CHAPTER XVIII

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS

The offences falling in Chapter XVIII may be classified as under :

1. Offences relating to documents (ss. 463-477).
2. Offences relating to trade, property and other marks (ss. 478-489).
3. Offences relating to currency notes and bank notes (ss. 489A to 489E).

1. Offences relating to documents.—The offences under this head may be grouped as follows :

(1) Forgery (ss. 463, 465).
(2) Making a false document (s. 464).
(3) Forged document (s. 470).
(4) Other offences relating to documents (ss. 472-477A).

(1) **Forgery.**—Under section 463 of the Pakistan Penal Code, a personc ommits forgery if he (*i*) makes any false document, or part of a document, (*ii*) with intent (*a*) to cause damage or injury to the public or to any person, or (*b*) to support any claim or title, or (*c*) to cause any person to part with property, or (*d*) to enter into any express or implied contract, or (*e*) to commit fraud, or that fraud may be committed. Punishment.—Imprisonment of either description for 2 years, or fine, or both. (S. 465).

Ingredients.—The ingredients of the offence of forgery are :

(1) The making of a false document or part of it.
(2) Such making should be with intent
  (*a*) to cause damage or injury to (*i*) public, or (*ii*) any person ; or

(*b*) to support any claim or title ; or

(*c*) to cause any person to part with property ; or

(*d*) to cause any person to enter into any express or implied contract ; or

(*e*) to commit fraud or that fraud may be committed.

(2) **Making a false document.**—Section 464 of the Pakistan Penal Code lays down that a person is said to make a false document.—

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

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

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

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

(*b*) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with

the intention of selling the estate to B and thereby of obtaining from B the purchase-money. A has committed forgery.

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

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

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

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

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

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

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

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

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

Explanation 1 to sction 464 provides that a porson's signature of his own name may amount to forgery.

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

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

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

(*d*) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate, to Z at a nominal rent and for a long period and dates the lease six months prior to the

seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(*e*) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory note binding himself to pay to B a sum for value received, and antedates the note, intending that it my be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2 says that the making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his life time, may amount to forgery. Thus, A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

The following points should be noted with regard to the offence of making a false document :—

(1) It is an essential quality of fraud mentioned in the section that it should result it, or aim at deprivation of property.

(2) The offence is complete as soon as a document is made with intent to commit a fraud.

(3) It is not necessary that the document should be made in the name of a really existing person.

(4) A general intention to defraud, without the intention of causing wrongful gain or loss to any particular person, is sufficient. There must, however, be a possibility of some person being defrauded.

(5) If several persons combine to forge an instrument, and each takes a distinct part in it, they are nevertheless all guilty.

(6) Counterfeiting a document to support a legal claim will amount to forgery.

(7) Antedating a document may become forgery if the date is a material part of the document.

(8) A document made to conceal a previous fraudulent or dishonest act amounts to forgery. But such falsification is not forgery if it is only for the purpose of concealing a previous negligent act.

(9) To sit at an examination falsely personating another and sign papers in that other's name amounts to forgery and also cheating by personation.

In the case of *Queen v. Apasami*,[1] A falsely represented himself to be B at a University examination, got a hall ticket under B's name, attended the examination, answered the questions set and headed and signed the papers with B's name. It was held that A had committed the offences of forgery and cheating by personation. Similarly, in the case of *Kotamraju v. Emperor*,[2] a candidate for the Matriculation Examination of the Madras University, for the purpose of being admitted to the examination, forwarded to the Registrar of the University, a certificate that he was of good character and that he had completed his 20th year. The certificate purported to be signed by the Headmaster of a recognised high school, but was in fact not signed by him, but was signed by the candidate in his own handwriting. It was held that the certificate was a forged document within the meaning of section 464 and the accused was guilty of forgery under section 465 of the Penal Code.

Aggravated forms of forgery.—The following are the aggravated forms of the offence of forgery :—

(1) Forgery of a record of a Court of Justice or of a register of births, baptism, marriage or burial, or a certificate or authority to institute or defend a suit or a power of attorney. (S. 466). Punishment.—Imprisonment of either description for 7 years and fine. (S. 466).

(2) Forgery of a valuable security, will etc. (S. 467). Punishment.—Transportation for life or imprisonment for 10 years and fine. (S. 467).

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1. (1889) I.L.R. 12 Mad. 151.
2. (1905) I.L.R. 28 Mad. 90 F.B.

(3) Forgery for the purpose of cheating. (S. 468). Punishment.—Imprisonment of either description for 7 years and fine. (S. 468).

(4) Forgery for the purpose of harming the reputation of any person. (S. 469). Punishment.—Imprisonment of either description for 3 years and fine. (S. 469).

(3) **Forged document.**—A false document made wholly or in part by forgery is designated a forged document. (S. 470).

Using as genuine a document known to be forged is punishable. (S. 471). Punishment.—Imprisonment of either description for 2 years or fine or both. (Ss. 465, 471).

(4) **Other offences relating to documents.**—The other offences relating to documents are :

(1) Making or possessing a counterfeit seal, plate, etc., with intent to commit forgery punishable under section 467. (S. 472). Punishment.—Transportation for life or imprisonment of either description for 7 years and fine. (S. 472).

(2) Same as above when punishable otherwise. (S. 473). Punishment.—Imprisonment of either description for 7 years and fine. (S. 473).

(3) Having possession of a valuable security or will, knowing it to be forged and intending to use it as genuine. (S. 474). Punishment.—If the document be one of those described in section 466—Imprisonment of either description for 7 years and fine. If the document be one of those described in section 467—Transportation for life or imprisonment of either despription for 7 years and fine. (S. 474).

(4) Counterfeiting a device or mark used for authenticating any document described in section 467, or possessing counterfeit marked material, (S. 475). Punishment.—Transportation for life or imprisonment of either description for 7 years and fine. (S. 475).

(5) Same as above when the documents are other than those described in section 467. (S. 476). Punishment.—Imprisonment of either description for 7 years and fine. (S. 476).

(6) Fraudulent cancellation, destruction, defacement, etc. of a will, or any authority to adopt, or a valuable security. (S. 477).

Punishment.—Transportation for life or imprisonment of either description for 7 years and fine. (S. 477).

(7) Falsification of accounts by a clerk or officer or servant with intent to defraud. (S. 477A). Punishment.—Imprisonment of either description for 7 years or fine or both. (S. 477A).

Falsification of Accounts.—Section 477A states that whoever, being a clerk, officer or servant, wilfully and with intent to defraud (*i*) destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which (*a*) belongs to or is in the possession of his employer ; or (*b*) has been received by him for or on behalf of his employer ; or (*ii*) makes (or abets the making of) any false entry in, or omits or alters, (or abets the omission or alteration of) any material particular from or in, any such book, paper, writing, valuable security or account—is said to commit "falsification of accounts." Punishment.—Imprisonment of either description for 7 years, or fine or both. (S. 477A).

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

Ingredients.—The ingredients of the offence of falsification of accounts are :

(1) The person coming within its purview must be a clerk, an officer, or a servant, or acting in the capacity of a clerk, an officer, or a servant.

(2) He must wilfully and with intent to defraud—

(*i*) destory, alter, mutilate or falsify any book, paper, writing, valuable security, or account which (*a*) belongs to or is in the possession of his employer ; or (*b*) has been received by him for or on behalf of his employer ;

(*ii*) make or abet the making of any false entry in or omit or alter or abet the omission or alteration of any material particular from or in any such book, paper, writing, valuable security or account.

In the case of *Emperor v. Rash Behary Das*[1], certain sums of money were received by the accused for payment into the Government Treasury but he did not enter the sums in the register. After the commencement of inquiry into the matter he made false entries in the register showing that those sums had been paid. It was held that he was guilty under section 477A.

2. Offences relating to trade, property and other marks.— The offences under this head may be grouped as follows :—

(1) Trade mark.

(2) Using a false trade mark.

(3) Property mark.

(4) Using a fasle property mark.

(1) **Trade mark.**—A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade-mark. For the purposes of this Code "trade mark" includes—

(*i*) any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883, and

(*ii*) any trade mark which, either with or without registration, is protected by law in any British possession or any Foreign State to which the provisions of section 103 of the Patents, Designs and Trade Marks Act, 1883, are applicable. (S. 478).

Property in a trade-mark is the right to the exclusive use of some mark, name, or symbol, in connection with a particular manufacture. If the same mark is used on a different article, it is not an infringement of such right. Thus, A may use for his cotton goods a trade-mark which B has used for his match-boxes.

(2) **Using a false trade mark.**—Under section 480 of the Pakistan Penal Code a person uses a false trade-mark—(1) if he (*i*) marks any goods or any case, package or other receptacle containing goods, or (*ii*) uses any case, package or other receptacle with any mark thereon, (2) in a manner reasonably

1. (1908) I.L R. 35 Cal. 450.

calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not. Punishment.—Imprisonment of either description for one year, or fine or both. (S. 482).

Ingredients.—The ingredients of the offence of using a false trade mark are :

(1) (*a*) Marking any goods or any case, package or other receptacle containing goods, or

(*b*) using any case, package or other receptacle, with any mark thereon.

(2) Such marking or using must be in a manner reasonably calculated to cause it to be believed that the goods so marked or any goods contained in the marked receptacle are the manufacture or merchandise of a person whose manufacture or merchandise they are not.

(3) **Property mark.**—A mark used for denoting that moveable property belongs to a particular person is called a "property mark." (S. 479).

(4) **Using a false property mark.**—Under section 481 of the Pakistan Penal Code, a person uses false property mark—(1) if he (*i*) marks any moveable property or goods or any case, package, or other receptacle containing moveable property or goods, or (*ii*) uses any case, package or other receptacle, having any mark thereon, (2) in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong. Punishment.—Imprisonment of either description for one year or fine or both. (S. 482).

Ingredients.—The ingredients of the offence of using a false property mark are :

(1) (*a*) Making any moveable property or goods or any case, package or other receptacle containing goods, or (*b*) using any case, or package or other receptacle with any mark thereon.

(2) Such marking or using must be in a manner reasonably calculated to cause it to be believed that the property or goods so marked or any property or goods contained in the marked receptacle belong to a person to whom they do not belong.

Distinction between trade mark and property mark.—The distinction between a trade mark and a property mark is that the former denotes the manufacture or quality of the goods to which it is attached, and the latter denotes the ownership of them ; or more briefly, the former concerns the goods themselves, the latter the proprietor of them. The term property mark is not recognised in English law.

Offences relating to counterfeiting any trade or property mark.—The following offences relate to counterfeiting any trade or property mark used by a person :—

(1) Counterfeiting any trade mark or property mark used by another. (S. 483). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 483).

(2) (*i*) Counterfeiting any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place or that the property is of a particular quality or has passed through a particular office or that it is entitled to any exemption ; or (*ii*) using as genuine any such mark knowing the same to be counterfeit. (S. 484). Punishment.—Imprisonment of either description for 3 years, and fine. (S. 484).

(*iii*) Making or possession of any instrument for counterfeiting a trade mark or property mark. (S. 485). Punishment.—Imprisonment of either description for 3 years or fine or both. (S. 485).

(*iv*) Selling or exposing or possessing for sale or any purpose of trade or manufature any goods or things with a counterfeit trade mark or property mark. (S. 486). Punishment.—Imprisonment of either description for one year or fine or both. (S. 486).

(*v*) Fraudulently making a false mark upon any case, package or receptacle containing goods or using such false mark with

intent to deceive. (Ss. 487, 488). Punishment.—Imprisonment of either description for 3 years, or fine or both. (Ss. 487, 488).

(*vi*) Tampering with property mark with intent to cause injury. (S. 489). Punishment.—Imprisonment of either description for one year or fine or both. (S. 489).

3. Offences relating to Currency Notes and Bank-Notes.—There are five offences relating to currency-notes and bank notes *viz* :

(1) Counterfeiting currency-notes or bank-notes. Punishment. —Transportation for life or imprisonment of either description for 10 years and fine. (S. 489A).

(2) Selling, buying, or using as genuine, forged or counterfeit currency-notes or bank-notes, knowing the same to be forged or counterfeit. Punishment.—Transportation for life or imprisonment of either description for 10 years and fine. (S. 489 B).

(3) Possession of forged or counterfeit currency-notes or bank-notes, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine. Punishment.—Imprisonment of either description for 7 years or fine or both. (S. 489C).

(4) Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes. Punishment.— Transportation for life or imprisonment of either description for 10 years and fine. (S. 489D).

(5) (*i*) Making or using documents resembling currency-notes or bank-notes. Punishment.—Fine upto Rs. 100. (S. 489 E).

(*ii*) Refusal by the person whose name appears on a document to disclose to a police officer the name and address of the person by whom the document was printed or otherwise made. Punishment.—Fine upto Rs. 200 (S. 489E).

For the purpose of sections 489A to 489D, the expression bank-note means a promissory note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power and intended to be used as equivalent to, or as a substitute for, money. (Explanation to S. 489A).

CHAPTER XIX

OF THE CRIMINAL BREACH OF CONTRACTS OR SERVICE

Breach of contract.—Section 491 of the Pakistan Penal Code deals with breaches of contract to attend on and supply the wants of a helpless person. It lays down that whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless, or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to 3 months or with fine which may extend to Rs. 200 or with both.

Ingredients.—The ingredients of the offence of breach of contract under section 491 of the Code are :

(1) Binding of a person by a lawful contract.

(2) Such contract must be to attend on or to supply the wants of a person who is helpless or incapable of providing for his own safety or of supplying his own wants by reason of (*i*) youth ; or (*ii*) unsoundness of mind ; or (*iii*) disease ; or (*iv*) bodily weakness.

(3) Voluntary omission to perform the contract by the person bound by it.

As regards the object of section 491 the authors of the Penal Code observed : "We also think that persons who contract to take care of infants, of the sick and of the helpless, lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair ; they generally come from the lower ranks of life, and would be unable to pay anything. We, therefore, propose to add to this class of contracts the sanction of the penal laws."

Ordinary servants do not come within the purview of this section. Thus a cook or a menial servant engaged on a monthly salary, are not punishable under this section, if they quit their employer without notice.

Why a breach of contract is penalised.—The reasons why a breach of contract is penalised can be gathered from the observation of the authors of the Penal Code. They observed : "We agree with the great body of Jurists in thinking that in general a mere breach of contract ought not to be an offence but only to be the subject of a civil action. To this general rule there are, however, some exceptions. Some breaches of contract are very likely to cause evil such as no damages or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for Penal legislation."

CHAPTER XX

OF OFFENCES RELATING TO MARRIAGE

Chapter XX deals with the following offences : –

1. Mock or invalid marriages (ss. 493 and 496).
2. Bigamy (ss. 494-496).
3. Adultery (s. 497).
4. Criminal elopement (s. 498).

1. Mock or invalid marriages.—The following two provisions of the Pakistan Penal Code relate to mock or invalid marriages :—

(1) Deceitfully causing a woman not lawfully married to the offender to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief. Punishment.—Imprisonment of either description for 10 years and fine. (S. 493).

(2) Dishonestly or with a fraudulent intention going through the ceremony of being married knowing that no lawful marriage is thereby created Punishment.—Imprisonment of either description for 7 years and fine. (S. 496).

The latter offence differs from the former in the fact that in it the ceremony is gone through, which is valid on the face of it, but invalid for some reason known to one party or the other, the former section applies to deception practised by a man on a woman, the latter applies to an offence by a man as well as by a woman.

2. Bigamy.—Section 494 defines the offence of bigamy as under :

"Whoever, (*i*) having a husband or wife living, (*ii*) marriage in any case in which such marriage is void (*iii*) by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to 7 years, and shall also be liable to fine."

There are two exceptional cases in which the second marriage will not be an offence, namely—

(1) When the first marriage was declared void by a Court of competent jurisdiction.

(2) When the former husband or wife has been continually absent or not heard of for 7 years provided that the facts be disclosed to the person with whom the second marriage is contracted. This exception lays down three conditions : (*i*) Continual absence of one of the parties for the space of 7 years ; (*ii*) The absent spouse not having been heard of by the other party as being alive within that time ; and (*iii*) The party marrying must inform the person with whom he or she marries of the above real state of facts.

According to English Law there is a third exception, *viz.*, *bona fide* belief in the spouse's death ; this exception has not been inserted in the Pakistan Penal Code.

Points to be proved by the prosecution on a charge of bigamy.— (1) Existence of the first wife or husband when the second marriage is celebrated.

(2) The second marriage is void by reason of the subsistence of the first according to the personal law, if any, of the person contracting the second marriage.

(3) Absence of either of the exceptions mentioned above.

In a prosecution for bigamy, the second marriage must be proved. A marriage is not proved unless the essential ceremonies required for its solemnisation are proved to have been performed.[1]

Defences.—An accused person, in order to escape a conviction on a charge of bigamy, may prove any of the following facts:— (1) The former marriage has been declared void by a Court of competent jurisdiction ; or (2) The former husband or wife has been, at the time of the subsequent marriage, continually absent from him or from her for 7 years, at least, and has not been heard of by him or her as being alive within that time and this real state of facts, so far as known to himself or herself, has been informed to the person with whom the subsequent marriage is contracted.

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1. *Kanwal Ram*, AIR 1966 S. C. 614.

The Hindu and Mahomedan Laws permit polygamy and therefore section 494 has no application to the Hindu and Mahomedan males. But the Hindu and Mahomedan women are not allowed the same liberty, hence they (females) would be exposed to the penalty under this section. But this section will apply to Christians, Buddhists and Zoroastrians (males and females) inasmuch as their faith sanctions only monogamous marriages.

Divorce dissolves a valid marriage, and the parties obtaining such dissolution can re-marry. Divorce is unknown to Hindu Law, though it is practised among the lower classes. It is recognised among Mahomedans, Parsis and Native Christians.

3. Adultery.—Section 497 defines the offence of adultery. It lays down that "Whoever has sexual intercourse with a person who is and whom he knows or has reason to belive to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery." Punishment.—Imprisonment of either description for 5 years, or fine or both.

Adultery is an act which requires the consent of both the parties. The male offender alone is liable to punishment and the married woman is not liable even as an abettor.

The offence under section 497 is limited to adultery committed with a married woman. It does not constitute an offence of adultery, if one has sexual intercourse with a widow or an unmarried woman. Even in the case of a married woman the adulterer is not liable if the husband consents to it.

Ingredients.—The following are the ingredients of the offence of adultery :—

(1) Sexual intercourse by a man with a woman who is and whom he knows or has reason to believe to be the wife of another man.

(2) Such sexual intercourse must be without the consent or connivance of the husband.

(3) Such sexual intercourse must not amount to rape.

English law.—Adultery is not an offence under the English law, and some of the most celebrated English lawyers have considered its omission from the English law a defect.

Points to be proved by the prosecution on a charge of adultery.—(1) That the accused had sexual intercourse with the woman in question.

(2) That she was the lawfully married wife of another man.

(3) That the accused knew or had reason to believe that she was the lawfully married wife of another man.

(4) That the husband of the woman did not consent to or connive at such intercourse.

(5) That the sexual intercourse so held did not amount to rape.

Defences.—The defences to a charge of adultery are—(*i*) There was no sexual intercourse ;

(*ii*) Accused did not know the woman to be the wife of another ;

(*iii*) Husband of the woman consented to or connived at the act of intercourse ; or

(*iv*) The complainant was neither the husband of the woman nor any other person permitted to prefer such complaint under section 199 of the Criminal Procedure Code.

Difference between adultery and rape.—Adultery differs from rape in several ways :

First, adultery is an act which requires the consent of both the parties, but in the case of rape the consent of the woman is wanting.

Secondly, in adultery, the woman must be a married woman, *i.e.*, the wife of another man. There is no adultery if one has sexual intercourse with a widow or even with a married woman whose husband consents to or connive at it. In the case of rape, it can be committed on any woman married, unmarried or a widow.

Thirdly, adultery cannot be committed by a husband with his own wife, but rape may even be committed by a husband upon his own wife if she is below 14 years of age.

Fourthly, adultery is an offence relating to marriage, but rape is an offence against the person of the woman.

Fifthly, in adultery the aggrieved party is the husband, the wife having consented to the act but in rape the woman is the aggrieved party.

And, *lastly*, adultery is not so serious an offence as rape. The punishment provided for the former is imprisonment of either description for 5 years or fine or both, but it is transportation for life or imprisonment of either description for 10 years and fine in the latter case.

4. Criminal elopement.—The offence of criminal elopement is stated in section 498 of the Pakistan Penal Code. It states that "Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

Ingredients.—There are three ingredients of criminal elopements. —(1) Taking or enticing away or concealing or detaining the wife of another man from that man or from any person having the care of her on behalf of that man.

(2) Such taking, enticing, concealing or detaining must be with intent that she may have illicit intercourse with any person.

(3) Knowledge or reason to believe that the woman is the wife of another man.

In the case of *Emperor v. Mahiji Fula*,[1] a married woman was taken by her brother from the house of her husband during his absence and was given away in marriage to the accused who lived in another village. The woman lived in the accused's house openly and freely as his wife. It was held that the accused was not guilty under section 498. The word "detains" in section 498 means keeps back. The keeping back need not necessarily be by physical force ; it may be by persuasion or by allurements and blendishment.

1. (1933) 35 Bom. L. R. 1046 : A. I. R. 1933 Bom. 489.

There should be something in the nature of control or influence which can properly be described as a keeping back of the woman. Proof of some kind of persuasion is necessary.

Summary of offences relating to marriage.—The following are the provisions in the Pakistan Penal Code dealing with the offence relating to marriage :—

(1) Cohabitation caused by a man deceitfully inducing a belief of lawful marriage. Punishment.—Imprisonment of either description for 10 years and fine. (S.493).

(2) Dishonestly or fraudulently going through a marriage ceremony knowing that no lawful marriage is thereby created. Punishment. —Imprisonment of either description for 7 years and fine. (S. 496).

(3) Bigamy *i.e.* marrying again during the life of husband or wife where such marriage is void. Punishment.—Imprisonment of either description for 7 years and fine. (S. 494).

(4) In (3) above if the former marriage is concealed from the person with whom the subsequent marriage is contracted, the punishment is 10 years and fine. (S. 495).

(5) Adultery. Punishment.—Imprisonment of either description for 5 years or fine or both. (S. 497).

(6) Enticing or taking away or detaining with criminal intent a married woman. Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 498).

CHAPTER XXI

OF DEFAMATION

Law of defamation.—The law of defamation is embodied in section 499 of the Pakistan Penal Code. It states : "Whoever (1) by words either (*i*) spoken or (*ii*) intended to be read, or (2) by signs or by visible representations, (3) makes or publishes any imputation concerning any person (4) intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Punishment.—Simple imprisonment for 2 years or fine or both. (S. 500).

Defamation of dead persons.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person, if living, and is intended to be hurtful to the feelings of his family or other near relatives (Explanation 1 to s. 499).

Defamation of a body of persons.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. (Explanation 2 to s. 499).

Form of imputation.—The form of imputation is immaterial. An imputation in the form of an alternative or expressed ironically, may amount to defamation. (Explanation 3 to s. 499).

Illustration.—A says—Z is an honest man ; he never stole B's watch ; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.

When is an imputation said to harm a person's reputation ? An imputation is said to harm a person's reputation, if it, directly or indirectly, in the estimation of others—(1) lowers the moral or intellectual character of that person, or (2) lowers the character of that person in respect of his (*i*) caste, or (*ii*) calling, or (3) lowers the credit of that person, or (4) causes it to be believed that the body of that person is (*i*) in a loathsome state, or (*ii*) in

a state generally considered as disgraceful. (Explanation 4 to s. 499). This Explanation specifies the various ways in which the reputation of a person may be harmed. If an imputation has no tendency to harm a person in his reputation, it will not amount to defamation, although its effect may be to cause that person to suffer in his interests.

The offence of defamation as it is found in this Code, consists in the injury offered to reputation, not in any breach of the peace or other consequence that may result from it. The essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creatures and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed. A man's reputation is his property, and if possible, of more value than other property and an injury to a man's character far exceeds an injury to his property and the protection of his character is more important than the protection of his trade. It is for these reasons that an injury to the reputation of another which always constitute a civil injury is sometimes treated as a crime.

The definition in the Code applies to words as well as writing. The Pakistan Penal Code makes no distinction between spoken and written defamation.

The defamatory matter must be published, *i.e.* communicated to a person other than the one defamed. According to the English law, if such matter is communicated to the person defamed, it will be sufficient for an indictment, if it is likely to provoke a breach of peace. The person who makes the imputation intending to harm the reputation of another as well as the person who publishes it are alike guilty. The publisher need not be the maker of the defamatory matter.

The publisher of a newspaper is responsible for defamatory matter appearing in the newspaper whether he knows it or not. But it will be a good justification to plead if such matter is published in his absence and without his knowledge and the temporary management of the paper was entrusted in good faith

to a competent person.[1] A newspaper published at one place and sent to a subscriber at another will be considered to have been published at the latter place.

Ingredients.—The ingredients of defamation are :

(1) Making or publishing any imputation concerning any person.

(2) Such imputation must have been made by (*a*) words, either spoken or intended to be read, or (*b*) signs, or (*c*) visible representations.

(3) Such imputation must have been made with the intention of harming or with knowledge or reason to believe that it will harm the reputation of the person concerning whom it is made.

Exceptions to the offence of defamation.—The following are the exceptions to the offence of defamation stated in section 499 *i.e.* any of the following defences may be set up against a charge of defamation :—

(1) Publication of truth for public good.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Publication in newspaper of facts which can be reasonably believed to be true, or which can be inferred from circumstances, does not amount to any offence under the section.[2]

(2) Criticism of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

(3) Criticism on public question. It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further. Thus, it is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for

1. *M. Anwar. v. Saadat Khayali* (1963) 15 D. L. R. (W. P) 76.
2. *Khondkar Abu Taleb v. The State* (1966) 19 D. L. R. (SC) 198.

a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or convassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

(4) Publication of judicial proceedings.—It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

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

(5) Comment on cases.—It is not defamation to express in good faith any opinion whatever (*i*) respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or (*ii*) respecting the conduct of any person as a party, witness or agent, in any such case, or (*iii*) respecting the character of such person, so far as his character appears in that conduct, and no further.

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

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

(6) Literary criticism.—It is not defamation to express in good faith any opinion (*i*) respecting the merits of any performance which its author has submitted to the judgment of the public, or (*ii*) respecting the character of the author, so far as his character appears in such performance, and no further.

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

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

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

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

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

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

(7) Censure by a person having lawful authority over another.—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates. Thus, a Judge censuring in good faith the conduct of a witness, or of an officer of the Court ; a head of a department censuring in good faith those who are under his orders ; a parent censuring in good faith a child in the presence of other children ; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils ; a master censuring a servant in good faith for remissness in service ; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception.

(8) Complaint to an authorised person.—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation. Thus, if A in good faith accuses Z before a Magistrate ; if A in good faith complains of

the conduct of Z, a servant, to Z's master; If A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

(9) Statement made for the protection of interests.—It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

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

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

The privileges of Judges, Counsels, Pleaders, parties and witnesses as well as statements made in pleadings, applications and affidavits and reports to superior officers come under this exception.

(10) Caution conveyed in good faith.—It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Distinction between English and Pakistan law of defamation.—According to English law defamatory matter even if published only to the person defamed, will support an indictment, provided it is likely to provoke a breach of the peace.[1] The Pakistan law is, however, different. The making known of the defamatory matter to any person other than the object of it is its publication. Therefore communication of defamatory matter to the person defamed is no publication, and, as such does not amount to defamation under the Pakistan law.

1. *Adams* (1888) 22 Q. B. D. 66.

Under the English law slander (which is a defamation by means of spoken words or guesture) is not an offence, but it is an offence under the Pakistan law. Under the English law, no indictment will lie for words spoken and not reduced into writing unless they are seditious, blasphemous, grossly immoral or obscene, or uttered to a Magistrate in the execution of his office or uttered as a challenge to fight a duel or with an intent to provoke the other party to send a challenge.[1] The Pakistan Penal Code, however, makes no distinction between written and spoken defamation. Under the Pakistan law the offence of defamation consists in making or publishing any imputation concerning any person intending to harm or knowing and having reason to believe that such imputation will harm the reputation of such person. The imputation may thus be conveyed by words either spoken or intended to be read, or by signs or by visible representations. The term 'defamation' under the Pakistan law, therefore, embraces both libel (defamation by means of writing, print or some permanent form) and slander (defamation by means of spoken words or guesture). The authors of the Code have recorded their disapproval of the English practice when they observed : "Herein the English law is scarcely consistent with itself. For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having that tendency in a higher degree."

Other cognate offences.—The following acts also are made punishable under the Pakistan Penal Code :—

(1) Printing or engraving matters known or having good reason to believe to be defamatory. Punishment.—Simple imprisonment for 2 years or fine or both. (S. 501).

(2) Sale of printed or engraved substance containing defamatory matter. Punishment.—Simple imprisonment for 2 years or fine or both. (S. 502).

1. Archbold, *Criminal Law*, 35th Ed. p. 3630.

CHAPTER XXII

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

Criminal intimidation.—Section 503 defines criminal intimidation. It states that a person commits criminal intimidation if he

(1) threatens another with any injury (*i*) to his person, reputation or property,or (*ii*) to the person or reputation of any one in whom that person is interested, or

(2) with intent (*i*) to cause alarm to that person, or (*ii*) to cause that person to do any act which he is not legally bound to do, or omit to do any act which that person is legally entitled to do.

(3) as the means of avoiding the execution of such threat.

Punishment.—(*i*) If the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire or to cause an offence punishable with death or transportation or imprisonment for 7 years or to impute unchastity to a woman—Imprisonment of either description for 7 years or fine or both. (*ii*) In all other cases—Imprisonment of either description for 2 years or fine or both. (*iii*) If the intimidation is caused by an anonymous communication or after having taken precaution to conceal the name or abode of the person from whom the threat comes—2 years imprisonment extra. (Ss. 506 and 507).

In terms of the Explanation a threat to injure the reputation of any deceased person in whom the person threatened is interested, falls within the purview of this section. Thus, A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

Ingredients.—The ingredients of the offence of Criminal intimidation are :

(1) Threatening a person with any injury

(*i*) to his person, reputation or property ; or

(*ii*) to the person, or reputation of any one in whom that person is interested.

(2) The threat must be with intent

(*i*) to cause alarm to that person, or

(*ii*) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or

(*iii*) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

In the case of *Ramesh Chandra Arora*[1] the accused took indecent photographs of a girl and threatened her father, in letters written to him, with publication of the photographs unless "hush" money was paid to him. The Supreme Court of India held that the accused was guilty of criminal intimidation and not of attempt to commit extortion. In the case of *Raghubar Dayal*[2] the accused gave a notice to a shopkeeper requiring him to execute an agreement not to import for one year any foreign cloth for sale at his shop and intimating that on his failure to do so, his shop would be picketed. At that time picketing was not an offence. It was held that the accused were guilty of criminal intimidation. Prohibition from importing for one year articles in which the shop dealt would, in the ordinary course of business, cause injury to the property of the shopkeeper, and the threat came within the definition of criminal intimidation.

Distinction between criminal intimidation and extortion.— Criminal intimidation is almost analogous to extortion. But it differs in the following respects :—

(1) Purpose.—In extortion, the immediate purpose is obtaining any property or valuable security ; in criminal intimidation the immediate purpose is to induce the person threatened to do an act which he is not legally bound to do or to abstain from doing an act which he is legally entitled to do.

(2) Effect.—Extortion is committed when the offender is present and the victim is, through fear of any injury, induced to

1. (1960) 1 S. C. R 924.
2 (1930) I. L. R. 53 All. 407.

deliver any property or valuable security ; in criminal intimidation the threat need not produce the effect aimed at nor should it be addressed directly to the person intended to be influenced. If it reaches his ears anyhow, the offence is complete.

(3) Delivery.—In extortion delivery of property is the essence of the offence, but in criminal intimidation there is no delivery of any property by the victim to the accused.

Distinction between criminal intimidation and assault.—(1) Threat.—Assault is committed by making some guesture or preparation as to cause any person present to apprehend that criminal force is about to be used to him, but in criminal intimidation there is threat of injury to one's person, reputation or property with intent to cause alarm to him.

(2) Immediate purpose.—In assault there is present apprehension of use of crminal force, while in criminal intimidation the threat of injury is future.

(3) Against whom directed.—Assault is always against one's person, but in criminal intimidation the threat of injury may be to one's person, reputation or property.

Insult.—The Pakistan Penal Code provides the following two provisions relating to insult offered to persons other than public servants :—

(1) Intentional insult with intent to provoke a breach of the peace, or to cause the commission of any other offence. (S. 504). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 504).

(2) Uttering any word, or making any sound or guesture, or exhibiting any object, intending to insult the modesty of a woman[1] or intruding upon the privacy of a woman. Punishment.—Simple imprisonment for one year or fine or both. (S. 509).

In the case of *Emperor v. Tarak Das Gupta*,[2] the accused, a University graduate, sent by post to the complainant, an English nurse, a letter containing indecent overtures and suggesting

1. *Md Sharif v. State* (1957) 9 D.L.R. (SC) 127.
2. (1925) 28 Bom. L. R. 99 : I. L. R. 50 Bom. 246 : A. I. R. 1925 Bom. 159.

that the complainant should take certain action in order to show whether she accepted the terms mentioned in the letter. It was held that the accused was guilty under section 509 of the Penal Code as he intended to insult the modesty of the complainant and the mere fact that the letter was in a closed envelope before it reached the complainant is immaterial. Similarly, in the case of *Mahomed Kassam Chisti*,[1] the accused followed in his carriage the complainant's unmarried daughter at various places and laughed and grinned and stared at her while passing and re-passing in his carriage, and stood up in it and shouted her name and so on. It was held that the accused was rightly convicted under section 509 of the Code.

Other provisions relating to insult are—(1) injuring or defiling any place of worship with intent to insult the religion of any person. (S. 295). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 295).

(2) Insulting the religion or religious feelings of any class. (S. 295A). Punishment. –Imprisonment of either description for 2 years or fine or both. (S. 295A).

(3) Criminal trespass with intent to intimidate, insult or annoy a person in possesssion of property. (S. 441). Punishment.—Imprisonment of either description for 3 months or fine of Rs. 500 or both. (S. 447).

(4) Intentional insult to a public servant sitting in judicial proceeding. (S. 228). Punishment.—Simple imprisonment for 6 months or fine of Rs. 1000 or both. (S. 228).

Statements conducing to public mischief.—Section 505 of the Pakistan Penal Code provides that whoever makes, publishes or circulates any statement, rumour or report,—

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

1. (1911) Unreported Bom. H. C.Cr. Appeal No. 454 of 1910, decided on January 18, 1911, quoted by Ratan Lal in his Law of Crimes, p. 1337.

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

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

shall be punished with imprisonment which may extend to 2 years, or with fine, or with both.

There is an exception to the above provision which lays down that it does not amount to an offence, within the meaning of section 505, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.

Divine displeasure.—Act or omission caused by inducing a person to believe that he will be rendered an object of divine displeasure if he does not do or omit to do the things which it is the object of the offender to cause him to do or omit is punishable. (S. 508). Punishment.—Imprisonment of either description for one year or fine or both. (S. 508).

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

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

Misconduct in public by a drunken person.—Mere intoxication is not made punishable. It is only when a person appears in a state of intoxication in a public place, or in any place which it is a trespass to him to enter, and there conducts himself in such a manner as to cause annoyance to any person, that he commits an offence under section 510 of the Pakistan Penal Code.

Ingredients.—The ingredients of the offence under this section are :

(1) appearance of a person in a state of intoxication in any public place, or any place which it is a trespass to him to enter ; and

(2) the person so entering must have conducted himself in such a manner as to cause annoyance to any person.

CHAPTER XXIII

OF ATTEMPTS TO COMMIT OFFENCES

Attempt to commit offences.—Section 511 lays down that whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

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

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

The points which require proof under the above section are :

(1) that the accused attempted to commit some offence punishable with transportation for life or imprisonment, or that he attempted to cause such an offence to be committed, and

(2) that in attempting to do the above act he did some act towards the commission of the offence.

Different stages of the commission of the offence.—There are three stages in the commission of a crime :

(1) Intention to commit a crime ;

(2) Preparation for its commission ; and

(3) A successful attempt.

Intention.—The first stage consists of the evil intention or design to commit the crime. Mere intention or evil design, not

followed by an act, does not constitute an offence. The will cannot be taken for the deed, unless there has been some external act showing the progress made towards maturing the crime. The Judges cannot look into the minds of criminals.

Preparation.—The second stage is that of preparation to commit a crime. It is devising or arranging the means or measures necessary for the commission of an offence. The provisions of the Code do not generally declare the stage of preparation as an offence. Mere preparation to commit an offence is punishable only in 3 cases, *viz* :

(1) Preparation to wage war against Pakistan (s. 122) ;

(2) Preparation to commit depredation on territories of any Power at peace with Pakistan (s. 126) ; and

(3) Preparation to commit dacoity (s. 399).

Attempt.—The third stage is the attempt to commit a crime which is the direct movement towards the commission of it after the preparations are made. It is something more than a mere preparation and short of actual commission. It consists in an intent to commit a crime coupled with the doing of some act adopted to, but falling short of, its actual commission. It is an act which, if not prevented, results in the consummation of the act attempted. If the attempt succeeds the crime itself is committed. To constitute the offence of attempt there must be an act done with the intention of committing an offence and it must be done in attempting the commission of the offence. An attempt is punishable even when the offence attempted cannot be committed ; as when a man intending to pick another's pocket thrusts his hand into the pocket but finds it empty.

Distinction between "preparation to commit an offence" and "attempt to commit an offence"—Preparation widely differs from attempt. While preparation consists in devising or arranging the means or measures for the commission of the offence, attempt is the direct movement towards the commission after preparations are made. Attempt is, therefore, preparation plus something more. Attempt begins where preparation ends. Attempt excludes the possibility of a change in the intention of the accused and the

possibility that it is for an innocent purpose. The relative proximity between the act done and the evil consequence contemplated largely determines the distinction between an attempt and a preparation. A preparation is generally not punished while every attempt is, the reason being that a preparation apart from its motives would generally be a harmless act. Thus A intends to kill B and with this motive he purchases poison in order to mix it in B's food. Upto this stage A's act is mere preparation, which is not punishable. But if A actually mixes poison in B's food and puts it before B among his dishes, he has committed an attempt. It is impossible to show in most cases that the preparation was directed to a wrongful end or was done with an evil motive or intention. An attempt is, however, made punishable because every attempt, although it fails to achieve the result, must create alarm which of itself is an injury and the moral guilt of the offender is the same as if he had succeeded.

There are, however, exceptional cases where the contemplated offence may be so grave that it must be nipped in the bud at its earliest stage. Instances of this type have been cited above *viz.*, preparation to wage war against the Government of Pakistan, preparation to commit depredation on territories of any power at peace with the Government of Pakistan and preparation to commit dacoity. There are also a few cases where even mere preparation is made punishable because they cannot by the very nature of things be meant for innocent purposes, *e.g.*, provision against making, mending, buying or selling or being in possession of instruments for counterfeiting coins, or the making of dies or other instruments used in the manufacture of coin. There are also a few acts which, although in reality are mere preparation, have been regarded as a substantive offence, *viz.*, possession of counterfeit coins, false weights and forged documents.

Distinction between abetment and attempt.—Although both are indictable offences they differ in certain respects. In the first place, in abetment the offence is complete in itself within the meaning of section 40, P. P. C., while an attempt to commit the

offence is not completed. If the act is completed there would no more be an attempt but the offence itself. It is only when the object to commit an offence fails that the accused is guilty of attempt to commit that offence. In the second place, abetment may be committed in several ways mentioned in section 107, *viz.*, instigating any person, engaging with one or more other person or persons in any conspiracy for the doing of a thing, or intentionally aiding, by any act or illegal omission, the doing of that thing. An attempt is, however, committed by doing any act towards the commission of the offence. In the third place, in abetment the abettor need not be present at the time of the commission of the offence, but in an attempt the presence of the offender is necessary at the time of the commission of the offence. In the fourth place, abetment of an offence is more severely punished than an attempt to commit the same offence. Thus abetment of the offence of murder would be punished in the same way as murder itself, *viz.* with death or transportation for life ; whereas an attempt to commit murder is less severely punishable.

LEADING CASES

BARENDRA KUMAR GHOSH V. KING EMPEROR
(1924) I.L.R. 52 Cal. 197 P.C. : 52 I.A. 40.

Facts of the case.—On August 3, 1923, when the Postmaster of the Sankaritola Post Office, Calcutta, was counting money in his office, three men, of whom the appellant Barendra was one, called upon him to hand over the money. Almost immediately afterwards, they fired pistols at him, hitting him in two places and he died at once. The appellant was chased and arrested with a pistol which he was firing at his pursuers.

He was tried upon a charge of murder at a criminal sessions of the Calcutta High Court. The Judge directed the jury that if they were satisfied that the Postmaster was killed in furtherance of a common intention of all three men, the prisoner was guilty of murder under section 302 I.P.C., whether he fired the fatal shot or not. Upon a unanimous verdict of guilty by a Special jury, he was convicted and sentenced to death.

The Advocate General having granted a certificate under clause 26 of the Letters Patent that the High Court should further consider the case whether there was any misdirection to the jury, it was heard by a Bench of five Judges who dismissed the appeal. Leave to appeal to the Privy Council was granted by the High Court under clause 41 of the Letters Patent. The Privy Council dismissed the appeal.

Point for decision.—Was the appellant guilty of murder under section 302 I.P.C., although it was not proved that it was he who fired the fatal shot ?

Decision.—Yes, as he had fired, in furtherance of the common intention of all, within the meaning of section 34 I.P.C.

Judgment and Reasons for Decision.

The doing to death of one person at the hands of several, by blows or stabs, under circumstances in which it can never

be known which blow or blade actually extinguished life, is common in all criminal experience. Is the crime in such cases attempted murder only ? Section 34 I.P.C. provides that whena criminal act is done by several persons in furtherance of the common intention of all, each is liable for that act as if it were done by him alone.

It was contended for the appellant that in a case of murder the words 'a criminal act' in this section mean an act which takes the life. This, it was said, appears from the concluding words of the section, 'liable for that act as if it were done by him alone.' It was argued that no act done by a man alone can make him liable as a murderer, except an act done by himself and fatal to his victim. In other words, the argument was that even in joint commission of crimes, a man is responsible only for his own acts.

Such a proposition was not worth enacting. For without it, a man is undoubtedly responsible for what he himself has done, irrespective of what others did. The argument, in effect, meant that if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be guilty of murder ; but if one bullet only grazes his ear, one of them is not a murderer, and each being entitled to the benefit of doubt, all must be acquitted of murder, and can be convicted only of attempt to murder.

This absurdity does not really follow from the provisions of the Code. By section 33, 'a criminal act' includes a series of acts. By section 37, when any offence is committed by means of several acts, the doing of any one of them, with an intention to cooperate in the offence, makes the actor liable for the offence. Section 38 provides that several persons concerned in a criminal act may be guilty of different offences. Read together, these sections are plain. 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. The contrary view taken in *Nirmal Kanta Ray's case*[1] was wrong.

1. (1914) I. L. R. 41 Cal. 1072.

Next argument of the appellant rested on sections 114 and 149 I.P.C. It was said that if section 34 bears the meaning stated above, these sections are otiose. Section 149, however, is certainly not unnecessary; for, it creates a specific offence and deals with the punishment of that offence alone. As to section 114, it is evidential. Participation in a crime is often difficult to establish. Section 114 provides that where there has been abetment and actual commission of a crime and the abettor is present there, participation is established, bringing the case within the ambit of section 34. Neither section 114 nor section 149 is thus superfluous.

The appeal therefore fails and is dismissed.

Points decided.—(1) When a number of persons, in furtherance of a common intention, shot a person dead, all are guilty of murder under section 302 I.P.C. read with section 34, irrespective of who fired the fatal shot.

(2) The interpretation put upon section 34 I.P.C. in *Nirmal Kanta Roy's case*[1] is not correct.

(3) No appeal lies to the Privy Council under clause 41 of the Letters Patent, against the decision of the High Court passed on review, on a certificate by the Advocate General under clause 26.

Note.—In *Nirmal Kanta Roy's case*,[1] two men acting in concert both fired at a police man, one hitting and killing him and the other failing to hit at all. The latter was acquitted of the charge under section 302 read with section 34. This view of the law is overruled by the Privy Council in this case. Their Lordships held that the orders 'that act' and 'the act' in the latter part of section 34 include the whole of the action covered by 'a criminal act' in the first part.

1. (1914) I. L. R. 41 Cal. 1072.

Sec 149 I.P.C. :- If an offence is committed by any member of an unlawful assembly in furtherance of a common object then each of the members of the assembly is respective of

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MAHBUB SHAH V. EMPEROR

A.I.R. 1945 P.C. 118 : 72 I.A. 148.

Facts of the case.—On August 25, 1943, at sun rise, Allah Dad, deceased, with a few others left his village by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Hossain Shah, father of Wali Shah (absconder), bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning, they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Quasim Shah, nephew of Mohammad Hossain Shah (acquitted by the High Court), who was standing on the bank of the river, asked Allah Dad to give him the reeds that had been collected from his uncle's land. He refused. What happened subsequently was spoken by two boys, Nur Hussain, P.W. 10, and Nur Mohammad, P.W. 11. Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave him a blow with a small stick, but it was warded off. Allah Dad then picked up a *lari* (bamboo pole) from the boat and struck Quasim Shah with it. Quasim Shah then shouted out for help. On hearing the cry, the appellant Mahbub Shah and his uncle Wali Shah who were out shooting game came up with guns in their hands. When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad, who fell down dead, and Mahbub Shah fired at Hamidullah causing injuries to him.

On the above facts the learned Sessions Judge convicted the appellant Mahbub Shah of murder of Allah Dad under section 302 read with section 34 Indian Penal Code. He was also convicted of the attempted murder of Hamidullah.

On appeal, the High Court confirmed the conviction and sentence. An appeal was then preferred to the Privy Coucil by special leave and the appeal was allowed.

Point for decision.— Was there any common intention making the appellant guilty under section 302 read with section 34 I. P. C. ?

Decision.—No.

Judgment and Reasons for Decision.

Section 34 of the Indian Penal Code lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is the existence of a common intention animating the doing of a criminal act in furtherance of such intention. Common intention within the meaning of the section implies a pre-arranged plan.

The High Court said : "It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more members of the complainant party." But this only shows that they had similar intention or even the same intention when they fired their guns. Care must be taken not to confuse same or similar intention with common intention required by section 34 ; 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.

The inference of common intention within the meaning of section 34 Indian Penal Code should never be reached unless it is a necessary inference reducible from the circumstances of the case. In this case, that cannot be said about the appellant. He must therefore be acquitted of constructive murder.

Points decided.—(1) To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. The common intention implies a pre-arranged plan, and to convict the accused of an offence under section 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.

(2) The essence of joint liability under section 34 of the I.P.C., is to be found in the existence of a common intention, leading to the doing of a criminal act, in furtherance of such intention.

(3) The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. Same and similar intention must not be confused with common intention.

(4) It is no doubt difficult if not impossible to procure direct evidence to prove the intention of an individual, it has to be inferred from his act or conduct or other relevant circumstances of the case.

Note.—The Privy Council summed up the facts as follows : "The evidence falls far short of showing that the appellant and Wali Shah (the uncle) ever entered into a pre-meditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah."

This being so, there could be no constructive liability of the appellant in law as expounded by the Privy Council. Their Lordships said that the distinction between same or similar intention and common intention, though very thin, is real and substantial, and if overlooked, will result in miscarriage of justice.

In *Barendra v. King Emperor*,[1] *ante*, the Sankaritola Post-master murder case, the conviction under section 34 I.P.C. was upheld by the Privy Council, as it was clear upon the facts that all the accused had formed a pre-arranged plan to murder and rob the postmaster. Who fired the fatal shot was, therefore, immaterial.

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1. (1924) I.L.R. 52 Cal. 197 P.C.

AMRITALAL HAZARA V. EMPEROR

(1905) I.L.R. 42 Cal. 957.

Facts of the Case.—This case is commonly known as the "Raja Bazar Bomb case." Amritalal Hazara and 3 others were charged with having had in their possession, under their control in a room, materials for making bombs with intent to endanger life and with having thereby committed an offence under section 4 (*b*) of the Explosive Substances Act, 1908 and also with conspiring between March 1911 and November 21, 1913, with 5 persons named and some others unnamed to make and keep explosive substances with intent by means thereof to endanger life, and thereby committed an offence punishable under section 120-B of the Indian Penal Code. The accused pleaded not guilty. One of them was acquitted by the Sessions Judge of 24-Parganas but the rest were convicted. The Government preferred an appeal against the acquital of one accused and the remaining accused appealed to the High Court against their convictions.

Point for decision.—Whether all the elements essential to sustain a conviction have been established ?

Decision.—It was held that all the elements necessary to sustain a conviction under sections 4 (*b*) of the Explosive Substances Act, 1908 and 120-B, I. P. C. have been made out in the case of Sasanka *alias* Amritalal Hazara only.

Judgment and Reasons for Decision.

On behalf of the accused many objections were raised before the High Court. In the first place it was argued that the charge under section 4 (*b*) of the Explosive Substances Act, 1908 is materially defective, inasmuch as it omits to state, first, that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously," and, secondly, that it was the intent of the accused to endanger life in British India. In the opinion of the learned Judges the defects in this charge have

not vitiated the trial and conviction, and that the case is covered by section 225 and by clause (*a*) of section 537, Criminal Procedure Code, and that the objection was not taken before the Sessions Judge. Consequently the first objection is overruled.

In the second place, it was contended that the charge under section 120-B, Indian Penal Code is bad, because it does not specify the explosive substance which, it is alleged, the accused had conspired with one another and with other persons to make and keep. The substance of the argument is that to make and keep explosive substances generally is not an offence which, it is contended, means according to section 4 clause (*o*) of the Criminal Procedure Code, "any act or omission made punishable by any law for the time being in force," and according to the second paragraph of section 40, Indian Penal Code, denotes, "a thing punishable under that Code or under any special or local law," as defined in sections 41 and 42. Reference has also been made to section 10 of the Indian Evidence Act, where expression is used, "two or more persons have conspired together to commit an offence or an actionable wrong." The learned Judges were unable to accept the contention that where the illegal act, charged under section 120-B, is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908 it is essential to specify in the charge the explosive substances which the accused have conspired to have in their possessions or under their control. It is indisputable that a person may be guilty of criminal conspiracy, even though the illegal act which he has agreed to do or cause to be done has not been done. The learned Judges were of opinion that the conspiracy charge is not open to objection on the ground that it does not specify the explosive substances for the preparation or possession whereof the alleged conspiracy was formed. The second contention is overruled as there is no force in it.

It was argued in the third place that conspiracy charge under section 120-B Indian Penal Code is bad, inasmuch as it assigns a wrong date for the commencement of the period during which the conspiracy charged against the accused lasted. The charge

specified the period as contained between March, 1911 and the 21st November, 1913. It is pointed out that section 120-A and section 120-B did not find a place in the Indian Penal Code before the 27th March, 1913, when Act VIII of 1913 became law. It is obvious that the period should have been restricted between the dates 27th March and 21st November 1913. Under section 222(1), Criminal Procedure Code, particulars as to the time of the alleged offence were necessary and the prosecution should have been careful in this respect. No objection to the charge on this ground was, however, taken at the trial till a very late stage of the proceedings, in fact not in the course of the final arguments, and the error cannot be deemed to have affected the legality of the trial. No doubt the accused cannot be convicted unless the prosecution establishes that the accused were members of the conspiracy after the 27th March, 1913, but this involves an investigation of the merits of the case. The third ground thus turns out to be unsubstantial and must be overruled.

In the fourth place, the legality of the trial has been questioned on the ground of misjoinder of the charges. The substance of the argument is that while four of the accused persons are charged with an offence under section 4(*b*) of the Explosive Substances Act, 1908, all the six accused are charged with conspiracy under section 120-B of the Indian Penal Code, and it is contended that a joint trial of all these persons for the two offences charged is illegal, on the authority of the decision of the Judicial Committee in *Subrahmania v. King Emperor*.[1] It cannot be disputed that if misjoinder of charges is established the trial must be deemed illegal because held contrary to an express provision of the law relating to the mode of trial. The real question in controversy in this case is whether there has been a misjoinder of charges. On behalf of the accused, it was contended that the same individual cannot be simultaneously charged with an offence as also with conspiracy to commit that offence, and

1. (1901) I.L.R. 25 Mad. 61.

much less can he be tried jointly with other persons alleged to be his co-conspirators In support of this view reliance was placed upon *King Emperor v. Tirumal.*[1] According to the learned Judges this decision is of no real substance to the accused ; it is an authority only for the proposition that a man cannot be cumulatively charged with the commission of an offence, as also of abetment by conspiracy or otherwise of the very same offence ; it is besides, a decision given before section 120-B Indian Penal Code, was enacted. In the opinion of the learned Judges the legality of the trial in the present case must be determined with reference to the language of section 239 of the Criminal Procedure Code, which so far as it is relevant to the question is in these terms :

"When more persons than one are accused of different offences committed in the same transaction, they may be charged or tried together or separately as the Court thinks fit."

It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction ; but circumstances which must bear on the determination of the question in an individual case may be easily indicated : they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. The fourth ground is overruled as unsustainable.

The 5th ground on which the legality of the trial is questioned is that the persons who are alleged to be conspirators in the charge have not been prosecuted, although their names and addresses were known to the prosecution. But the learned Judges were unable to hold that the omission of the prosecution to proceed against the alleged conspirators in this case has vitiated the trial of the other persons. The fifth ground, consequently, fails.

The sixth ground on which the legality of the trial was assailed is that the facts disclosed, if believed, indicate that the accused have committed an offence punishable under section 121-A of the Indian Penal Code, and should have been tried accordingly. The contention in substance is that the prosecution has been

1. (1901) I.L.R. 24 Mad. 523, 547.

commenced under section 120-B of the Indian Penal Code, and section 4 (*b*) of the Explosive Substances Act, 1908 with a view to evade the requirements of section 196 of the Criminal Procedure Code, compliance wherewith, as was ruled in *Barindra Kumar Ghose v. Emperor*,[1] is imperative in prosecutions for offences against the State. In the opinion of the learned Judges there is no basis for this contention.

Points decided.—(1) It was indisputable that the person might be guilty of criminal conspiracy even though the illegal act which he had agreed to do or cause to be done had not been done. Conspiracy differs from other offences in this respect, that in other offences the intention to do a criminal act is not a crime in itself until something is done amounting to the doing or the attempting to do some act to carry out the intention, conspiracy on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not The gist of the offence is the agreement and association to break the law whether any act be done in pursuance thereof by the conspirators or not.

(2) A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for "the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means."

(3) On a charge of conspiracy the defence is entitled to insist upon proof of reasonable ground for belief that the persons named in the charge have conspired together before particular facts are proved to show that one or more of the accused took part in it.

(4) The charge of conspiracy must not be indefinite. The courts must state the illegal purpose and design of the agreement entered into between the accused with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law.

1. (1909) I. L. R. 37 Cal. 467 : 14 C. W. N. 1114.

BARINDRA KUMAR GHOSE & OTHERS V. KING EMPEROR

(1909) I.L.R. 37 Cal. 467.

Facts of the case.—The case of the prosecution in brief is that about 1904, the appellant, Barindra Kumar Ghose, who was one of the mainsprings of the alleged conspiracy, commenced preaching the doctrines of political independence throughout Bengal. In 1905 came the partition of Bengal, which, according to the case for the Crown, was unquestionably a landmark in this attempted revolution, and was used in its promotion. He with two others started the "Jugantar" paper as a channel for the dissemination of seditious doctrines.

A secret society was formed for the overthrow of British Government, which had its office at a garden house in 32, Muraripukur Road, Maniktolla, in the suburbs of Calcutta. The appellants were all members of this society and joined in this unlawful enterprise. They collected arms and ammunition with the object of waging war against the King and finally they waged war against the King. They were tried under section 121, 121-A, and 122 I. P. C. and convicted by the Sessions Judge of Alipore. Against the convictions and sentences 18 accused filed appeals to the High Court.

Point for decision.—Whether the accused have committed offence under section 121, 121-A and 122 I.P.C.

Decision.—It was held that they have committed offence punishable under section 121-A only.

Judgment and Reasons for Decision.

It was urged on behalf of the appellants that the convictions are bad in law and further that they are not justified by the evidence on the record. It was next argued that there was no jurisdiction to take cognisance of the several offences of which the accused had been guilty, that is to say, of offences under sections 121, 121-A and 122 of the Indian Penal Code.

It was found that the evidence on the record was not enough to sustain the charge under sections 121 and 122. The offence of conspiracy under section 121-A of the Indian Penal Code was established. Barindra Kumar Ghose and 11 others were convicted under section 121-A of the Indian Penal Code.

Points decided.—(1) The Criminal Procedure Code, in so far as it interferes with the mode of trial by jury is not *ultra vires* under the proviso to section 22 of the Indian Council's Act, 1861.

(2) The joint trial of the accused on charges under sections 121, 121-A, 122 and 123 of the Penal Code was not bad for misjoinder of persons or charges.

(3) A confession under section 164 of the Criminal Procedure Code must be made either in the course of an investigation under section XIV or after it has ceased and before the commencement of the inquiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased and not when it is made in the course of the Police investigation.

(4) Sections 164, 342 and 364 of the Code are not exhaustive and do not limit the generality of section 21 of the Evidence Act as to the relevancy of admissions.

(5) The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under section 164 of the Criminal Procedure Code or section 29 of the Evidence Act, though such fact may be material on the question of its voluntariness.

(6) The expression "wages war" in section 121 of the Penal Code must be construed in its ordinary sense and a conspiracy to wage war, or the collection of men, arms and ammunition for that purpose is not waging war.

PULIN BEHARI DAS & OTHERS V. KING EMPEROR

(1911) 16 C. W. N. 1105.

Facts of the case.—The case for the Crown is that the first appellant, Pulin Behari Das, founded an association known as the Dacca *Anushilan Samity*, that that association had branches or similar associations affiliated to it throughout Eastern Bengal, that the object for which the association was formed was for the purpose of bringing about a revolution by force of arms and depriving the King of the sovereignty of British India, that the appellants were the members of the association and that they had agreed amongst themselves to promote the revolutionary object with which the association was formed, that having associated themselves for this purpose they committed an offence under section 121-A of the Indian Penal Code.

In this case 35 persons appealed against the decision of the learned Additional Sessions Judge of Dacca, convicting them under section 121-A of the Indian Penal Code and against the sentences varying from transportation for life to rigorous imprisonment for 3 years passed on them on that conviction. In the lower Court 44 persons were placed upon the trial, of these 8 were acquitted ; one of those convicted did not appeal and was said to have become insane. The remainder appealed to the Calcutta High Court.

Point for decision.— Are the appellants guilty under section 121-A of the Indian Penal Code ?

Decision.—Yes.

Judgment and Reasons for Decision.

Three objections were raised on behalf of the appellants. First, it was contended that there was no complaint within the meaning of sections 4 and 190 of the Code of Criminal Procedure and that there the proceedings are void *ab initio* because the Magistrate had no jurisdiction to initiate them. After discussing the various sections

of the Criminal Procedure Code the learned Judges were of opinion that the Magistrate had jurisdiction and that on the materials he had before him it could not be said that there was no allegation that the persons against whom process was asked had committed an offence. The appellants did not take any steps to set aside the Magistrate's order on the ground that on the face of it the materials on which it was made were insufficient. They proceeded to trial, the point was not one which affected the fairness of the trial in any way. It was not open to them at that stage to object to the issue of the process unless they could show that there was no power to issue it ; and that they failed to show.

The second contention on the part of the appellants was that the complaint was not lawfully authorised under section 196 of the Criminal Procedure Code. It says the sanction was too vague, and that even if not too vague it was granted by an officer who had no power to grant it. The learned Judges held that this question was not open in an appeal preferred by the prisoner against his conviction and, that a person convicted was not entitled to question in appeal the right of the *de facto* Government of the Province to exercise any of those powers which a Government may lawfully exercise.

Thirdly, it was contended that there had been misjoinder of charges. The prisoners were charged under sections 121-A, 122 and 123 of the Indian Penal Code. It was argued that a charge under section 123 could not be legally joined with one under section 121-A. The learned Judges did not agree with that contention. The charge under section 121-A was that of conspiring to wage war against the King and to deprive him of the sovereignty of British India and overawe by means of criminal force or show of criminal force the Government of India. In furtherance of that conspiracy the persons engaged therein actively conspired or collected arms or concealed the existence of their conspiracy from the authorities.

All these acts, if done, are in furtherance of the one transaction and therefore may clearly be charged against these persons under section 235 of the Criminal Procedure Code and the prisoners

may be tried at one trial for all these offences. But had there been any doubt at all in reference to this matter it is now set at rest by the decision in the case of *Barindra Kumar Ghose v. King Emperor*,[1] in which this point was raised and decided adversely to the contention of the appellants.

After considering the evidences on the records the learned Judges affirmed the convictions in respect of 14 accused persons and the remaining appellants were acquitted and discharged.

Points decided.—(1) The acts of an officer *de facto* who is holding his office under some colour of title cannot be collaterally impeached in a proceeding to which he is not a party although he may not be the *de jure* holder of it.

(2) A complaint which does not setforth a fairly full statement of concrete facts, but merely copies out the words of the section describing the offence is not a complaint of facts within the meaning of section 190 Cr. P. C.

(3) A defect in the complaint may be a good ground for quashing the proceedings.

(4) A charge under section 121-A coupled with one under section 123 does not constitute a misjoinder of charges.

(5) A criminal Court no less than a civil Court has inherent power to mould its own procedure.

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1. (1910) I. L. R. 37 Cal 467: 14 C. W. N. 1114.

QUEEN EMPRESS V. BAL GANGADHAR TILAK
(1897) I.L.R. 22 Bom. 112.

Facts of the case.—The first accused Bal Gangadhar Tilak was the editor, publisher and proprietor of a Marathi Weekly Newspaper "KESARI" and the second accused was the printer. They were tried at the Bombay High Court Sessions for having committed an offence under section 124-A, Indian Penal Code by publishing certain articles in their paper, on the occasion of Shivaji festival. The following extract from the translation of the articles shows their nature :

Shivaji's Utterances.—

I delivered the country by establishing "Swarajya" (literally, "on's own Government ;" native rule) and by saving religion ..Alas! Alas ! I now see with (my own) eyes the ruin of (my) country. What a dislocation is this ! Foreigners are dragging out Lakshmi (Paradise of Indra) violently by the hand by (means of) persecution. Along with her plenty has fled (and) after (that) health also. This wicked Akbaya (the eldest sister of fortune ; Miss Fortune ; misfortune personified) stalks with famine through the whole country. Relentless death moves about spreading epidemics of diseases ... The cow—the foster mother of babes when (their) mother leaves (them) behind—the mainstay of the agriculturists ; the imparter of strength to many people, which I worshipped as my mother, and protected more than (my) life, is taken daily to the slaughter-house and ruthlessly slaughtered (there). "He himself came running exactly with in the line of fire of (my) gun !" "I thought (him to be) a bear !" "Their spleens are daily enlarged !" How do the white men escape by urging these meaningless pleas ? This great injustice seems to prevail in these days in the tribunals of Justice. Could any man have dared to cast an improper glance at the wife of another, a thousand sharp swords (would have) leapt out of (their) scabbards instantly. Now, (however), opportunities are availed of in railway carriages, and women are dragged by the hand. You

eunuchs ! How do you brook this ? Get that redressed ! ... Give my compliments to my good friends, your rulers, of whose vast dominions the sun never sets. Tell them "how have you forgotten that old way of yours, when with scales in hand you used to sell (your goods) in (your) warehouses ?" (As) my expeditions in that direction were frequent, it was at that time possible (for me) to drive you back to (your own) country.

Point for decision.—Is Tilak guilty of an offence under section 124-A of the Indian Penal Code ?

Decision.—Yes.

It being a Sessions trial, there was no judgment by the Court. The following charge to the jury contains a discussion of the facts and law on the point :—

Charge to the Jury

It was contended for the accused that only the writer of the article is guilty under section 124-A and not the editor, publisher or printer. But this is not the law. As held in the *Bangabasi case*[1] by Petheram C. J., in the Calcutta High Court, whoever uses words or printed matter, exciting or attempting to excite disaffection towards the Government is guilty under this section.

It was next argued on behalf of the accused that unless there is an excitement to violence, disorder, rebellion or mutiny, there is no action under this section. This also is not correct. This section does not speak of any such thing but clearly states that exciting or attempting to excite disaffection is enough. The important question, therefore, is to determine what the section means by disaffection.

Disaffection means absence of affection. It means hatred, contempt, enmity, hostility, dislike and every form of ill-will. Disloyalty is perhaps the best general term, comprehending every possible form of bad feeling. To excite such feeling or an attempt to do so is what the section aims at.

But this does not make all criticisms punishable. For, all criticisms do not excite disaffection. This is expressly provided

1. (1891) I. L. R. 19 Cal. 35 at 44.

for by the Explanation to the section which states that mere disapprobation of the measures of the Government is not disaffection. But if the criticism goes beyond the measure and is directed against the Government itself, its foreign origin, its motives, its feelings towards the people, etc., so as to excite hatred, contempt or ill-will against the Government, it comes within the section.

The question, therefore, is about the intention of the accused. Did they intend to excite mere disaffection towards the Government itself? To ascertain their intention, the most important evidence is the articles themselves. Other articles published in the paper and produced in evidence may also be taken into consideration to ascertain the intention.

Tilak admits that he is the publisher and editor of the paper. He must be presumed to have known what he published in his paper, unless he proves to the contrary. This he has not done. He is, therefore, responsible. The other accused, the printer, says that he knew nothing of the articles. If the jury believe it, he should be acquitted.

Points decided.—(1) Not only the writer, but whoever in any way uses the writing for the purpose of exciting feelings of disaffection to the Government, is liable under section 124-A, I. P. C.

(2) 'Disaffection' means hatred, enmity, dislike, hostility, contempt and every other form of ill-will to Government, and is not limited to exciting mutiny or rebellion.

(3) 'Government established by law' means British rule as such—the existing political system as distinguished from any particular set of administrators.

(4) The object of the Explanation to section 124-A, is to protect honest journalism in criticising the measures of the Government, not amounting to an attack on the Government itself exerting disaffection against it.

(5) The most important index of the intention of the writer or publisher of a newspaper article is the article itself, with special reference to the class of readers, the time, the place, the circumstances and the occasion of the publication.

Note.—The jury by a majority found Tilak guilty and unanimously found the second accused, the printer, not guilty. Tilak was convicted and sentenced to imprisonment. He applied to the High Court for leave to appeal to the Privy Council. He then appealed to the Privy Council itself for a special leave which too was refused.

The dismissal by the Privy Council of the application for special leave amounted to approval of the view of law taken in this case. This was expressly done by the Privy Council in *King Emperor v. Sadashiv Bhalerao*.[1]

1. (1947) 51 C. W. N. 768.

GANOURI LAL DAS AND OTHERS V. QUEEN EMPRESS

(1889) 1. L. R. 16 Cal. 206.

Facts of the case.—This is a Criminal Revision against the order passd by the Sessions Judge of Bhagulpore, affirming the order passed by the Deputy Magistrate of Bhagulpore.

Ganouri Lal Das and others were convicted under section 147 of the Indian Penal Code of the offence of rioting by the Deputy Magistrate of Bhagulpore and sentenced to undergo one year's rigorous imprisonment each, and were further directed to execute recognisance bonds in the sum of Rs. 200 each for keeping the peace for a period of two years, or in default to undergo two years' simple imprisonment each.

The disturbance took place at a spot on the river Karalya, close to where a water course issues from that river. Around that spot, and on both sides of the river, were lands belonging to Mahashoy Taruk Nath Ghose, of whose *cutchery* Gonori Lal was the tahsildar. He was in charge of these lands. Some distance from the point were the lands belonging to Thakur's family of Barari. These lands were irrigated by the water course. The disturbance took place in consequence of a number of persons, under the direction of Thakur, having gone for the purpose of diverting the waters of the stream into the water course. The party arrived at the spot at about 10 a.m. and worked at the bund. While they were engaged on the work, different bodies of men in large numbers were seen gathering in the neighbourhood and marching towards the spot. Many of them were armed with lathis. Most of the Thakur's party had fled. Twenty five or thirty men fell upon the Thakur's men, five of whom were seriously wounded. The assembly then dispersed.

Against the conviction and sentence they appealed to the District Judge, who confirmed the conviction and sentence. On the 28th November 1888 they moved a petition before the

High Court under its Revisional powers to send for the records, and to set aside the conviction and sentence. It was contended that the acts of the petitioners did not amount to rioting on the following grounds :—

(1) That the petitioners simply exercised their right of private defence of property.

(2) That the assembly under the circumstances was not an unlawful assembly (section 141) as the petitioners did not assemble to enforce a right or supposed right but to defend it.

Point for determination.—Whether the acts of the person convicted did, under the circumstances of the case, come within the provision of the Penal Code relating to the offence of rioting ?

Decision.—Yes.

Judgment and Reasons for Decision

The High Court rejected the above contentions and held that the petitioners were rightly convicted.

Points decided.—(1) The right of private defence of property under the Indian Penal Code exists as against theft, robbery, mischief or criminal trespass or an attempt to commit one of those offences. No such right is conferred, by any words in sections 97, 103, 104 and 105, save against the perpetrators of offences under the Penal Code.

(2) The Code confers a right of private defence not as against a mere trespass but as against a crime. In the present case no offence was committed by Thakur's men.

(3) As to the argument that the assembly did not assemble to enforce a right or supposed right within the terms of section 141 but to defend a right, the Court observed that what the section prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of 5 or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions. The section refers to "right or supposed right." This would seem to make a division : First, rights in actual enjoyment when interfered with ; secondly, rights claimed though

not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force defends the right. Otherwise, then not merely the right to the actual occupation of property, but a right of way, a right to draw water from the well and many others may, if interrupted, be vindicated by force or show of force. To defend them by force against interruption is to enforce them and this, if done by five or more is, in many, if not in most cases, forbidden by the law. For the above reasons the right of private defence did not arise in the present case.

In re. MATILAL GHOSH & OTHERS
(1917) I. L. R. 45 Cal. 169 S. B.

Facts of the case.—On the 18th May, 1917, the following paragraph appeared in the editorial columns of the Amrita Bazar Patrika :—

"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate-payer is safe in the hands of the Hon'ble Judges, and we do not think that any official of the Trust can go so far."

Four days later, on the 22nd May, the following paragraph appeared in the editorial columns of the same paper :—

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court, before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Mr. Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that, for purposes of hearing Improvement Trust Appeals, the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now, what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned—a contention,

however, which we do not believe the Chief Justice will care to advance—why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as land-owners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Chandra Kanta Ghosh v. The Improvement Trust.*[1] Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust Appeals."

On the 30th May, 1917, the Chief Justice, after previous consultation with the other members of the Court, directed the issue of a Rule on Tarit Kanti Biswas (the printer and publisher of the Amrita Bazar Patrika), Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, directors and Gopal Lal Ghosh and Mrinal Kanti Ghose, managers of the company called the "Amrita Bazar Patrika, Limited," to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court committed by the publication of the two articles referred to concerning the High Court and the Chief Justice in his administration thereof. The materials whereon the Rule was issued were contained in two affidavits sworn by the Registrar on the Original Side and the Registrar on the Appellate Side as to the actual publication of the articles in the paper and the position the opposite parties occupied in relation to the paper and the company which were its proprietors.

1. (1916) I.L.R. 44 Cal. 219.

Points for decision.—(1) Whether the Court, being the complainant, has jurisdiction to hear the Rule ?

(2) Whether the articles constitute a contempt of Court ?

Decision.—(1) & (2) Yes.

Judgment and Reasons for Decision

First, it was objected that the Court being the complainant has no jurisdiction to hear the Rule. But this contention was overruled. It was held in 1883 in *Surendra Nath Banerjee v. The Chief Justice*[1] by Judicial Committee that the High Courts in the Indian Presidencies are Superior Courts of Record. The offence of contempt of court and the powers of the High Court to punish it are the same in such Courts as in the Superior Courts in England, and the jurisdiction was exercised by the High Court in that case. The jurisdiction was affirmed in 1913 in the case of *Legal Remembrancer v. Motilal Ghose & others.*[2] Sir Lawrence Jenkins C. J. said at page 216 : "Now this Court is a Court of Record in all its jurisdictions and it thus has power to commit for any contempt in relation to any of those jurisdictions."

Next the Court considered whether the articles constituted a contempt of the Court. It was admitted on behalf of the respondents at the hearing of the Rule that the statements of facts contained in the first article were in many material respects untrue. There was not an Appellate Bench constituted to hear "Appeals against the awards of the Improvement Trust" as the article assumes—such Bench was not originally composed of Mookerjee and Cuming JJ. as stated in the article : such Bench had not latterly come to be presided over by the Chief Justice and Woodroffe J., and it was untrue that Mookerjee J., had been withdrawn from the Court.

It was also admitted by the learned Counsel appearing for the Printer and Publisher that it was a gross libel upon the Improvement Trust, one of the litigants. It was stated that a vigorous attempt was made to get a Bench to consider the appeal on the Judgment of

1. (1883) I. L. R. 10 Cal. 109.
2. (1913) I. L. R. 41 Cal. 173, 216, 242.

Greaves J., in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice which Bench was referred to "as a counterpoise to the Mookerjee and Cuming Bench," which had decided against the Improvement Trust. It was urged that this should not be regarded as a contempt, because the matter which would be argued on the appeals was the construction of an Act, and would be decided by Judges who would not be affected by such remarks. The question is not whether the article in fact obstructed or interfered with the due course of justice, but whether it is 'calculated' to obstruct and interfere with the due course of justice. No matter what the tribunal may be, such a grave allegation against one of the litigants, that he was attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is calculated to obstruct or interfere with the course of justice. It was established that the first article constitutes a contempt of the Court.

The facts stated in the second article were admittedly untrue, and consequently the insinuations based thereon were equally groundless. The only part of the article which was based on an alleged rumour was that Chitty J. was to be appointed to the Bench which was to hear the Improvement Trust Appeals. For the rest of the statements in the article the author made himself responsible.

The statement that "something like consternation prevails on account of the proposed new constitution of the Appellate Bench," taken by itself is a grave allegation. Why should a Bench which was to be composed of the Chief Justice and two of the most experienced Judges of the Court, cause consternation ? But when it is taken with what follows it assumes a much more serious complexion. After misstating the facts as to the previous constitution of the Bench and referring to the proposed inclusion of Chitty J., it proceeded "now what neither the public nor ourselves can understand is this special reason for such a special Bench." It then proceeded to argue that the proper thing would have been to have a Full Bench on which at least two Indian Judges could have seats.

When the two articles are read together they mean to suggest that a vigorous attempt had been made by the Improvement Trust to secure a Bench composed according to their choice, and that the attempt had succeeded ; that otherwise the proposed constitution of the Bench is inexplicable and something like consternation prevails. If this be the correct meaning, there is no doubt that it is calculated to bring the Court and the Chief Justice, who was responsible for its administration, into contempt, it was calculated not only to destroy confidence in the tribunal but also undermined and impaired the authority of the Court. If so, there is no doubt that it is a contempt of the Court.

Next it was considered whether the Rule should be made absolute against the respondents or any of them. As regards the case of Tarit Kanti Biswas, the first respondent on the record, there was evidence that he was the printer and publisher of the Newspaper. His Counsel admitted the jurisdiction of the Court and further admitted his legal responsibility if the articles constituted a contempt. This responsibility could not be denied, for it was held in many cases that the printer and publisher is liable for contempt even though he was not aware of the subject constituting such contempt, and the reason for that is given by Lord Morris in *McLeod v. St. Aubyn*,[1] as follows :—"A printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents." Again it was pointed out by Stirling J. in *The American Exchange in Europe*,[2] that the foreman printer (who was the person concerned in that case) was the person who was held out to the public as the publisher, and under those circumstances he was answerable for publishing the article complained of, although he was ignorant of its contents. This has been the law since the well-known decision of Lord Hardwicke in the case of *St. James Evening Post*.[3] If the articles

1. (1899) A. C. 549, 562.
2. (1889) 58 L. J. Ch. 706, 707.
3. (1742) 2 Atk. 469.

constitute a contempt of Court, the printer and publisher is legally liable in respect thereof.

In this case the Editor was undisclosed.

The result is that the Rule was made absolute against Tarit Kanti Biswas, the Printer and Publisher of the Amrita Bazar Patrika and he was fined Rs. 300 and it was discharged against the other respondents.

Points decided.—(1) Where a newspaper unlawfully publishes articles scandalizing the High Court and the Chief Justice in his administration thereof, it constitutes a contempt of Court.

(2) The Editor, Printer and Publisher of a Newspaper are liable for the publication of the articles published in the Newspaper.

(3) The Judges have jurisdiction to hear the Rule though issued of their own motion.

(4) The Legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper.

REG V. GOVINDA

(1876) I. L. R. I Bom. 342.

Facts of the case.—The accused, a young man of 18 years was married to a girl of 15. It appeared that he was habitually ill-treating the girl. On the fateful day the accused knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards. The accused was held guilty of the offence of murder by the Session Judge of Satara. The case came up before a Bench of two Judges of the Bombay High Court for confirmation of the death sentence. As there was a division of opinion between the learned Judges constituting the Bench as to whether the facts constituted an offence of murder, or an offence of culpable homicide not amounting to murder, the case was referred for opinion to a third Judge, Melvill, J.

Point of Decision.—Was it murder or culpable homicide ?

Decision.—It was held by two Judges against one that there being no intention to cause death, and the bodily injury intended to be inflicted not being sufficient in the ordinary course of nature to cause death, the offence committed was not murder but culpable homicide.

Judgment and Reasons for Decision.

A comparison of section 299 and section 300 of the Indian Penal Code (similar to Pakistan Penal Code) shows :

(!) If the intention was to cause death, the culpable homicide is murder.

(2) If the *intention* was to cause such injury as is *likely* to cause death, it is culpable homicide ; but if death is the *most probable* result, it is murder.

(3) If the act was done with the *knowledge* that it is *likely* to cause death, it is culpable homicide ; but if done with the knowledge that *in all probability* it will cause death, it is murder.

The present case comes under clause (2) above. It is a question of degree of probability. People often survive such blows and death is certainly not the *most probable result* of such blows. It is, therefore, not murder. But death is a likely result and hence it is culpable homicide.

Point decided.—Where there is no intention to cause death, and the bodily injury inflicted on the deceased person is not sufficient in the ordinary course of nature to cause death, the offence is not murder but culpable homicide.

VAITHINATHA PILLAI V. THE KING EMPEROR
(1913) 40 I.A. 193.

Facts of the case.—The appellant was covicted by the Additional Sessions Judge of Tanjore, Madras, of the abetment of murder of his daughter-in-law named Dhanam, wife of his son Aiyasami, under soction 302 read with either section 109 or section 114 of the Indian Penal Code and was sentenced to death.

The murder took place on the night of October 22, 1911, in the house of the appellant, in which the murdered woman and her husband Aiyasami, the appellant's son, were temporarily resident ; death was due to a wound or wounds inflicted with a sharp instrument, apparently an aruval which was found near the body. On the following day an inquest was held at which, chiefly upon the evidence of Mutachi, the maternal grandmother of Aiyasami, the jury found that Aiyasami had committed the murder.

On October 27, 1911 Aiyasami made a statement before the Magistrate under section 342 of the Criminal Procedure Code, 1882 charging the appellant with the murder in conjunction with other persons.

On November 7, 1911, he was brought before the Sub-divisional Magistrate of Mannagardi, who, on November 27, 1911, released him and ordered the arrest of appellant and other persons residing in his house.

On December 27, 1911, the Sessions Judge at Tanjore ordered the release of these persons on the ground that there was no evidence against them, but, on the statement of the Public Prosecutor that a person suspected of being concerned had made a confession, suspended this order. The suspect in question was one Thiagan, who on December 2, 1911, had made a statement implicating the appellant, his son Kalyanam, his daughter Thanga Babu, his wife Kanthimathi, his servants Kathiresan and Avani, Thiagan himself, and Thiagan's brother Somu. Of these persons

Kalyaṇam and Somu could not be found, but the other six were brought before the Magistrate. Thiagan was offered and accepted a pardon and Kanthimathi was discharged, but the other four were committed for trial for murder and abetment of murder.

Many witnesses were examined to prove that the appellant had some motive to procure the murder of his daughter-in-law which, however inadequate to tempt ordinary human beings to commit such a crime, was quite sufficient to tempt the appellant to commit it. The motive suggested was that the son was greatly under the influence of his wife, and was instigated by her to insist on her husband's rights to the partition of certain lands between the members of the family, on the ground that they were the property of a joint Hindu family, while the appellant insisted that he had himself acquired them.

Against the conviction and sentence of the Additional Sessions Judge, Tanjore the appellant appealed to the High Court of Madras and the judgment of the Sessions Judge also came before that Court on a reference under the Criminal Procedure Code. The appeal was argued on June 5, 1912, before Bakewell and Sadasiva Aiyar JJ., who on June 19, 1912, delivered separate judgments, the former learned Judge dismissed the appeal and the latter allowed it. Both the learned Judges however were of opinion that reliance could not be placed on the evidence of the approver or of Aiyasami. Owing to the difference of opinion the case was re-argued before Sankran Nair J., who delivered judgment on August 8, 1912, against the appellant. With regard to the evidence of Thiagan he stated that it could not be relied upon. He thought that Aiyasami's evidence should be received with the greatest caution, but upon a review of the whole case he considered the latter's evidence that the appellant instigated and was present at the death of the deceased woman was fully coroborated. He concurred in the view that the conduct of the appellant after a murder was more consistent with his guilt than his innocence. The appeal was accordingly dismissed and the sentence of death confirmed.

On December 16, 1912, special leave to appeal was granted to the appellant and he filed the appeal to the Privy Council.

Points for decision.—(1) Whether in the prosecution of the appellant by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice have been done.

(2) If so whether the conviction can stand ?

Decision.—(1) Yes ; (2) No.

Judgment and Reasons for Decision.

The learned Sessions Judge based his conviction of the appellant on 5 specific findings :

(1) That the murder must have been committed by some of the inmates of the appellant's house that night.

(2) That the clothes, *i.e.*, the two loincloths which were spotted with blood, afforded conclusive proof that more than one man assisted in the murder.

(3) That the accounts given by the appellant and his mother-in-law (Mutachi) were demonstrably inconsistent with facts.

(4) That the appellant's conduct after the murder indicated a guilty conscience.

(5) That he was the only one of the inmates of the house who is proved to have had any motive to murder Dhanam.

Their Lordships did not think that this last conclusion necessarily follows from the evidence. The learned Sessions Judge concluded by saying :

"On these findings (the five preceding) I convict the first accused (the appellant) Vaithinatha Pillai, of abetment of murder punishable under section 302 read with either section 109 or section 114 of the Indian Penal Code since he is said to be physically incapable of having inflicted the injuries with his own hand."

What the learned Sessions Judge meant by this paragraph is this, that the appellant did not himself inflict the blows, but of course, if the case against him has any truth in it, he was a principal.

Their Lordships came to the conclusion that a grave and substantial injustice was done, mainly owing to this, that a vast body of wholly inadmissible evidence, hearsay and other, were admitted ; that when admitted it was used to the grave prejudice of the accused ; that at the end of the hearing before the Judge of first instance there did not exist any reliable evidence upon which a capital conviction could safely or justly be based.

The result is that appeal was allowed.

Point decided.—Conviction of abetment of murder and sentence of death cannot stand on the ground that substantial and grave injustice has been done, mainly by the admission of evidence which was inadmissible, and from the fact that at the end of the hearing before the Judge of the first instance there did not exist any reliable evidence upon which a capital conviction could safely and justly be based.

KWAKU MENSAH V. THE KING

A. I. R. 1946 P.C. 20 : 47 Cr. L. J. 569

Facts of the case.—This is an appeal to the Privy Council from the West African Court. The fact of the case is that in the early morning of the 27th November 1942, the deceased with some others of his tribe, the Zabrama, arrived at the village of Kajakron, where the appellant lived, carrying bundles of cloth which they were intending to smuggle into French territory. According to the witnesses for the prosecution they reached the village when it was light, either just before or just after daybreak, while according to the defence they arrived in the dark when the villagers were asleep. An alarm was given by someone, and there were cries of "thief" and a fight ensued. The theory of the prosecution was that the villagers attacked the Zabrama with the object of stealing the goods they were carrying. On the other hand, the case for the defence was that the incident started because the tribesmen, or some of them including the deceased, entered the compound of the appellant and tried to break into his home. In the course of the fight the appellant was stabbed, receiving a wound some four inches long on his hip, and according to his evidence it was inflicted by the deceased. The Zabrama, being outnumbered, made off to the Mohammedan part of the village, the Zongo. The deceased, who was being chased by the appellant among others, entered a house and was followed by some of the villagers, still calling out "thief." The deceased ran out of the house and as he was running away the appellant fired a gun and killed him.

The appellant and 9 others of the villagers were charged with murder, the appellant as a principal in the first degree and the others as abettors. The sole defence set up at the trial on the part

of the appellant was that he presented the gun with the object of frightening the deceased and inducing him to surrender. The learned Judge in the course of his summing up directed the jury that there were three possible verdicts that they could return *viz*, murder, manslaughter and acquittal, and that in his opinion no verdict of manslaughter could be entered unless the jury accepted the appellant's own account as to how he shot the deceased. He further directed them that if they did accept that account the appellant would be guilty at least of manslaughter as pointing a gun at the deceased as he was running away was an unlawful act. The jury found the appellant guilty of murder, but the other 9 accused were found by them guilty only of manslaughter. On appeal, the West African Court of Appeal dismissed the appeal of the present appellant, holding that though in their opinion there was a misdirection in saying that on the appellant's own evidence he was at least guilty of manslaughter, the jury must have rejected his evidence as was shown by their returning a verdict of murder. With regard to the remaining accused they quashed the conviction on the ground that the jury should have been directed that in their case the only possible verdicts were murder or acquittal. The appellant appealed to the Privy Council.

Points for decision.—(1) Whether the direction to the jury was wrong.

(2) Whether, under the circumstances, the appellant was guilty of murder or manslaughter.

Decision.—(1) Yes. (2) Manslaughter.

Judgment and Reasons for Decision.

The first submission on behalf of the appellant was that the Court which heard the appeal was not properly constituted. Discussing certain provisions of the West African Court of Appeal Orders, 1928-1935, it was found that this contention is not tenable.

The second point that was submitted for the appellant depends partly on the direction of the learned trial Judge and partly on the verdict with regard to the prisoners other than the appellant

who were found guilty by the jury of manslaughter only. The learned trial Judge directed the jury that only in the event of the appellant's evidence being accepted could a verdict of manslaughter and not murder be returned against him. It is clear that his direction was that if the jury thought that his account was true the appellant was on his own showing guilty of manslaughter because the pointing of the gun was in itself an unlawful act from which death resulted. The Court of Appeal, however, held that to be a misdirection, because, they said, pointing a gun which he did not know was loaded was not an unlawful act. But this view is wrong. Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here as the dead man was running away, it is an unlawful act. Accordingly this ground fails.

It was finally submitted on behalf of the appellant that as there was evidence of matters which could amount in law to provocation sufficient to reduce the crime to manslaughter this ought to have been submitted by the Court to the jury, and the failure to do so on the part of the trial Judge and the failure to consider it by the Court of Appeal was enough to justify the Board entertaining the appeal on the ground that there had been a failure of justice in this respect. It does not appear that any attempt was made in either of the Courts below to argue that there was sufficient provocation to reduce the crime to manslaughter and indeed as the defence relied on was one of accidental killing it is not surprising that Counsel for the prisoner did not attempt to set up what would appear to be inconsistent with that defence. But if on the whole of the evidence there arises a question whether or not the offence might be manslaughter only, on the ground of provocation as well as on any other ground, the Judge must put that question to the jury.

The result is that the appeal was allowed and the verdict of guilty of murder and the sentence of death passed on the appellant was set aside. The case was remitted to the West African Court of Appeal with directions to them to substitute

for the verdict found by the jury a verdict of guilty of manslaughter and to pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence.

Points decided.—(1) Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse it is an unlawful act.

(2) In a trial for murder the fact that the jury found the other accused persons who were abettors guilty only of manslaughter cannot affect the verdict of murder against the principal offender.

(3) Where in a trial for murder the defence of the accused is that of accidental killing and no attempt is made by the accused to rely on provocation or other ground reducing the offence to manslaughter but on the whole of the evidence their arises a question whether or not the offence might only be manslaughter, on the ground of provocation or otherwise, the Judge must put that question to the jury. The reason for the rule is that on an indictment for murder it is open to the jury to find a verdict of either murder or manslaughter, but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought.

(4) If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the Judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then whether the defence have relied on it or not the Judge must bring it to the attention of the jury.

(5) The question whether in the particular circumstances of a case the provocation is such as to deprive an ordinary man of self-control and whether sufficient time had elapsed to enable control to be regained are questions for the jury. It is on such questions that the knowledge and common sense of a local jury are invaluable in considering whether the offence is murder or manslaughter.

(6) The failure of the Judge to take the opinion of the jury on such matters of grave importance would justify an interference by the Privy Council in appeal even if the point is raised for the first time in argument before the Privy Council.

VASUDEO BALAWANT GOGTE V. EMPEROR

(1932) I. L. R. 56 Bom. 434.

Facts of the Case.— His Excellency Sir Ernest Hotson, the Acting Governor of Bombay, was paying a visit to the Fergusson College, Poona, and in the course of the visit, he in company of the Principal and certain Professors of the College and his *Aide-de-Camp* went to the College Library. Whilst there, and whilst the party was engaged in inspecting some portraits in the Library, two Rivolver shots were fired at His Excellency by a student of B. A. Class of that College. The shots were fired at point blank range but they failed to take effect owing to some defect in the ammunition or to the intervention of a leather wallet and folded currency notes in the pocket of the Governor. On these facts the accused was tried by the Sessions Judge of Poona with a jury and convicted of an offence punishable under section 307 of the Indian Penal Code (similar to Pakistan Penal Code). He was also convicted under section 19(*e*) and (*f*) of the Indian Arms Act. For the first offence he was sentenced to undergo rigorous imprisonment for 8 years, while he was sentenced to undergo rigorous imprisonment for 2 years on each of the charges under section 19 (*e*) and (*f*) of the Indian Arms Act ; all these sentences were to run concurrently. The accused appealed to the High Court.

Point for decision.— Whether the accused was rightly convicted of an offence punishable under section 307 I. P. C.

Decision.— Yes.

Judgment and Reasons for Decision.

It was argued on behalf of the accused that although two shots were fired at His Excellency at point blank range and the two shots were afterwards found in the lining of his coat, no injury in fact occasioned to His Excellency. That being so, no offence was committed by the accused under section 307 I. P. C. That section

states : "Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished ....."

It was also contended that the meaning of that section is that the act done must be such that it is capable of causing death, and that, from the fact that neither of the two shots caused death, it can be inferred that owing to some defect in the ammunition or for some unexplained reason the act was not in fact capable of causing death. This argument could not satisfy the learned Judges who observed : "If section 307 does not cover the case of a man who fires a gun at his enemy with intent to kill him but misses his aim, it is difficult to see how the section can ever have any operation." Section 307 means that "the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events."

The next point taken on behalf of the accused was that His Excellency was not called as a witness, nor either any of the students who were present at the time of the offence. The evidence is that about 200 to 250 students were in the room at the time. It was suggested that there is a rule that every eye witness ought to be called by the prosecution. But the learned Judges did not think that there is any such rule. They observed that "no doubt, as pointed out by the Calcutta High Court, the duty of the prosecution is not to endeavour to obtain a conviction at any cost, but to see that the facts are fairly presented before the Court. But *prima facie* it is for the prosecution to call such witnesses as they think will establish their case. No doubt if the Public Prosecutor knows of a witness who favours the accused, it is his duty either to call the witness himself or to see that the defence is supplied with the name of the witness and given an opportunity of calling him. In the present case undoubtedly the evidence called by the prosecution was sufficient to establish the charge.

The learned Counsel for the accused also suggested that his

client was prejudiced by the fact that His Excellency did not go into the witness box. When he was pressed to say in what respect the evidence of His Excellency would have helped the accused, he was unable to say more than that the pleader for the accused might perhaps have got something out of the witness in cross examination which would have helped the accused. There is evidence before the Court that His Excellency was not hurt by the bullets, so that it was not necessary to call him for that purpose. It was suggested that His Excellency's evidence might have been of value on the defence set up by the accused, *viz.*, that it was not he but somebody else who fired the shots. But as the evidence is that His Excellency at once flung himself upon the accused it is perfectly obvious that he at any rate thought that the accused was the guilty party. Therefore, there is no substance whatever in the suggestion that the case has been in any way prejudiced by the failure of the prosecution to call any more witnesses. It was of course open to the accused himself to call any witness he chose, and no obstacle to his so doing was put in his way.

The result is that the appeal is dismissed and the conviction and sentence confirmed.

Points decided.—(1) To attract the operation of section 307 of the Indian Penal Code the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events.

(2) The words "under such circumstances" in section 307 have not such a wide meaning as was given to them in *Reg v. Cassidy*.[1]

(3) There is no rule that in murder cases including cases of attempt to murder every eye witness must be examined by the prosecution. The duty of the prosecution is not to endeavour to obtain a conviction at any cost but to see that the facts are fairly presented before the Court. *Prima facie* it is for the prosecution

1. (1867) 4 Bom. H. C. (Cr.) 17.

to call such witnesses as they think will establish their case. If the Public Prosecutor knows of a witness who favours the accused, it is his duty either to call the witness himself or to see that the defence is supplied with the name so as to give the accused an opportunity of calling him.

BHAGIRAM DOME (COMPLAINANT)
V.
ABAR DOME AND OTHRS (ACCUSED)

(1888) I.L.R. 15 Cal. 388.

Facts of the Case.—The accused were charged with unlawfully taking fish in a public river. The right of fishing in the river was let out by the Government to the complainant and the Assistant Commissioner of Sibsagar amongst other offences, convicted them of theft, criminal misappropriation, mischief, criminal trespass and unlawful assembly.

The main charge was theft and the case was tried summarily. It was argued on behalf of the accused that on point of law and on the finding they committed no offence. It was urged (1) that the fish are not complainant's property within the meaning of the Penal Code ; (2) that they were not in complainant's possession within the meaning of section 378 of the Penal Code ; (3) that trespass on a fishery in a public river is not criminal trespass within the meaning of section 441.

The Assistant Commissioner did not accept the argument. Each of the accused was fined Rs. 10 or in default sentenced to two months' rigorous imprisonment.

The Deputy Commissioner of Sibsagar, Assam referred the case to the Calcutta High Court under section 438 of the Criminal Procedure Code, questioning the legality of the conviction of Abar Dome and Bhagiram Dome, by the Assistant Commissioner of Sibsagar, under sections 143, 379, 426, 447 and 506 of the Indian Penal Code (similar to Pakistan Penal Code). In

referring the case he stated that he considered that the conviction was based on an erroneous view of the law, and that it should be set aside.

The reference case was heard by a Divisional Bench of the Calcutta High Court. No one appeared on the reference.

Point for Decision.—Whether the accused was guilty of theft.

Decision.—It was held that the conviction was wrong and that no offence had been committed.

Judgment and Reasons for decision.

It was observed by the learned Judges of the High Court that the river being a public one, it was not in the exclusive possession of the complainant, and that the entry of the accused upon that river was not made with the intention of committing any of the offences mentioned by the Assistant Commissioner, *viz.*, criminal mischief, criminal misappropriation or theft.

Point decided.— Fish in a public river cannot be said to be property in the possession of the person who may have the fishery right, and infringement of that right is not theft under section 378 of the Indian Penal Code.

PROSONNO KUMAR PATRA (PETITIONER)

V.

UDOY SANT (OPPOSITE PARTY)

(1895) I. L. R. 22 Cal. 669.

Facts of the case.—The case for the prosecution was that, on the 13th December 1894, 3 heads of cattle worth Rs. 60 were removed from the complainant's homestead under the immediate order of the petitioner, with a view to coerce the complainant to pay a sum of Rs. 14 which he owed to the petitioner as rent. The defence was that the cattle were handed over to the petitioner's servants voluntarily in part payment of a debt due by him. and that the petitioner himself was not present at the time and knew nothing of the occurrence. This defence was found false by the Lower Courts. On the 19th January 1895, the petitioner, Prosonno Kumar Patra was convicted of an offence under section 380 of the Penal Code and was sentenced to 6 months' rigorous imprisonment. On appeal, the Sessions Judge of Midnapur upheld the conviction but reduced the sentence to rigorous imprisonment for one day and a fine of Rs. 50. On the 21st March 1895, the petitioner obtained a Rule from the High Court to show cause why the conviction should not be set aside on the ground that no offence under section 380 of the Indian Penal Code had been committed.

Point for decision.— Whether the offence of theft had been committed by the petitioner.

Decision.—No.

Judgment and Reasons for Decision.

The illustrations to section 378 of the Penal Code indicate that it was the intention of the Legislature that, in order to have committed theft within the meaning of the section, the taker must have taken the thing with the intention of keeping it himself, or disposing of it for his own benefit, or in some way which

would compel the owner to pay him money which he did not owe him in order to regain his property.

The words in section 378 "intending to take dishonestly any moveable property" when read with section 23 and section 24 of the Penal Code mean "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, etc." The expression "to gain property by unlawful means" means "to gain the thing moved for the use of the gainer," and not "gaining possession of it for a time for a temporary purpose."

For these reasons the learned Judges thought that upon the case for the prosecution the offence of theft had not been committed and the Rule was made absolute to set aside the conviction.

Point decided.— A creditor by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt does not commit the offence of theft as defined in section 378 of the Penal Code.

Note.—The decision of this case was overruled by the Full Bench decision in the case of *Queen Empress v. Sri Churn Chungo*.[1] (See next case.) Consequently it is no longer a good law.

1. (1895) I. L. R. 22 Cal. 1017 F.B.

QUEEN EMPRESS V. SRI CHURN CHUNGO

(1895) I. L. R. 22 Cal. 1017 F. B.

Facts of the case.—The fact of the case is that the sister of the complainant, Kunjo Pramanick, was married to a man named Krishna Pramanick. Her husband borrowed a sum of Rs. 5 from Babu Harinath Bagchi, and this debt with the interest on it increased to Rs. 11-8 annas. Krishna Pramanick executed a bond for this amount. About a year ago he died leaving a widow and a child. He left also a buffalo and a bullock. His widow after his death went to live with her brother, Kunja Pramanick, and took the buffalo and bullock with her. Kunja Pramanick used to work for other people as a ploughman using his sister's buffalo and bullock in the plough. On the day in question he had gone to Jamsherpur to plough the land of one Mokunda. He was to be paid for the work. While he was preparing the land the servant of Babu Harinath Bagchi came and forcibly took the buffalo and bullock to Hari Babu's *cutchery*. The accused Sri Churn Chungo was the servant of Hari Babu. Hari Babu detained the bullock and said he would not release it until the debt due from Kunjo's deceased brother-in-law was paid.

The Joint Magistrate of Meherpur convicted the accused and sentenced him to pay fine of Rs. 50 under section 379 of the Indian Penal Code (similar to Pakistan Penal Code) and also allowed Rs. 20 as compensation to the complainant. Against the order of conviction an appeal was filed to the Sessions Judge of Nuddea. It was contended on behalf of the accused that if the statement of the complainant is believed the taking away of the cattle and their detention to cause the owner to pay up a legitimate due would not amount to theft and the conviction is therefore bad in law and the sentence should be set aside. The learned Pleader relied on the principles enunciated in the ruling of the Calcutta High Court in *Prosonno Kumar Patra v.*

Udoy sant[1] in which it was held that removal of cattle with a view to coercing to pay the debt did not amount to theft. The Sessions Judge referred the case to the High Court under section 438 of the Criminal Procedure Code for proper orders.

When the case came up for hearing before the Divisional Bench, they referred it to the Full Bench.

No one appeared for the accused.

Point for decision.— Whether a creditor, by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt, commits the offence of theft as defined in section 378 of the Indian Penal Code.

Decision.—Yes.

Judgment and Reasons for Decision.

The judgment was delivered by Petheram, C. J. and the other Judges concurred. They held that the accused was rightly convicted and there was no reason for the interference of the Court.

A comparison of the judgment in the case of *Prosonno Kumar Patra v. Udoy Sant*[1] with the whole of the definitions contained in section 23 of the Penal Code will show that no effect has been given in that judgment to the last two paragraphs of the section. The judgment proceeded on the assumption that when the words in the definition are read with section 378 of the Penal Code in place of the word "dishonestly," the section will read "whoever, with the intention of gaining by unlawful means property to which he is not legally entitled, moves that property, is said to commit theft." It is evident that in making such an assumption the last two paragraphs of section 23 have been left out of consideration, and if they as well as the first paragraph are read with section 378, it will read as follows :

"Whoever, in order to take with the intention of gaining property by unlawful means moves that property, or whoever in order to take with the intention of retaining by unlawful means

1. (1895) I. L. R. 22 Cal. 669.

property which he does not intend to acquire, moves that property, or whoever moves property in order to take it with the intention of keeping the person entitled to the possession of it out of the possession of it by unlawful means, though he does not intend to deprive him permanently of it, is said to commit theft."

When the section is read in this way it is evident that it was the intention of the legislature that it should be theft under the Code to take goods in order to keep the person entitled to the possession of them out of the possession of them for a time, although the taker did not intend to himself appropriate them, or to entirely deprive the owner of them. This is precisely what a creditor does, who by force or otherwise takes the goods of his debtor out of his possession against his will in order to put pressure on him to compel him to discharge his debt ; and it must follow that a person who does so is guilty of theft within the provisions of the Indian Penal Code. For these reasons their Lordships held that the case of *Prosonno Kumar Patra v. Udoy Sant*[1] was wrongly decided.

The Court came to the conclusion that the accused was rightly convicted of theft.

Points decided.—(1) A creditor by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in section 378 of the Penal Code.

(2) The decision in the case of *Prosonno Kumar Patra v. Udoy Sant*[1] is overruled.

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1. (1895) I. L. R. 22 Cal., 669.

QUEEN EMPRESS V. ABBAS ALI

(1896) I. L. R. 25 Cal. 512 F. B.

Facts of the case.—The accused in this case was tried before Mr. Justice Jenkins and a common jury on a charge of having fraudulently or dishonestly used as genuine a certain forged document, to wit, a document purporting to be a certificate of competency as an Engine-room First Tindal and purporting to be signed by one H. Abern, Chief Engineer of the Steam Launch 'Nicol,' and being a forged document, knowing or having reason to believe the same to be a forged document, and that thereby he committed an offence punishable under sections 465 and 471 of the Indian Penal Code (similar to Pakistan Penal Code). The Certificate in question purported to be a testimonial of service and good character.

A verdict of guilty was returned in accordance with the ruling of the Judge, who, however, reserved and referred, under section 35 of the Letters Patent and section 434 of the Code of Criminal Procedure, for the decision of the Full Bench the question whether, having regard to the decision in *Queen Empress v. Haradan*,[1] his ruling and conviction could be upheld. This case was dissented from in *Queen v. Sasi Bhusan*,[2] and the point reserved had been the subject of conflicting decisions.

No one appeared on behalf of the accused.

Point for decision.—Whether in view of the decision in *Queen v. Haradan*[3] the conviction could be upheld ?

Decision.—It was held that the accused was rightly convicted and that *Haradan's case*[3] was wrongly decided.

Judgment and Reasons for Decision.

Whether the conviction sanctioned by the provisions of the Code can be determined by an examination of the Code itself.

1. (1892) I.L.R. 19 Cal. 380.
2. (1893) I.L.R. 15 All. 210.
3. (1892) I.L.R. 19 Cal. 380.

Section 471 of the Indian Penal Code states that "Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document."

It will be seen that the essential elements of the offence of using as genuine a forged document are :

(1) that the document in question should be a forged document,

(2) that the accused should have used it as geniune, and

(3) that he should have so used it fraudulently or dishonestly knowing or having reason to believe that it was a forged document.

A forged document is a false document made wholly or in part by forgery (section 470), and the meaning of a false document is found in section 464 which provides, that a person is said to make a false document who dishonestly or fraudulently makes a document with the intention of causing it to be believed that such document was made by a person by whom he knows it was not made. Forgery is in turn defined by section 463, which is in the following terms :—

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

Dishonestly is defined by section 24, which provides that whoever does any thing with the intention of causing wrongful gain to one person and wrongful loss to another person, is said to do that thing dishonestly and the meaning of the expressions wrongful gain and wrongful loss is made clear in section 23. Fraudulently is defined by section 25 in the following words : "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." As a definition this provision is obviously imperfect, and perhaps introduces an element of doubt, which did not previously exist ; for it leaves it to be determined, and that really is the point on which the present case turns, whether the word 'defraud' as used in section 25 implies the depri-

vation or intended deprivation of property as a part or result of the fraud. The word 'defraud' is of double meaning in the sense that it either may or may not imply deprivation, and as it is not defined in the Code and is not to be found in the Code except in section 25, its meaning must be sought by a consideration of the context in which the word 'fraudulently' is found.

The word 'fraudulently' is used in section 471 and section 464 together with the word 'dishonestly' and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word 'dishonestly' and its use would be mere surplusage. So far as such a consideration carries any weight, it obviously inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part.

Section 463 defines the offence of forgery, and in so doing prescribes the intents necessary to that offence. The words of the section are as follows :—"Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery."

The section contemplates two classes of intents, and it is clear that it is not an essential quality of the fraud mentioned in the section that it should result in or aim at the deprivation of property. If this be so, it cannot be supposed that the definition of a false document, which is but a part of the definition of forgery, requires as a condition of criminality an intent different in its quality and its aims from that prescribed in section 463.

It appears, therefore, that deprivation, actual or intended, is not a necessary ingredient of the intent to defraud referentially imported into section 464 and by a similar train of reasoning the learned Judges came to the conclusion as to the true construction

of section 471.

The result is that the accused Abbas Ali was rightly convicted of the offence with which he was charged.

Points decided.—(1) If a person uses a forged certificate with the intention of obtaining permission to appear at an examination, which but for such certificate he would not have been allowed to sit for, he commits an offence under section 471 of the Indian Penal Code.

(2) Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knows or has reason to believe to be false.

(3) The decision in *Haradan's case*[1] is overruled.

1. (1892) I. L. R. 19 Cal. 380.

AMRITA LAL BOSE V. CORPORATION OF CALCUTTA

(1917) I. L. R. 44 Cal. 1025 F. B.

Facts of the case.—Three persons, Amrita Lal Bose, Hari Prosad Bose and Dasu Charan Neogi, are joint proprietors of the "Star Theatre," in Cornwallis Street, Calcutta. A complaint was laid against them by the Corporation of Calcutta, alleging that on the 3rd September 1916, in breach of clause 83 bye-laws made under section 559(52) of the Calcutta Municipal Act, 1899, they had continued a performance at the "Star Theatre" later than 1 a. m. On the 24th November 1916 one of the petitioners appeared before the Magistrate and admitted the offence charged, whereupon the Magistrate fined Amrita Lal Bose Rs. 20 and the other two petitioners Rs. 10 each, *i. e.* Rs. 40 in all. The three individuals concerned filed a petition to the High Court and a Rule was granted by Teunon and Beachcroft JJ., on the 1st December 1916, calling upon the Magistrate to show cause why the order of the 24th November 1916 should not be set aside.

On the 18th January 1917, the Rule was argued before Teunon and Chaudhuri JJ., and the learned Judges differed in opinion. Teunon J., being in favour of discharging the Rule, and Chaudhuri J., being of opinion that the Rule should be made absolute. When the matter was referred to Chitty J., he agreed with Chaudhuri J. Consequently, the Rule was made absolute. The conviction of the three petitioners was upheld but the penalty imposed was limited to Rs. 20, and it was ordered that it should be apportioned equally between three petitioners.

In the meantime six other cases were instituted against the same 3 persons, the allegation being that they had continued the performance at the theatre after 1 a. m. on the 2nd, 5th, 6th, 9th, 12th and 13th November 1916. They were convicted in each case and fined Rs. 20 each. In each case rules were issued by the High Court. On the hearing by Teunon and Newbould JJ.,

of these rules the same points were involved as in the case of *Amrita Lal Bose v. Corporation of Calcutta*,[1] and these two learned Judges, disagreeing with the decision of Chitty J., in that case, referred the matter to the Full Bench.

Point for decision.—Was the case of *Amrita Lal Bose v. Corporation of Calcutta*[1] rightly decided ?

Decision.—No.

Judgment and Reasons for Decision.

As a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone : consequently, although as joint actors in the commission of the crime, they may be jointly tried and convicted, each must be separately punished as if he had committed the offence alone. This general principle is applicable in the construction of bye-law 85 read with bye-law 83 and section 561 of the Calcutta Municipal Act ; consequently each person who had committed a breach of the bye-law in question is, upon conviction, liable to be punished with the maximum amount of the prescribed fine, regardless of the number of persons who may have been associated with him in the commission of the breach. The case of *Amrita Lal Bose v. Corporation of Calcutta*[1] was not correctly decided, and the convicions and sentences in the six cases were upheld and the Rules discharged.

Points decided.—(1) Bye-law 85 framed under section 559(52) of the Calcutta Municipal Act (Bengal Act III of 1899) is not *ultra vires* by reason of section 561 thereof, and each of the joint proprietors of the theatre is liable to a fine to the extent of Rs. 20 for keeping it open after 1 a. m., in contravention of bye-law 83.

(2) As a general principle of criminal law, all who participate in the commission of an offence are severally responsib le although the offence had been committed by each of them acting alone ; consequently each must be separately punished.

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1. (1917) 21. C. W. N. 1003.