations.—(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe, A has abetted the offence defined in section 161.

(*b*) A instigates B to give false evidence. B, in consequence of the instigation commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(*c*) A and B conspire to poison Z. A, in pursuance of the conspiracy procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy and is liable to the punishment for murder.

(2) Where a person abets the commission of an offence with a particular object and intention, and the person abetted does the act with a different intention, the abettor will be punished with the same punishment, as if the person abetted committed the act as intended by the abettor. (S. 110).

(3) When an act is abetted and a different act is done, the abettor will be held liable for the act done in the same manner and to the same extent, as if he had directly abetted it, provided the act done was a probable consequence of the abetment, and was the direct result of the instigation. (S. 111).

Illustrations.—(*a*) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(*b*) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not

guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(*c*) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery, and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

(4) The abettor is liable both for the act abetted and for the act done, if the act done is a probable consequence and was committed under the direct influence of the abetment. (S. 112).

Thus A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and, if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress A will also be liable to punishment for each of the offences.

(5) When the abettor intends a particular result, and the result caused by that abetment is different, the abettor is liable for the effect caused, provided he knows that the act abetted was likely to cause that effect. (S. 113).

Thus A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

(6) When any person, who, if absent, would be liable to be punished as an abettor, is present when the act abetted is committed, he shall be deemed to have committed the offence. (S. 114). Mere presence will not render a person liable; he must sufficiently be near to give assistance, and he must participate in the act.

(7) (*a*) If an offence punishable with death or transportation for life is abetted, but no offence has been committed in consequence of that abetment, and no express provision is made for the punishment of such abetment, then the offender will be punished with imprisonment of either description for a term which may extend to 7 years and with fine ; if any hurt is caused in consequence of the abetment, the imprisonment shall be extended to 14 years and to fine. (S. 115). Thus A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine ; and, if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

(*b*) If an offence punishable with imprisonment is abetted, but no offence has been committed in consequence of that abetment, and no express provision is made for the punishment of that abetment, the abettor shall be punished with imprisonment which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both. But if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, he will be punished with imprisonment of any description for a term which may extend to one-half of the longest term provided for that offence or with such fine as is provided for the offence or with both. (S. 116).

Illustrations.—(*a*) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(*b*) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(*c*) A, a police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(*d*) B abets the commission of a robbery by A, a police-officer, whose duty it is to prevent that offence. Here though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

(8) Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. (S. 117).

Thus A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

(9) Whoever voluntarily conceals, by any act or illegal omission, the existence of a design to commit an offence punishable with death or transportation for life, shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, but if that offence is not committed, with imprisonment of either description for a term which may extend to three years. (S. 118). In both the cases the person concerned shall also be liable to fine.

Thus A, knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

But if the same kind of offence is committed by a public servant, whose duty it is to prevent it, he may be punished

with imprisonment of either description for a term which may extend to one-half of the longest term provided for that offence if committed. If the offence be punishable with death or transportation for life, he will be punished with imprisonment for a term which may extend to ten years. But if the offence is not committed, he will be punished for a term which may extend to one-fourth of the longest term provided for that offence or with fine, or with both. (S. 119).

Thus A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this section.