



**THE TAMIL NADU  
Dr. AMBEDKAR LAW UNIVERSITY**

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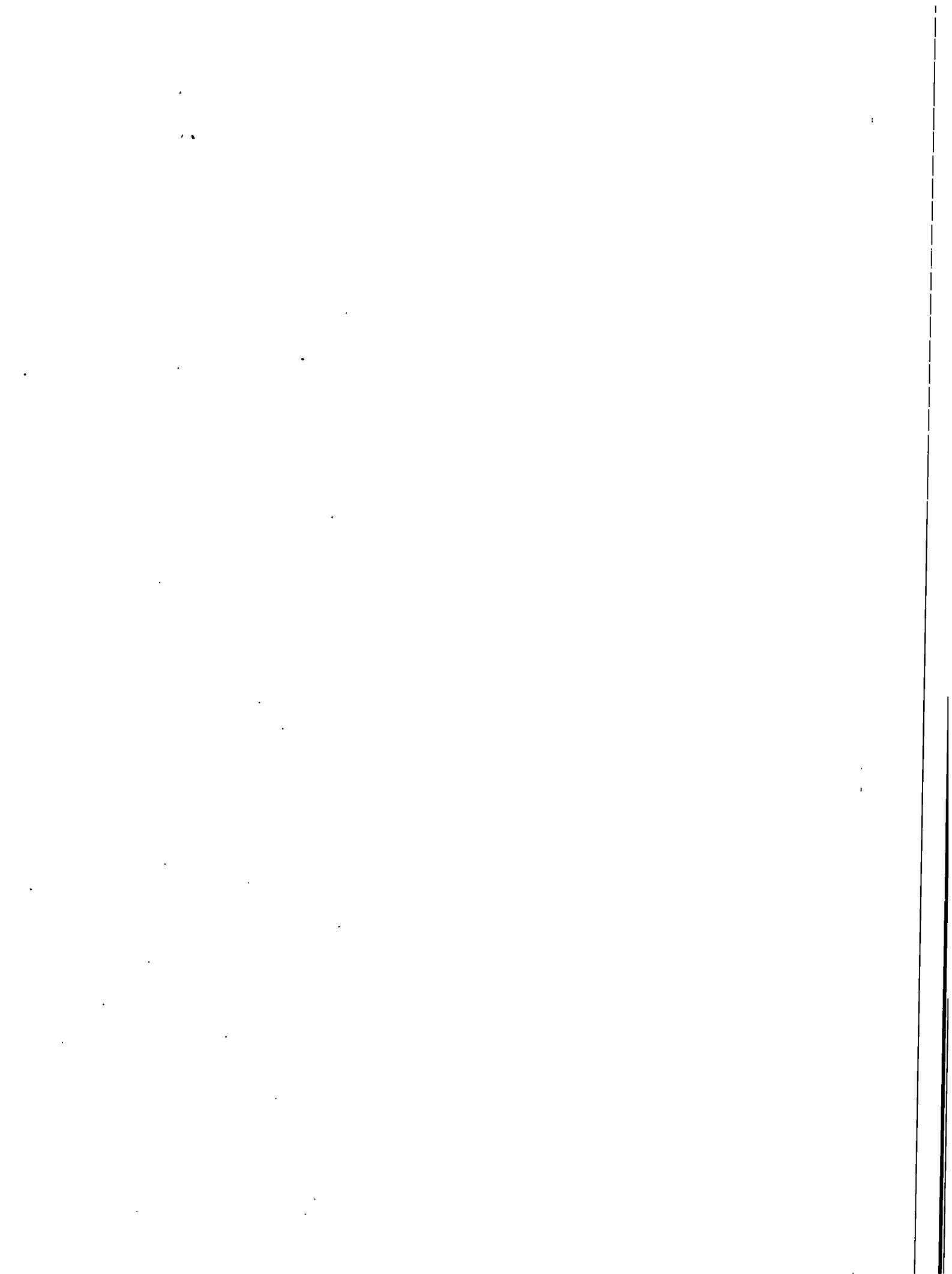
# **LAW OF CRIMES – I (Indian Penal Code) STUDY MATERIAL**

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## **PREFACE**

It is one of the important functions of a modern State to protect peaceful and law-abiding citizens from anything that upsets smooth operation of the social and economic life of the country. In the event of its failure to properly discharge this onerous responsibility, there is insecurity of life and property tending to breed lawlessness and arrest growth of economic activities. Criminal law is divided into substantive law which explains basic concepts and to define what constitutes specific offences that are dealt with all phases of the criminal justice system and the procedural law which encompasses such matters as rules of evidence, constitutional law and criminal procedure. Together they deal with means and methods necessary for making the criminal justice system operative, especially the functioning of judicial branch of criminal proceeding. The basic substantive law is the Indian Penal Code, 1860 that stipulates offences and punishments.

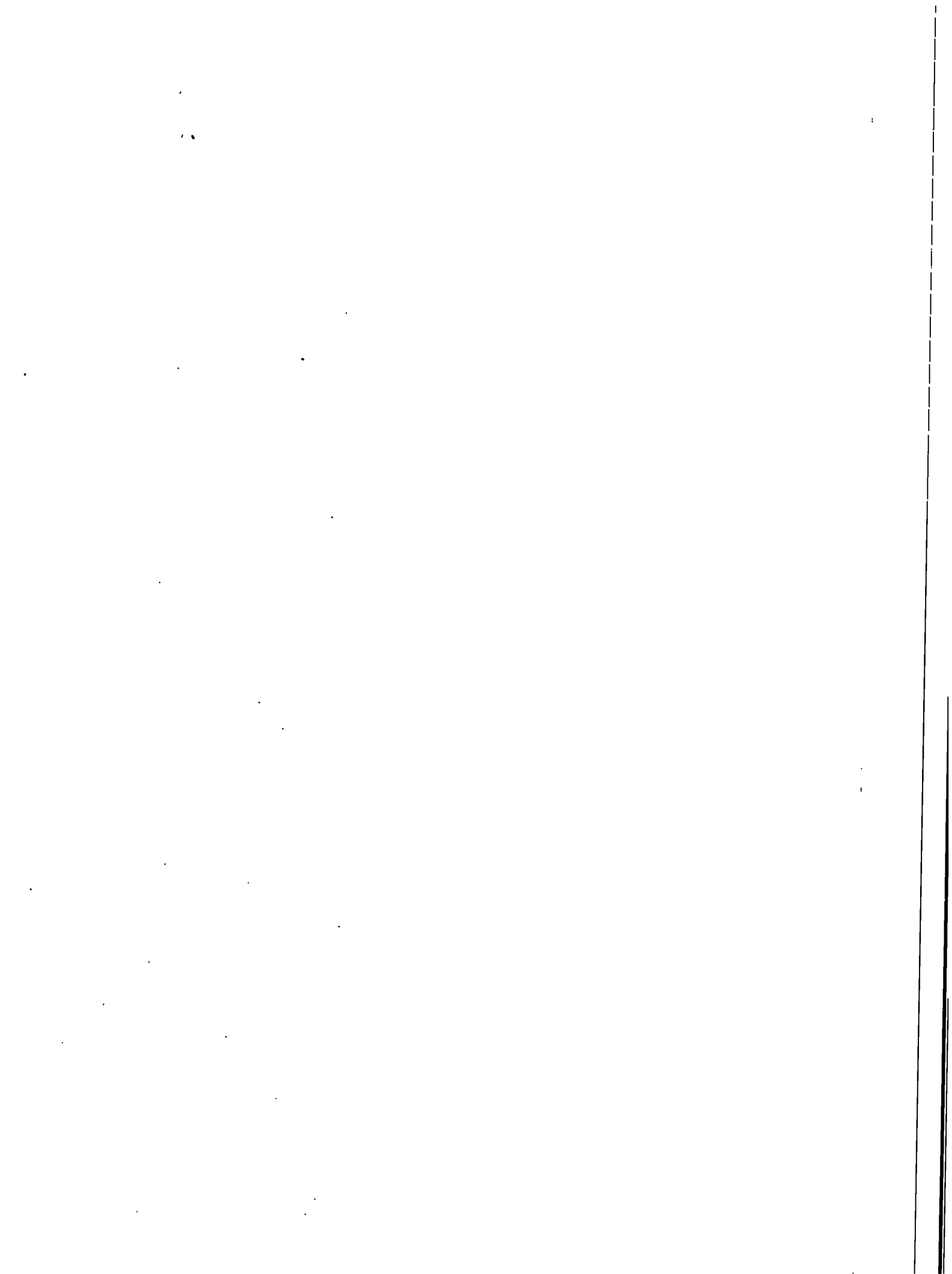
The study material on Law of crimes-I, is not meant to be a substitute to criminal Major Acts. It attempts to throw some basic information on the substantive law. The study is not comprehensive one as it would require many more volumes to cover all the aspects of criminal law. The selection of the materials has been such so as to give an overall design of the Indian penal code. Some of the references have been mentioned at the footnotes, but there are too many books and influences that do not find a direct reference point in the book, but are scattered all over.

The credit of this work extends to The Tamil Nadu Dr. Ambedkar Law University, Chennai. Lastly an apology for any flaws and mistakes.

**Dr. S. Rajalakshmi**

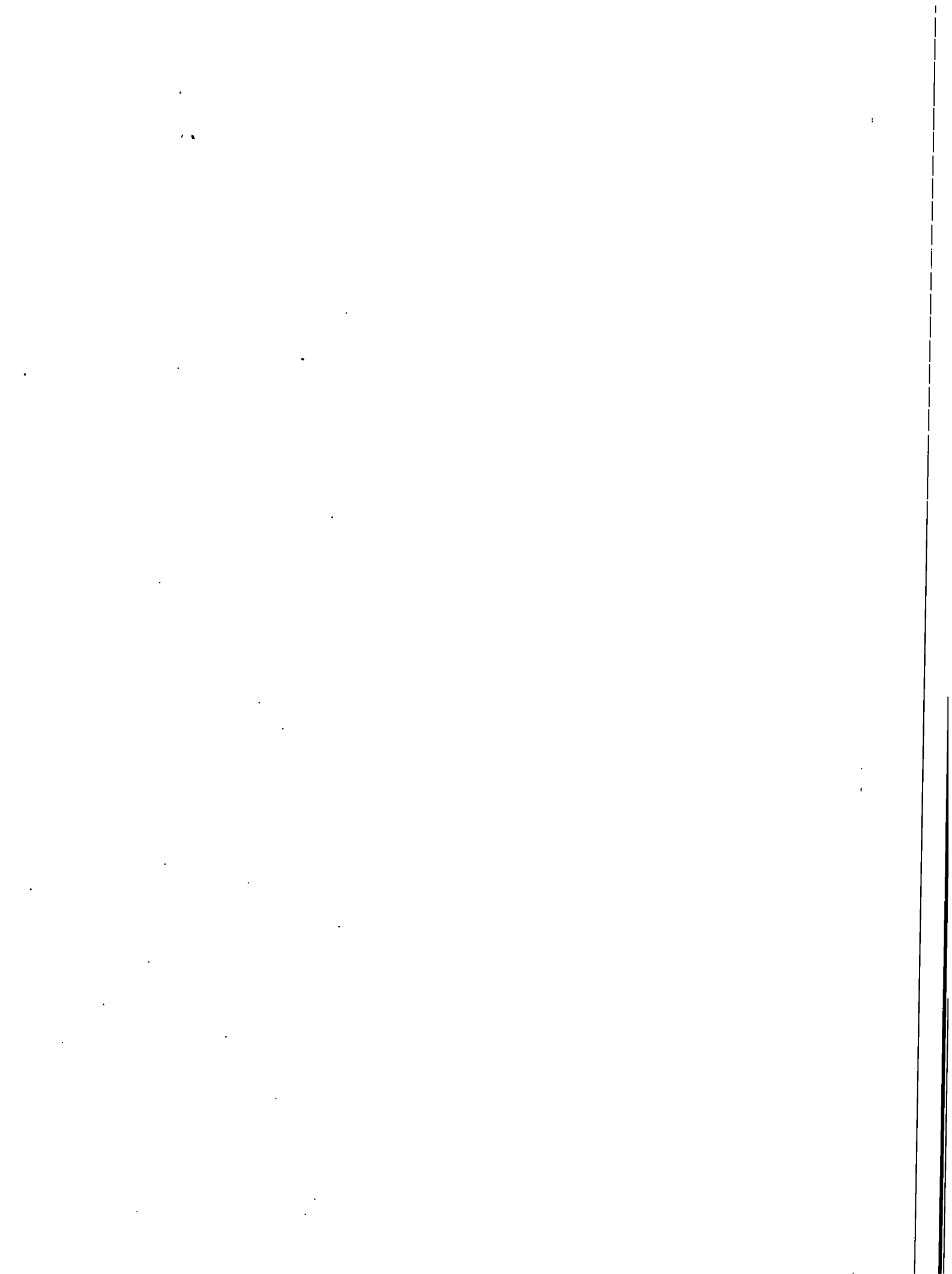
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**LAW OF CRIMES – I**  
**(Indian Penal Code)**

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# **LAW OF CRIMES – I**

## **(Indian Penal Code)**

### **Objectives of the Course**

It is fact that both Crime and Criminal are looked upon with greatest hatred by all the section of the people in the society. Whenever people organized themselves into group- there is a need for some sort of rules to regulate the behaviour of that member. The State has to impose certain penalties upon the wrong doer with the object of prescribing peace in the society at large. Crime and Law are so closely connected with each other that it is very difficult to understand one without knowing the other.

### **COURSE OUTLINE**

#### **UNIT-I**

##### **Nature and Scope of Criminal Law**

Definition-Essentials Elements-Strict Responsibility-Mens Rea-Intention and Negligence-Recklessness and Knowledge-Offences Without Conduct - Punishment : Objectives-Basis and Types-Theories of Punishment-Justification of Punishment - General Defences - Excusable Defences-Justifiable Defences-Private Defence - Joint and Constructive Liability-Abetment-Conspiracy-Attempt-Corporate Liability - Jurisdiction-Territorial-Extra Territorial-Personal and Admiralty.

#### **UNIT-II**

##### **General Offences**

Offences Against State - Offences Against Public Peace-Unlawful Assembly-Riot -Affray - Offences Against Election-Bribery-Personation-Offences Relating to Religion - Offences Against Public Justice- Administration of Justice-Giving and Fabricating the False Evidence-Disappearance of Evidence.

#### **UNIT-III**

##### **Offences against Human Body**

Culpable Homicide and Murder-Suicide-Causing Miscarriage-Hurt-Wrongful Restrain and Wrongful Confinement-Assault-Kidnapping and Abduction-Rape.

#### **UNIT-IV**

##### **Offences against Property**

Theft- Extortion- Robbery and Dacoity-Criminal Misappropriation of Property and Trust- Cheating- Mischief- Offences Relating to Documents.

#### **UNIT-V**

##### **Offences Relating to Marriage and Reputation**

Mock or Deceitful Marriage-Bigamy-Adultery-Cruelty by Husband or Relatives- Defamation-Intimidation-Attempt to Commit Offences-Thug.

## **Statutory Material**

- The Indian Penal Code

## **Books prescribed**

- Kenny - Outlines of Criminal Law
- Ratan Lal - The Indian Penal Code
- M.K.D. Gour - Criminal Law
- Atchuthan Pillai - Criminal Law
- B.M. Gandhi - Indian Penal Code

## **Books for reference**

- Glanville William - Criminal Law
- Russel - Criminal Law
- Ejaz's - Law of Crimes
- Nigam - Law of Crimes (Volume I)
- Dr.H.S. Gour - Penal Law of India
- Raghavan V.V. - Law of Crimes
- C.K.Takwani- Indian Penal Code

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# UNIT I

## INTRODUCTION

### Synopsis

- ▶ Introduction
- ▶ Basis of Criminal Law
- ▶ History
- ▶ Commencement
- ▶ Extent and applicability
- ▶ Code whether exhaustive
- ▶ Interpretation
- ▶ No retrospective operation
- ▶ Scheme

### Introduction

Laws are usually divided into two groups: 1) substantive law; and 2) procedural law. Substantive law defines, creates and confers rights and imposes liabilities, while procedural law prescribes procedure and provides the machinery for the enforcement of rights and liabilities. Substantive laws and procedural law, however, are complementary and interdependent. The efficacy of substantive laws largely depends upon the proper implementation of procedural laws. In the administration of criminal justice, Penal Code, 1860 (IPC) can be said to be a substantive law relating to crimes while the Criminal Procedure Code can be described as procedural law.

### Criminal Law: Origin

In every civilised society, certain acts (omissions) are considered improper, incorrect or wrong. But evil effects resulting from such acts (omissions) differ in degree. Some acts are purely individual in nature whereas others affect society as a whole though they also result in injury to individuals. The basis of criminal law is breach of public right or duty amounting to crime affecting society at large. Such acts or omissions are normally made punishable by the State in the larger interest of society. Except in a few cases allowed by law, there can be no settlement, compromise or bargaining between an offender and a victim in respect of crimes committed by the former. For instance, offenders of serious crimes (e.g. murder, rape, robbery, etc.) cannot be allowed to be acquitted or relieved of the consequences of their acts on payment of compensation or making gifts to victims or their family members.

### Historical Perspective

In primitive society, there was no developed branch of criminal law. "A tooth for a tooth and an eye for an eye" was the basis of administration of criminal justice. With the advancement of education and awareness, it was realised that the "revenge theory" was uncivilised, uncultured and barbarous. Instead, there should be an organised system of administration of justice whereunder a criminal, culprit or offender should be punished by the State. In the good old days, it was considered to be the duty of the king to protect his subjects. The king himself was to administer justice by imposing appropriate punishment to offenders. With the passage of time, however, the task of administering justice was entrusted to pundits or Qazis (judges). That is how the present system came into existence.

So far as India is concerned, Manusmriti is considered to be the first leading Code on penal law. Manu recognised certain wrongs as crimes, such as, assault, robbery, cheating, criminal breach of trust, defamation, kidnapping, rape, etc. The right of self-defence was also recognised. After invasion by Muslims, Mohammedan criminal law was applied in the administration of justice. Mohammedan law was based on the Koran. Qazis used to administer justice on the basis of principles formulated in the Koran.

After entry of the British in India and after taking over administration over Indian Dominion, there were several reforms in criminal law. Initially, in three Presidency Towns (Bombay, Madras and Calcutta), English Law was applied. But in other parts of the country, Muslim Law was still in force. There were several defects therein. Attempts were made to improve administration of criminal justice which were partially successful. But there was no uniform code applicable to all. In 1833, Macaulay (later on Lord Macaulay) moved the House of Commons to codify criminal law for the whole of India. In 1834, for the first time Law Commission was constituted. The Commission was headed by Macaulay as its Chairman and Macleod, Anderson and Millett as its members. The Commission prepared a draft Penal Code stating:

Out principle is simply this- uniformity when you can have it; diversity when you must have it; but certainty in all cases.

The draft Code was then circulated and suggestions were invited from different corners. The Bill was passed on 6 October 1860. The assent of the Governor General-in-Council was received on the same day. The present IPC came into force on 1 January 1862.

### **Indian Penal Code: Objective**

The Preamble of the IPC states that the object of the Code is to provide a "general penal code for India". The substantive law of crimes in India is thus what is contained in the IPC. It consolidates the whole of the law on the subject and is exhaustive on the matters in respect of which it declares the law. No Court of law is at liberty to go outside the Code and stretch its provisions by referring to law in force prior to the Code coming into force.

### **Title & Commencement**

The title "Indian Penal Code" aptly describes its contents. The word "penal" emphasises the concept of punishing those who transgress the law and commit offences. Punishment and threat of it are the chief methods known to the State for maintaining public order, peace and tranquillity. The Code came into force on 1 January 1862.

### **Extent and Applicability**

The Code extends to the whole of India "except the State of Jammu and Kashmir". The Code also defines "India" to mean "territory of India excluding the State of Jammu and Kashmir". The territorial waters of India also form part of India. Hence, any offence committed within territorial waters of India is deemed to be committed within India. The Code applies to all persons irrespective of their sex, race, sect or religion. It is thus territorial in nature and not personal law like Hindu Law, Muslim Law, Parsi Law, etc.

### **Code Whether Exhaustive**

The Code is exhaustive on matters specifically and expressly dealt with by it. The Code has been enacted to provide a "general penal code" for India. It has consolidated the whole of the law relating to crimes specified therein and is thus exhaustive in nature. No doubt, the Preamble of the Code speaks of a "general penal code for India". But it has to be read with Section 5 of the Code which is in the nature of a saving clause. It excludes "special or local law" from the operation of the Code. Hence, where an offence falls under a special law or a local law, the offender can be tried and punished under that law, though he cannot be punished under both, i.e. IPC as well as a special or local law.

## **Interpretation**

Penal laws adversely affects the rights of subjects. Such statutes, therefore, have to be construed strictly. It is the duty of the Court to ensure that the act (or omission) with which the accused is charged having committed an offence falls within four corners of law. It has been said, "When the Legislature imposes a penalty, the words imposing such penalty must be clear and unambiguous. Blackstone stated: "The law of England does not allow of offences by construction and no cases shall be holden to be reached by penal laws but such as are within both the spirit and the letter of such law."

The same principles apply to Indian legal system. No case can be said to fall within a penal statute which does not comprise all elements of a crime. Where the language of a statute is unclear, ambiguous or vague, or leaves doubt as to its meaning and scope, the benefit must be given to the accused. In *Tolaram Relumal v. State of Bombay*, the Supreme Court stated, "If two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes the penalty". A statute may be regarded as penal if it imposes substantive sentence, fine, penalty or forfeiture.

## **No Retrospective Operation**

It is settled rule of interpretation of statutes that a substantive law is prospective unless retrospective effect is given by a competent Legislature. It is more so in case of a penal statute. A statute which makes a particular act (or omission) an offence or aggravates the nature of offence or increases punishment for existing offences or deprives accused person of his rights hitherto available is always prospective in nature and no retrospective effect can be given to such law. Apart from general rule of interpretation, Article 20 (1) of the Constitution of India places the following two limitations on the law making power of the Legislature:

1. No law can make any act an offence with retrospective effect; and
2. No law can impose greater sentence upon a person with retrospective effect.

The prohibition thus applies to passing of ex post facto laws as also to sentence to be imposed under those laws.

## **Scheme**

The IPC is indeed an admirable piece of legislation dealing with various offences enumerated therein. It has completed more than one and a half century. It has covered a vast range of anti-social behaviour and has provided punishments. No doubt, several offences, which were non-traditional and non-conventional crimes at that time, came to be added subsequently. The fundamentals of law, however, have remained more or less similar as recognised in the original code. The provisions of the Code may conveniently be discussed under two broad heads:

1. General principles of criminal law: Sections 1 to 120- B; and
2. Specific offences: Sections 121 to 511; for instance, offences against State; offences against human body; offences against property; offence against public tranquility; offences against public justice; offences relating to marriage, defamation, etc.

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# FUNDAMENTAL PRINCIPLES OF CRIMINAL LAW

## Synopsis

- ▶ Introduction
- ▶ Crime: Meaning
- ▶ Causes of Crime
- ▶ Crime and Morality
- ▶ Crime and Tort
- ▶ Elements of Crime
- ▶ Stages of Crime
- ▶ Penal Liability
- ▶ Right to Defend
- ▶ Speedy Trial

## Introduction

The primary and principal object of criminal law is maintenance of public order and protection of society from anti-social behaviour by prescribing rules of conduct and by punishing a person who violates law by holding a "fair trial". A "fair trial", therefore, must achieve two objects: 1) it must be fair to the accused, and 2) it must also be fair to the victim.

## Crime: Meaning

The expression "crime" has not been defined in the Penal Code, 1860 (IPC). Stated simply, "crime" is violation of a criminal code. It is an act prohibited by law as injurious to public. It is an act deemed by law to be harmful to society in general though the ultimate sufferer is an individual. "Crime" is thus commission of an act forbidden or prohibited by law and subjects the doer to punishment.

## Causes of Crime

Crimes have been committed by persons from ancient days. It is, therefore, said that crime is "eternal" and cannot be totally abolished. Proper way to deal with the problem is to find out causes of crime and to solve them. Causes of crime are multiple in nature. They relate to socio-economic conditions of persons, family background which includes education, status, culture, stability, intelligence, opportunity, social pattern and societal atmosphere, disparity or inequality in status, education, employment, etc. and a host of other considerations.

## Crime and Morality

In Ancient India, law and morality were not considered different and independent of each other. Things which were approved by dharma were allowed as positive acts and thing which were prohibited by dharma were not allowed. There is, however, a distinction between criminal law and morality. Every criminal act may not be moral wrong and vice versa. Thus, driving a vehicle without licence or without light or on a wrong side may be a criminal wrong, but it has nothing to do with morality. Conversely, adultery or homosexuality may be immoral (moral wrong) but may not be legally wrong if there is no prohibition of such relation-ship under the existing legal system.

Certain wrongs, no doubt, are immoral as also illegal. Thus, murder, theft, rape, robbery, dacoity, bribery, etc. are morally wrong and legally punishable. It has been rightly observed more than a century ago, that though law and morality may not be one and the same and many things may be immoral which may not be necessarily illegal, yet absolute divorce of law from morality would be of fatal consequence.

### **Crime and Tort**

There is no fundamental difference between a crime and a tort. It is said that normally, a conduct which harms an individual, harms to some extent society also, as society is formed by individuals. Moreover, there are several wrongs which are in the nature of tort as also crime; for example, assault, battery, libel, etc. Yet, there is difference between the two. It is said that tort is an infringement or violation of a private right of an individual while crime is breach of public duty affecting society as a whole. Thus, tort is a "private wrong" while crime is a "public wrong". It is also said that in crime, mens rea is an essential element, which is not necessary in an action in tort except where it is considered as an essential constituent, for example, malicious prosecution.

In tort, action is brought by aggrieved individual whereas in crime, State can be said to be an aggrieved party. The proceedings in tort are thus initiated by the party concerned while in case of crime, normally, the action is taken by the State. Even with regard to remedy, there is difference between the two. A remedy available to the plaintiff in an action in tort is to recover damages from the defendant. In crime, however, the object is to punish the offender and not to compensate the complainant even if compensation or a part of the amount of fine is paid to the victim. Again, tort is less serious as compared to crime. It is the duty of the State to prevent crime and as such, the State maintains sufficient staff to ensure "law and order" by engaging police personnel, by launching prosecution against accused persons and by ensuring punishment to offenders. In case of tort, usually, it is for the "injured", i.e. aggrieved person to bring appropriate action in a competent Court of law and to get compensation from the opposite party.

### **Elements of Crime**

The following elements are necessary to constitute a crime:

- i. Human being ("person");
- ii. Mens rea: Guilty mind: Evil intent;
- iii. Actus reus: Physical or actual act; and
- iv. Injury: Evil consequences.

### **Human being ("person")**

The IPC makes every person liable for punishment for every act or omission contrary to law. "Person" means natural person, i.e. a human being ("man" or "woman") as also juristic or legal person. Thus the first element of crime is that the act must have been done by a human being (or by a "person"). In ancient days, the theory of retribution was in vogue. "A tooth for a tooth and an eye for an eye" was the law. Hence, even animals were punished. If a pig kills a child or a horse kicks a man, the animal could be punished. If an ass destroys crop in a field, not belonging to its master, its one ear can be chopped off. If it repeats the same offence, it may lose the second one also.

But as society developed, it realised that for constituting an offence, mens rea, evil intent or guilty mind was necessary. No animal can be imputed with guilty mind. Normally, therefore, there must be a human being who must have committed some act (or omission) which should be contrary to law or punishable under a statute. No doubt, "person" would include a juristic or legal person. As such, a company, corporation or legal entity can also be punished in certain cases if it has committed an act or omission contrary to law.

## **Mens rea: Guilty mind: Evil intent**

The second constituent of crime is mens rea, guilty mind or evil intent. It is said that there can be no crime without mens rea or evil intention. Every crime requires guilty mind or bad intention. Mens rea has played an important role and is one of the basic characteristics of English Criminal Law. It is based on a well-known maxim *actus non facit reum nisi mens sit rea* ("intent and act together will constitute a crime" or "act alone does not make a man guilty unless his intention were so").

But so far as the IPC is concerned, it is said that the above doctrine does not apply inasmuch as the provisions of the Code are clear which include the said principle.

For instance, murder must have been committed intentionally or knowingly [S. 300]; theft must have been committed dishonestly [S. 378]; cheating must have been committed fraudulently or dishonestly [S. 415]; mischief must have been committed intentionally or knowingly [S. 42.5], etc. The Code also contains provisions in Chapter IV [Ss. 76-106] which enumerate circumstances wherein no mens rea or criminal intent is presumed. But there is a distinction between "intention" and "motive". Intention refers to immediate object while motive refers to remote, final or ultimate object. Stephen stated, "Intention is an operation of the will directing an overt act; motive is the feeling which prompts the operation of the will, the ulterior or ultimate object of the person willing."

Motive is thus something which prompts a person to form an intention. Motive may provide a clue to the intention. To put it differently, intention is a means while motive is an end. Intention is mental formulation involving foresight of possible end and the desire to seek to attain it. Motive accordingly supplies reason or ground for intended act. Motive is the last or final step in the direction of the Act, intention is a prior step leading to that end (motive).

Motive is not considered *sine qua non* for holding the accused guilty. Hence, in a criminal case, the prosecution is required to prove intention (mens rea) on the part of the accused, but not the motive for commission of offence. It is not necessary on the part of the prosecution to establish motive where there is direct evidence against the accused. Conversely, where all ingredients of an offence are proved, *bona fides* or good faith on the part of the accused is equally immaterial. Thus, if A takes away a cow belonging to B with a view to save her so that she is not slaughtered (good faith). A cannot justify his act on that ground.

Absence of motive, however, is an important factor where there is no direct evidence against the accused. It is also relevant consideration while imposing sentence on the accused. There is also a difference between "intention" and "knowledge". As already indicated, "intention" is a state of mind. It is subjective element which can be inferred from the act committed by a person. "Knowledge", on the other hand, is an awareness on the part of the person concerned. A person can be said to have knowledge where there is a direct appeal to his senses, for example, when he sees something, does something, perceives something, etc.

Thus, though "intention" and "knowledge" both relate to mental attitude and may also go together, they are different concepts. There may be an intention without knowledge or vice versa. Knowledge is awareness on the part of the person of the consequences of his act. Knowledge of certain facts may hold a person guilty of an offence. Hence, where a person committing an act knows that it is so imminently dangerous that in all probability it would cause death and yet he commits such act, it can be said that he has committed "murder" as defined in Section 300 of the Code.

Thus, if a person throws a child in a well and the child dies, it can be said that he had knowledge that the act committed by him was so dangerous that in all probability it would result in the death of the child. He can, in the circumstances, be convicted under Section 302, IPC. "Intention" also differs from "negligence". To put it simply, "negligence" is doing of something which a reasonable and prudent man would not do or failure to do (not doing) something which a reasonable and prudent man would do.

Whereas in intention, a man voluntarily and willingly does some act, in negligence, there is absence of proper care and caution which is expected of a common man. A person may also be liable for negligence on his part. Thus, if a person drives a vehicle negligently or causes death of any person by a negligent act, he may be punished.

### **Actus reus: Physical or actual act**

The third element of crime is actus reus or physical or actual act. As it is said: actus non facit nisi mens sit rea (the act alone does not amount to an offence unless accompanied by a guilty mind). Actus reus may be said to be a human conduct which the law prevents or prohibits. If there is no actus reus, i.e. if the act has not been committed, there is no crime. The law does not punish a person only on the basis of mens rea or guilty mind unless he does some overt act. Thus, if A intends to kill B, he cannot be punished for his intention (mens rea). Even if in furtherance of that intention, A purchases a pistol (preparation), he does not commit any offence (if he possesses a licence as required by law). But once A does an overt act, i.e. fires at B, he commits an offence. If A is successful in his attempt and kills B (act), he commits an offence of murder punishable under Section 302, IPC. But even if A is unsuccessful in killing B (attempt), he can be convicted for an attempt to commit murder punishable under Section 307 IPC.

### **Injury: Evil consequences**

The last element of crime is that such act (omission) must have resulted in evil consequences, i.e. it must have caused injury to a human being ("person") or society. "Injury" is defined as "any harm whatever illegally caused to any person in body, mind, reputation or property". It is, however, not necessary that such evil consequence or injury must have been caused as desired by the person doing the act. Thus, where A intends to kill B and fires at him but hits C who dies, A cannot contend that since he did not intend to kill C, he is not liable.

### **Stages of Crime**

As a general rule, every crime has four stages:

- a) intention;
- b) preparation;
- c) attempt; and
- d) act (crime).

### **Intention**

Intention is the first stage in commission of crime. But mere intention to commit a crime is not punishable. It has been said that devil himself knoweth not an intention of a man. Mere intention not followed by preparation, attempt or act cannot constitute an offence. The will cannot be taken for the deed, unless there is some external act showing progress in the direction of the crime. Intention can only be proved by acts. It has been rightly said that "Juries cannot look into the breasts of criminals". But once an act is done, the law judges not only the act committed by the person but also the intention with which such act was done. Hence, where a person is charged for doing an act, it is open to a Court of law to draw an inference of his intention for doing such an act.

For instance, A intends to kill B but does nothing in the direction of reaching to the target of killing B. A cannot be punished. But if for doing that act (killing of B) A makes preparation and purchases a revolver, tries to kill him by firing at B (attempt) and is successful and actually kills him, the law will take into account even the intention of A for killing B and will punish him accordingly.

## **Preparation**

Preparation is the second stage in the direction of crime. Preparation consists in devising or arranging means or measures for commission of offence. It is thus a step further in the direction of doing an act. Thus, after forming an intention by A to kill B, if A purchases a pistol and keeps it with him, it can be said to be "preparation" on his part. Mere preparation, however, is not punishable. In the above illustration, if A has a valid licence for keeping a pistol, he cannot be punished for any offence.

It is said that it is possible that before a person goes beyond the stage of preparation and enters the third stage of attempt, he may give up the idea of commission of offence. It is also said that it is not necessary that a person making a preparation for commission of an offence will always commit a crime. The law, hence, allows an opportunity to repent (*locus penitentiae*) and does not punish him unless he goes beyond the stage of preparation. Under IPC, however, in respect of certain offences which are grave and very serious in nature, mere preparation is also punishable:

1. preparation for waging war against government [S.122];
2. preparation for committing dacoity [S. 399]; etc.

## **Attempt**

An attempt is the third stage of crime. The term "attempt" has not been defined in the Code. Section 511 does not define the word "attempt". It merely provides punishment for attempt to commit an offence. According to dictionary meaning, an "attempt" is an endeavour to commit a crime. It is, therefore, called "preliminary crime". Though sometimes it is called "inchoate crime", the said expression is not correct as it does not convey the right meaning. "Inchoate" is incomplete while "attempt" is in itself complete and, therefore, punishable.

"Attempt" may broadly be defined as an intentional act done by a person in the direction of commission of a crime which failed in its object independent of the volition of the person doing it. It is thus a futile exercise by the accused. Illustrations to Section 511 of the Code aptly explain the principle. Thus, A intending to pick the pocket of B thrusts his hand into the pocket of B but finds nothing. A is guilty of an attempt to commit theft. If the attempt is successful, the crime is committed. But even if the attempt is unsuccessful, the person committing the attempt is liable to be punished. There is, however, distinction between "preparation" and "attempt". The dividing line between "preparation" and "attempt" is very thin and it is difficult to precisely conclude where "preparation" ends and "attempts" starts. The question requires to be decided on the facts and circumstances of each case. If there is no specific provision for punishment for attempt, Section 511 of the Code will apply and the accused will be punished accordingly.

## **Act (crime)**

The last stage of commission of crime is the act, i.e. accomplishment of the act. Where a person succeeds in his attempt to commit a crime, he is obviously responsible for such act, crime or offence and he will be punished accordingly. Thus, if A intends to kill B (intention), purchases a pistol for committing murder of B (preparation), fires at B (attempt) and succeeds in his attempt and kills B (act), and B dies, A will be held guilty for committing an offence of murder and will be punished either for imprisonment for life or with death.

## **Penal Liability**

### **Nature and scope**

According to dictionary meaning, "liable" means "bound or obliged by law", "exposed to certain contingency or casualty", "under an obligation", "subject to penalty", "responsible in law", etc. "Liability" thus means



"obligation to do a particular thing". As a legal term, "liability" signifies that condition of affairs which gives rise to an obligation to do a particular thing. In criminal law, the said term covers every form of punishment to which a person subjects himself by violating the law of the land.

### **Individual liability**

The general principle of criminal law is that a person is liable for what he has done which he should not have done or what he failed to do which he ought to have done. Thus, a person is liable for his own acts or omissions. The maxim generally applied to the law of tort *qui facit per alium facit per se* (he who acts through another acts by himself) does not apply to criminal law.

### **Vicarious liability**

As a general rule, every person is liable for his own acts and omissions. This is particularly true to penal or criminal liability. A person cannot be held liable for an act (or omission) of others. But the said rule is not absolute. In certain cases, IPC makes a person vicariously liable for acts committed by others. Thus, where an offence is committed in furtherance of common intention, with common object, in criminal conspiracy, etc. or where there is abetment, the person, not directly involved in the commission of crime may also be held vicariously liable.

### **Strict liability**

Normally, before holding a person liable in the administration of criminal justice, it must be shown that he had a guilty mind or evil intention (*mens rea*). If the prosecution is unable to prove guilty mind on the part of the doer of the act, the act itself (*actus reus*) is not sufficient to hold him guilty. But there are certain exceptions to this rule. One of them is strict or absolute liability. Where any statute imposes liability on a person doing a particular act irrespective of intention, the person concerned can be held liable even if there was no *mens rea* or guilty mind in committing that act. For instance, public nuisance. If a person causes public nuisance, he must be held liable. He cannot contend that he had no intention to cause such nuisance or that there was no *mens rea* on his part. The liability is absolute and absence of guilty mind is irrelevant.

### **Right to Defend**

It is the right of every accused in our system of administration of criminal justice to defend himself. The first and fundamental principle of criminal justice is that every accused is presumed to be innocent unless he is proved guilty. It is for the prosecution to prove beyond reasonable doubt that it is the accused who has committed the offence with which he has been charged. The Constitution of India allows every accused before a criminal court to engage a pleader of his choice. If the accused is unable to engage an advocate, it is the duty of the State to provide him a lawyer at the expense of the State. Thus, free legal aid is provided to the accused. Even in respect of arrest of accused, the law takes care of rights of the accused. During investigation, inquiry and trial, several rights have been conferred on the accused.

### **Speedy Trial**

Speedy and expeditious criminal trial is an essential ingredient of administration of criminal justice and part of right to life guaranteed by Article 21 of the Constitution of India. Section 309, Criminal Procedure Code, 1973 mandates every enquiry or trial to be held as expeditiously as possible. The Amendment Act, 2008 has provided that the trial shall be completed within two months from its commencement. On the judicial side also, the Supreme Court has held in various cases that a criminal trial should be conducted promptly and the case must be decided expeditiously. No outer limit, however, can be prescribed for conclusion of criminal proceedings.

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# TERRITORIAL JURISDICTION

## Synopsis

- ▶ Introduction
- ▶ Intraterritorial Jurisdiction
- ▶ Exemption from Criminal Liability
- ▶ Extraterritorial Jurisdiction
- ▶ Offences Committed Outside India
- ▶ Admiralty Jurisdiction
- ▶ Extradition

## Introduction

Sections 2 to 4, Penal Code, 1860 (IPC) deal with operation of the Code for the offences committed in India as also in foreign territory. Similarly, they provide for trial and punishment of offenders who are citizens (nationals) of India or who are foreigners.

Territorial jurisdiction may be considered under two heads:

- i. Intraterritorial jurisdiction; and
- ii. Extraterritorial jurisdiction.

## Intraterritorial Jurisdiction

Section 2 of the Code relates to intraterritorial jurisdiction of Indian courts. It states that where any offence has been committed by any person in India, he can be tried and punished in India. As a general rule, jurisdiction of a criminal court is determined on the basis of place of crime or locality of offence irrespective of nationality, citizenship or domicile of the offender. Section 2 of the Code recognises this principle. The phrase "every person" means every person irrespective of citizenship, nationality, race, religion, caste, sex, etc., except who are exempted from the jurisdiction of courts. This is based on the principle that "the crime carries the person" (crimen trahit personam).

Thus, if a foreign national commits a crime, for example, unnatural offence or adultery in India, he can be tried and punished under IPC. He can neither plead ignorance of law nor can justify his act on the ground that in his country, the act in question is not considered a crime. It has been said that when a foreigner enters Indian territory and thereby accepts the protection of Indian Laws, impliedly he also gives an undertaking or assurance to abide by all laws which are operative in India.

## Exemption from Criminal Liability

Section 2 IPC makes "every person" liable to punishment for every act or omission under the Code. Certain categories of persons, however, are exempted from criminal prosecution. The following are some of the recognised categories:

1. foreign sovereigns;
2. UN officials;
3. foreign ambassadors, diplomats and envoys;
4. alien enemies;
5. President and Governors;
6. foreign army;
7. warships, etc.

## **Extraterritorial Jurisdiction**

Sections 3 and 4 of the Code deal with extraterritorial jurisdiction of Indian courts. Section 3 enacts that if a person liable under Indian law commits an offence beyond India, he can be tried under the Code for such act in the same manner "as if such act had been committed within India". Section 4 extends the provisions of the Code to an offence committed by a citizen of India anywhere beyond India as also an offence committed by any person on ship or aircraft registered in India.

### **Illustration**

A, who is a citizen of India, commits a murder in Uganda. He can be tried and convicted of murder in any place in India in which he may be found.

### **Offences Committed Outside India**

Offences outside India can be committed by any person: i) on land; ii) in water; or iii) in air.

#### **Offences committed on land**

Where an offence is committed by an Indian citizen beyond India, he can be tried and punished under the Code. This is based on the rule that the jurisdiction of court over its citizens is not lost by the reason of venue of offence. Substantive law as to extraterritorial jurisdiction of Indian courts is found in Sections 3 and 4 IPC while procedure has been laid down in Section 188, Criminal Procedure Code, 1973. Thus, a citizen of India committing a murder in Uganda can be tried and convicted for an offence of murder in India. Again, where an Indian citizen committed an offence outside India where such act was not an offence, yet he was held liable to be tried and punished in India since such act was offence under IPC.

But if at the time of commission of offence in a foreign country, the accused is not an Indian citizen, he cannot be dealt with under the Code even if he/she acquires Indian citizenship subsequent to the commission of offence.

#### **Offences committed in water**

Section 4(2.) IPC also applies where an offence has been committed on any ship. This is known as "admiralty jurisdiction". Admiralty jurisdiction applies to the following cases:

- i. offences committed on Indian ships on high seas;
- ii. offences committed on foreign ships in territorial waters of India; and
- iii. offences committed by pirates.

#### **Offences committed on Indian ships**

Where an offence is committed on an Indian ship, it can be tried by an Indian court wherever the ship may be, even on high seas. This is based on the principle that a ship is a "floating island" and belongs to the country whose flag it is flying. Hence, a person committing a crime on board (whether an Indian citizen or a foreigner) is subject to the provisions of IPC if such vessel is flying under Indian flag.

#### **Offences committed in territorial waters of India**

The admiralty jurisdiction also applies where an offence is committed on a foreign ship, i.e. a vessel not registered in India if she (such vessel) is within the territorial waters of India. In such cases, it can be said that an offence has been committed in India and the offender is liable to be punished under IPC. But where an offence has been committed by a foreigner on high seas on a ship not registered in India, an Indian court has no jurisdiction over the accused of such a crime.

## **Offences committed by pirates**

To define simply, "piracy" is an act of robbery or dacoity committed on ship or vessel at sea. It consists of those acts of robbery and violence upon the sea, which if committed upon land would amount to felony. Pirates have no authority or permission from any Sovereign or State, empowering them to attack others. They are, therefore, regarded as robbers. According to Cicero, they are common enemies of all (*communis hostis omnium*).

Piracy is an offence against International Law or Law of Nations. A pirate is, hence, subject to arrest, trial and punishment by all States as an enemy of mankind. Actual act (robbery or dacoity) is not an essential element of piracy. A frustrated attempt to commit a piratical robbery amounts to piracy *jure gentium*.

## **Offences committed in air**

All principles applicable to offences committed on a ship also apply to offences committed on an aircraft. Hijacking of an aircraft has emerged as an offence of international dimension. It is also called "skyjacking". It is triable by courts wherever it has been committed. Ignorance of law is no excuse in such cases.

## **Admiralty Jurisdiction**

Admiralty is that branch of law which relates to maritime property, affairs and transactions, civil as well as criminal. Admiralty jurisdiction, is jurisdiction to try offences committed on high seas and in territorial waters. It is thus a maritime branch of administration of justice.

## **Extradition**

"Extradition" is an act of surrendering by one State to another of a person desired or required to be dealt with for a crime for which he has been accused or convicted and which is justiciable or triable in the other State. The doctrine of extradition is based on two principles:

1. It is in the interest of all civilised societies that no criminal should go unpunished; and
2. No State should allow its territory to become a place of refuge for criminals of other countries.

Surrender of an accused or a convict of another State (whether a citizen or an alien) is a political act done in pursuance of a treaty between the two countries. In India, the question relating to extradition can be determined in accordance with the provisions of Extradition Act, 1962.

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## GENERAL DEFENCES

### Synopsis:

- ▶ Introduction
- ▶ Exception: Meaning
- ▶ General Defences: Scheme
- ▶ Burden Of Proof of Guilt Of Accused
- ▶ Burden Of Proof of Exception
- ▶ General Defences: Types
  - ◆ Mistake [Ss. 76 & 79]
  - ◆ Judicial Acts [Ss. 77 & 78]
  - ◆ Accident [S. 80]
  - ◆ Necessity [S. 81]
  - ◆ Infancy: Act Of Child [Ss. 82 & 83]
  - ◆ Insanity [S. 84]
  - ◆ Drunkenness (Intoxication) [Ss. 85 & 86]
  - ◆ Consent [Ss. 87-93]
  - ◆ Good Faith [Ss. 88-93]
  - ◆ Act Done Under Compulsion [S. 94]
  - ◆ Trivial Acts [S. 95]
  - ◆ Private Defence [Ss. 96-106]

### Introduction

Chapter IV, Penal Code, 1860 (IPC) consists of 31 sections [Ss. 76-106]. It contains "general exceptions". These general exceptions make an "offence" a "non-offence". General exceptions are thus general conditions of non-imputability.

The chapter is important inasmuch as it controls all provisions defining various offences under the Code which is also made clear by Section 6. It deals with persons who are not normal or there are special or peculiar circumstances whereunder the act is totally excluded from criminal liability or guilt is lessened under certain circumstances.

### Exception: Meaning

According to the dictionary meaning, "exception" means exemption, immunity, exclusion, impunity, privilege, etc. "Exception" thus is something that is excepted. It is an act of excepting; an instance or case not conforming to the general rule or to which general rule does not apply.

## **Nature and Scope**

Section 6 IPC declares that every definition of an offence should be understood subject to general exceptions contained in Chapter IV [Ss. 76-106]. Section 6 thus clarifies that even if a particular act (omission) falls within the definition clause, such act (omission) would not be an offence if it is covered by Chapter IV [Ss. 76-106].

## **Object**

The "General Exceptions" contained in Sections 76 to 106 are of universal application. For the sake of convenience, all of them have been grouped together at one place. Instead of repeating in every section that the definition is subject to the exceptions, the Legislature devised a method vide Section 6 which expressly states that every penal provision and every illustration shall be understood subject to the exceptions contained in "General Exceptions".

## **Whether Exhaustive**

"General Exception" in Chapter IV [Ss.76-106] are, however, not exhaustive in nature. They are common to all offences. But over and above the said exceptions, there are other special exceptions also. For instance, Section 300 which defines "murder" has as many as five exceptions whereunder "culpable homicide" would not amount to "murder". Similarly, Section 499 which defines "defamation" has several (10) exceptions. Again, Section 375 defines "rape", but the exception accepts sexual intercourse by a man with his (own) wife not under 15 years of age.

## **General Defences: Scheme**

General exceptions [Ss. 76-106] may broadly be grouped in two categories:

1. Excusable Exceptions; and
2. Justifiable Exceptions.

In the former category, the doer of act is not liable on the ground that there is no requisite mens rea (guilty mind or evil intent) on his part which is necessary element for criminal liability. In the later category, the doer is not ignorant of his act. He is very much aware and conscious of what he is doing but there are justifiable reasons, grounds or circumstances which allow the doer to do such act and does not hold him criminally liable.

The topic of "General Exceptions" may be discussed under the following heads:

- i. Mistake [Ss. 76, 79];
- ii. Judicial acts [Ss. 77-78];
- iii. Accident [S. 80];
- iv. Necessity [S. 81];
- v. Infancy [Ss. 82-83];
- vi. Insanity [S. 84];
- vii. Intoxication [Ss. 85-86];
- viii. Consent [Ss. 87-91];
- ix. Good faith [Ss. 88-93];
- x. Compulsion or threat [S. 94];
- xi. Trivial acts [S. 95]; and
- xii. Right of private defence [Ss. 96-106].

## **Burden Of Proof of Guilt of Accused**

The fundamental rule of criminal jurisprudence is that the burden of proof of the guilt of the accused is on the prosecution. It is for the prosecution to prove the accused guilty beyond reasonable doubt.

There is a presumption of innocence in favour of the accused. The accused is, therefore, presumed to be innocent until his guilt is established by the prosecution by leading cogent, convincing and reliable evidence and by proving beyond reasonable doubt that it is the accused who has committed the offence with which he has been charged.

## **Burden of Proof of Exception**

Section 105, Evidence Act, 1872 enacts that where an accused claims the benefit of any of the general exceptions under Chapter IV IPC, the burden is on him to prove such exception. This section [S. 105] of the Evidence Act, 1872 is thus an exception to the general rule of administration of criminal justice which requires the prosecution to prove the guilt of the accused.

There is, however, difference between the burden of proof which is on the prosecution to prove the guilt of the accused and the burden of proof which is on the accused to prove an exception. Where the burden is on the prosecution to prove the guilt of the accused, the prosecution must prove it beyond reasonable doubt. It is not necessary for the accused to adduce evidence in support of his plea that he is innocent. If the prosecution fails to establish its case against the accused, the court is bound to acquit him.

Burden of proof under Section 105, Evidence Act, 1872, on the other hand, is not of the same nature or character as on the prosecution to prove the guilt of the accused. Whereas the prosecution is required to prove the guilt of the accused "beyond reasonable doubt", the accused need not prove his case, i.e. any exception beyond reasonable doubt. It is sufficient if he proves any exception by "preponderance of probability". In that case, the burden will again shift on the prosecution to prove the guilt of the accused.

As held by the Supreme Court, the onus on an accused person is similar to the onus on a party in civil proceedings. Just as in civil proceedings the court trying an issue makes its decision by adopting the test of probabilities, so must a criminal court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him.

## **MISTAKE [Ss. 76 & 79]**

### **Statutory provisions**

Sections 76 and 79 apply to acts done by a person under a mistake. Both the sections read thus:

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it.

### **Illustrations**

(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a Court of Justice, being ordered by that court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

## **Illustration**

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

### **Meaning**

According to dictionary meaning, "mistake" means an error in action, calculation, opinion or judgment caused by poor reasoning, carelessness, insufficient information, misunderstanding or misconception; to regard or identify wrongly as something or someone else; to be in error, etc. It is thus an erroneous mental condition.

### **Doctrine explained**

Sections 76 and 79 recognise general principle of law that ignorance of fact is an excuse, ignorance of law is not an excuse (*ignorantia facti excusat; ignorantia frith non excusat*).

These provisions make it clear that

1. ignorance of fact is excusable; and
2. ignorance of law is not excusable.

### **Types**

Mistakes are of two types:

1. mistake of fact; and
2. mistake of law.

It is well-settled principle of law that mistake of fact is excusable but mistake of law is not excusable.

### **Sections 76 and 79: Distinction**

Both the provisions apply to mistake of fact and not mistake of law. In both the situations there is bona fide intention on the part of the doer to advance the law. Such intention is manifested or exhibited by the circumstances attending the act which is the subject of charge.

There is, however, a distinction between the two. In the former [S. 76], a person is assumed to be bound by law, whereas in the latter [S. 79], he is justified by law. The distinction is thus between a real or supposed legal obligation and a real or supposed legal justification in doing a particular act. It is for the person who has been prosecuted to assert and prove that either he was bound by law to do the act [S. 76] or he was justified in doing such act [S. 79].

### **Mistake of fact**

Mistake of fact is a good defence and is excusable. It is based on a well known maxim *ignorantia facti excusat, ignorantia juris non excusat* [ignorance of fact is excusable (but) ignorance of law is not excusable].

A mistake of fact consists in ignorance, forgetfulness or erroneous mental condition of the truth resulting in some act or omission on the part of the actor or doer. Where any act prohibited by law has been committed by a person under a mistake of fact, the doer is not liable because there is no mens rea or evil intent which is necessary to constitute a crime. Thus, where the accused under a bona fide mistake of fact kills a human being in a jungle under the belief that it is a wild animal, or shoots a person entering his house considering him to be a dacoit, or believing him to be a ghost, he commits no offence. But before a mistake of fact is accepted as a defence, certain conditions must be fulfilled.



The first and the foremost condition is that the state of things believed to exist, if found to be true, would have justified the act done and the accused would not have been held liable.

Secondly, the mistake must be reasonable, i.e. after taking into account all the relevant circumstances and considerations, the act must have been committed.

Thirdly, the mistake must relate to fact and not law. If the liability is statutory or strict liability under the relevant provisions of law, the question of evil intent (*mens rea*) is totally irrelevant. In that case, the doer will be liable irrespective of his intention or mistake of fact, for example, liability under the Prevention of Food Adulteration Act, 1954.

Finally, the act must have been done by the accused in "good faith".

### **Mistake of law**

We have seen that though mistake of fact is a good defence and is excusable, mistake of law is not. A person committing an offence, hence, cannot plead mistake of law. Mistake of law means mistake as to the existence of any law on the point or mistake as to what the law is. In either case, the mistake does not afford a ground for defence to a criminal act committed by a person. The rule *ignorantia juris non excusat* (ignorance of law is not excusable) is based on another well-known maxim *ignorantia eorum quae scire tenetur non excusat* (ignorance of those things which everyone is bound to know is not excusable).

It is also said that if ignorance of law is admitted as a ground of exemption, every accused may take such plea and it will be very difficult or even impossible for the prosecution to prove that the accused had knowledge of the law on the point. Moreover, such defence would introduce an element of uncertainty in the administration of justice. It is also said that the operation of law is independent of its being known to everybody. If it were not so, it would be impossible for the administration to enforce the law which would lead to injustice and would adversely affect the rule of law.

In *State of Maharashtra v. M.H. Georges*, the accused in contravention of notification published in Government Gazette imported gold in India. Though he was not aware of publication of notification, he was held liable. But if a person can be held guilty only on his knowledge of certain law, the question of knowledge is material and it must be proved by the prosecution that the accused was aware of such law. Where the law prescribes particular mode of publication of law, for example, publication in Government Gazette, it must be complied with. In absence thereof, the accused cannot be punished. Finally, though mistake of law is no defence, it is a relevant ground and a mitigating circumstance in regard to quantum of punishment to be awarded to the accused.

## **JUDICIAL ACTS [Ss. 77 & 78]**

### **Judicial and executive immunity**

Sections 77 and 78 of the Code grant immunity to judges acting judicially and officers carrying out the orders of the court.

### **Judicial immunity**

Section 77 protects judges while acting judicially. It enacts that nothing is an offence which is done by a judge when acting judicially in the exercise of any power given to him by law. A similar power is also conferred on judges under Section 1, Judicial Officers Protection Act, 1850.

The underlying object of granting such protection is to ensure independence of judges to enable them to discharge their duties without fear of consequences.

**Before Section 77 is applied, the following conditions must be fulfilled:**

1. the act must have been done by a judge while acting judicially;
2. it must have been done in the exercise of power given by law; and
3. it must have been done in good faith.

Thus, where a Magistrate assumed power on erroneous reading of the law and passed an order, it was held that he was not criminally liable.

It has also been held that the exemption extends not only to cases in which a judge proceeds irregularly in the exercise of his power but also where he, in good faith, exceeds such power.

But where a judge does not act in good faith or knowingly exceeds his authority or does something maliciously contrary to law, he can be held liable.

Thus, if a judge assaults or abuses any person, or takes a bribe, he can be prosecuted and can be punished like an ordinary man. Again, if a judge makes a defamatory remark with mala fide intention or for improper or oblique motive, he cannot seek protection of Section 77 IPC.

#### **Executive or ministerial immunity**

Section 78 is supplementary or corollary to Section 77. It protects officers carrying out the orders of the court. It states that nothing is an offence if the act is done in pursuance of a judgment or an order passed by a court, even though the court has no power to pass such judgment or make such order. Protection of officers carrying out the orders of the court is necessary and consequential. In absence of such provision, a judge while acting under Section 77 may be protected but an officer carrying out such order would be held criminally liable. Section 78 is, hence, necessary to extend protection to officers executing, implementing or carrying out the orders of the court.

But the officer executing or enforcing the order of the court must also have acted in good faith. If he acts mala fide, he is not entitled to protection under Section 78. Thus, if a Magistrate authorised to issue a search warrant, issues a search warrant without credible information (which is a necessary condition) and asks the police officer to execute it and the police officer executes the warrant, he is protected under this section. But where distress warrant was issued against the judgment-debtor and the bailiff executed such warrant in absence of judgment-debtor forcibly entering the house wherein a pardanashin lady was present who fell down, became unconscious and suffered great pain, it was held that the accused was guilty.

### **ACCIDENT [S. 80]**

#### **Meaning**

According to dictionary meaning, "accident" is an unfortunate event which is unintentional and unexpected. The word "misfortune" connotes the same meaning with an additional element of ill-luck.

#### **Section 80**

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

## **Conditions**

For the application of this section, the following conditions must be fulfilled:

1. the act must be an accident (or misfortune);
2. it must have been done without criminal intention or knowledge;
3. it must be lawful, must have been done in a lawful manner and by lawful means; and
4. it must have been done with proper care and caution.

### **Illustrative cases**

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

1. A, a school master corrects a scholar in a manner not intended or likely to injure him using due care. The scholar dies. The death is accidental.

2. A, a workman throws snow from a roof giving proper warning. A passer-by is killed. The death is accidental.

### **Lawful act, lawful manner and lawful means**

The section requires "doing of a lawful act in a lawful manner and by lawful means". All the three ingredients should be present so as to enable the doer of the act to claim benefit of this provision. If the act is not lawful or is not done in a lawful manner or by lawful means, Section 80 has no application and the accused must be held guilty.

### **Proper care and caution**

Section 80 requires "proper care and caution". The amount of care and caution should be "reasonable", i.e. must be such as to be taken by a reasonable and prudent man in the circumstances of a particular case.

Whether the doer of an act had taken proper care and caution must be decided having regard to the facts and circumstances of each case and no rule of universal application can be laid down.

## **NECESSITY [S. 81]**

### **Doctrine of necessity**

Section 81 IPC embodies the doctrine of necessity, It states that nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm, normally greater harm, to person or property.

### **Object**

The principle recognised by Section 81 is based on the well-known maxim *necessitas non habet legem* (necessity knows no law).

### **Explaining the doctrine Mayne stated:**

Section 81 is intended to give legislative sanction to the principle that where, on a sudden and extreme emergency, one or the other of the two evils is inevitable, it is lawful so to direct events that the smaller only shall occur.

It has been said that such provision is necessary in every civilised society with a view to prevent greater harm or injury in compelling circumstances. There may be exceptional cases wherein expediency of breaking the law is so overwhelming that a person may be justified in breaking it. "A man who is absolutely by natural necessity forced, his will does not go along with the act."

### **Illustrations**

A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with 10 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat C.

### **Conditions**

For Section 81 to apply, the following conditions must be fulfilled:

1. the act must have been done without criminal intention (mens rea);
2. it must have been done in good faith; and
3. it must have been done in order to prevent or avoid other (greater) harm.

### **R. v. Dudley and Stephens**

In *R. v. Dudley and Stephens*, after a shipwreck at the high seas, four persons including a young boy were compelled to board a small boat. They were without food and water for several days. They, therefore, killed the young boy and fed upon his flesh and blood for a few days. They were then rescued by a passing ship. They were tried for murder wherein they pleaded necessity and self-preservation. The plea, however, was rejected by the court holding the act to be murder.

It has been held that a man, in order to escape death from hunger, kills another man for eating his flesh is guilty of murder even if it was the only alternative to preserve his own life. The court held that a deliberate killing of an unoffending and unresisting boy however great the temptation cannot be justified by necessity. Though the law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequences; and such divorce would follow, if the temptation to murder were to be held by law an absolute defence to it.

### **Doctrine of self-preservation**

"Self-preservation" means preservation of oneself from harm or destruction. Self-preservation which was a concept in International Law has largely been discarded and replaced by the doctrine of necessity. Self preservation can be adduced as justification of action in exceptional or extraordinary circumstances demanding immediate action. It is wider than self-defence.

Macaulay observed that many acts falling under the definition of offences ought not to be punished when committed from the desire of self-preservation. For instance, a gang of dacoits, finding a house strongly secured, seize a smith, and by torture and threat of death compel him to open the door for them. Now, to punish the smith as a housebreaker would amount to inflict gratuitous pain. The next smith may find himself in the same situation and may take a chance of being at a distant time arrested, convicted and sentenced to imprisonment, than incur certain and immediate death. In *R. v. Dudley and Stephens's*, the accused who

killed a boy of 17 years for their survival invoked this doctrine. The court, however, refused to uphold the plea. The court laid down certain principles:

1. Self-preservation is a duty but self-sacrifice is a higher duty imposed on every man.
2. Self-preservation is not an absolute necessity.
3. No man has a right to take other's life to preserve his own life.
4. The doctrine of necessity or self-preservation does not justify private homicide.

### **INFANCY: ACT OF CHILD [Ss. 82 & 83]**

#### **Act of child**

Sections 82, and 83 deal with an act of a child. Section 82 confers absolute immunity on a child under the age of 7 years. Section 83 applies to a child who is more than 7 years and less than 12. years. It states that such a child will not be criminally liable if he has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct at the time of committing the act.

#### **Categories**

The Code deals with the following categories of children:

- i. Child below 7 years: Absolute immunity;
- ii. Child of more than 7 years and less than 12 years: Qualified immunity; and
- iii. Child of 12. years (or more): No immunity.

It is interesting to note that there is a lacuna in the legislative provision. Section 82 applies to a child under 7 years of age. Section 83 covers a child above 7 years and under 12 years of age. There is no provision as regards a child exactly of 7 years of age.

#### **Doctrine explained**

For every crime, mens rea or guilty mind is necessary. Immunity of a child from criminal responsibility is based on the principle that a child below 7 years is doli incapax, i.e. incapable of understanding what is right and what is wrong. Blackstone stated: "Infancy is a defect of the understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever."

#### **Child below 7 years**

A child below 7 years is totally exempted from criminal liability in respect of any act done by him. The basis of total immunity is on the assumption that a child below 7 years does not understand and consequently does not realise the consequences of his act. Necessary culpable state of mind is absent in a child below 7 years of age.

#### **Child above 7 and under 12 years**

A child above 7 years and under 12 years of age cannot claim total immunity from criminal liability. The immunity is qualified. Section 83 states that such a child will not be held liable if he has not attained sufficient maturity of understanding of the nature and consequences of his act. In other words, if such child is doli incapax, i.e. incapable of understanding what is right and what is wrong, he is not liable. On the other hand, if he is doli capax, i.e. capable of understanding what is right and what is wrong, he is liable.

Thus, when the accused (wife) aged 10 years killed her husband, told her mother that she was going for work and concealed herself in a field, it was held that she was capable of understanding the nature of act. Similarly, where a boy of 11 years picked up his knife and advanced towards the deceased with a threatening gesture saying that he would cut the deceased to bits and actually killed him, it was held that he knew what he was doing and was, therefore, held guilty. Likewise, where a boy aged 9 years picked up a necklace worth Rs. 100 and immediately sold it for 20 Rs and misappropriated the amount, it was held that he was sufficiently mature to understand the nature of his act. Again, where the accused aged 11 years along with his two elder brothers participated in committing a crime and used sharp edged weapon for killing the deceased, he was held liable.

Where a child above 7 and under 12 years commits an offence and the court finds that he was unable to understand the nature of his act, he cannot be held liable. It does not, however, mean that other persons also would not be held guilty if otherwise they have committed any offence. Thus, where a child below 12 years marries again during the lifetime of her husband and the marriage is caused to be performed by her mother, the child may not be held guilty but the mother can be convicted. Similarly, if a child below 12 years takes up a golden chain and sells it to another person, the latter may be convicted for an offence of receiving stolen property.

### **Child of 12 years and more**

A child of 12 years or more is criminally responsible for all his acts.

### **Welfare legislations**

In recent years, several legislations have been passed for the purpose of care, protection, welfare, training, education and rehabilitation of neglected and delinquent children, including the Juvenile Justice (Care and Protection of Children) Act, 2000.

## **INSANITY [S. 84]**

### **Statutory provision**

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

### **Doctrine of insanity**

Section 84 recognises the well-known principle of law that intent and act must concur to constitute a crime (*actus non facit reum nisi mens sit rea*). A mere act without guilty mind cannot constitute an offence. An insane person who is not capable of knowing what he is doing, cannot be said to have evil mind and hence, he cannot be held guilty and cannot be punished.

It has also been said that a mad man is best punished by his own madness (*furiosus furore suo punier*); or a mad man has no will (*furiosus nulla voluntas est*); or a mad man is like one who is absent (*furiosus absentis loco est*).

### **Categories of persons of unsound mind**

There are four categories of persons who may be described as not of sound mind (*non compos mentis*) or are mentally diseased:

1. an idiot;
2. a person suffering from illness;
3. a lunatic or a mad man; and
4. a person who is drunk.

An idiot is a person who is having defective mental capacity by birth. There are no lucid intervals in his life. The infirmity is perpetual or perennial. A person may be non compos mentis by illness. He may be excused from criminal liability if an offence has been committed under the influence of this disorder (illness). A lunatic may become insane temporarily. Mental disorder may be at certain periods. Madness, on the other hand, is permanent lunacy without lucid intervals. There is distinction between insanity and drunkenness whereunder man's mind may be incapable of forming a specific intention. Drunkenness is a species of madness for which a man is to be blamed.

### **Conditions**

For application of Section 84, the following conditions must be fulfilled:

1. at the time of commission of the act, the person must be of unsound mind; and
2. he must be incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law.

### **M'Naghten case**

The doctrine recognised by Section 84 is based on well known English case in R. v. M'Naghten . In that case M was under an insane delusion that Sir Robert Peel (then Prime Minister) had injured him and would continue to harm him. He, therefore, decided to kill Sir Robert Peel. One day M, mistaking D as Robert Peel, killed him. M was tried for murder. Relying on medical evidence, the jury acquitted M on the ground of insanity. The acquittal provoked widespread dissatisfaction. The House of Lords invited all Law Lords for laying down a law on insanity which is known as M'Naghten Rule of insanity.

The main points may be summarised thus:

1. Every person is presumed to be sane till contrary is proved.
2. It is for the accused to prove that at the time of committing the act he was insane, i.e. he was incapable of knowing the nature of the act or was not knowing that what he was doing was wrong or contrary to law.
3. If at the time of committing the act, the person was knowing or capable of understanding as to the nature of the act or that the act was wrong or contrary to law, he is liable.
4. In case of partial delusion, he will be exempted from criminal liability if he was not knowing or aware as to the act or criminality; otherwise he will be liable for his act.

### **Medical insanity and legal insanity**

There is a difference between legal insanity and medical insanity. A court of law is concerned with legal insanity and not medical insanity. It is not every form of insanity which exonerates the doer of the act from criminal liability. Abnormal mind itself also is not enough to show that the accused was of unsound mind. What is necessary is to consider whether the person was incapable of knowing the nature of the act.

Medical insanity relates to prisoner's consciousness of his act on those who are affected by it while legal insanity relates to prisoner's consciousness in relation to himself. Mayne rightly stated: "The medical witness states the existence, character and extent of the mental disease. The judge is to decide whether the disease made out comes within the legal conditions which justify an acquittal on the ground of insanity."

## **Presumption of sanity**

The law presumes every person to be sane unless contrary is proved. Similarly everyone is presumed to know natural consequences of his act. Again, everyone is presumed to know law. These are not the facts which prosecution has to establish. Hence, it is not for the prosecution to prove the sanity of the accused at the time of commission of the offence. To put it in positive form, every man is presumed to possess sufficient degree of reason to be responsible for his acts unless contrary is proved.

## **Burden of proof**

The burden of proof of insanity is on the accused who is seeking the benefit of Section 84. The burden of proving an offence is always on the prosecution and it never shifts. Whenever intention is an essential element of crime, it has to be established by the prosecution. Since Section 84 of the Code is an exception wherein the accused is not held liable for his act on account of insanity, it is a sort of exception under Section 105, Evidence Act, 1872. The burden of proving existence of circumstances bringing the case within the exceptions is on the accused.

### **(i) Standard of proof**

When a plea of insanity has been set up by the accused, the burden is on him to prove it. It has, however, been held that it is not necessary for the accused to prove that he is innocent. It is sufficient if he raises a reasonable doubt in the mind of the judge trying the case. The nature of burden of proof is not higher than that which rests upon a party in civil proceedings. But it has also been held that by creating a mere doubt, the burden is not discharged.

## **Test**

Though Section 84 exempts an act of a person of unsound mind, the expression "unsoundness of mind" has not been defined. The courts have held that the expression is equivalent to insanity. But the said term ("insanity") is also not defined by the Code. Every person who is mentally disabled or diseased cannot ipso facto be exempted from criminal liability.

It is settled law that everyone is presumed to be sane and is aware of natural consequences of his act. Likewise, every person is presumed to know law. These are not the facts which the prosecution has to prove.

Whenever a plea of insanity is raised by the accused, the court has to consider two issues: Whether the accused has proved that at the time of committing the act he was of unsound mind. If he fails to establish this preliminary fact, he must fail. But even if he is able to prove that he was of unsound mind, he has to establish that by reason of such unsound mind, he was incapable of knowing the nature of the act or that the act he was doing was either wrong or contrary to law.

For determining the mental state of the accused, the court is required to consider the totality of circumstances. For deciding the issue, the court must keep in view the conduct and behaviour of the accused which preceded, attended and followed, i.e. his action before, at and after the commission of the act, whether there was motive for the act, deliberation and preparation for such act, previous history, attempt to conceal or hide himself after the commission of the act, brutality with which the offence was committed, putting forward false excuses, the manner in which the act was committed, duration of attack and a host of other considerations. The court must also consider the evidence of experts, relatives and prosecution as well as defence witnesses. The court may also refer to standard law books on the subject, for example, Medical Jurisprudence by Taylor, Modi, etc.

One of the tests having an important bearing on the question is:

Would the prisoner have committed the act if there had been a policeman at his elbow?



It is on the basis of totality of all these circumstances that the court should decide whether the accused is entitled to the benefit of Section 84. If he is, the court will acquit him. If he is not, the court will convict him.

### **Procedure at trial**

Chapter XXV [Ss. 328 & 329], Criminal Procedure Code, 1973 lays down procedure to be followed where the accused is a lunatic or of unsound mind.

### **Principles**

While dealing with a case of an accused of unsound mind, the following principles will have to be borne in mind by a court:

1. every type of insanity is not legal insanity: the cognitive faculty must be so destroyed as to render one incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law;
2. the court shall presume the absence of such insanity;
3. the burden of proof of legal insanity is on the accused, though it is not as heavy as on the prosecution to prove an offence;
4. the court must consider whether the accused suffered from legal insanity at the time when the offence was committed;
5. in reaching such a conclusion, the circumstances which preceded, attended or followed the crime are relevant considerations; and
6. the prosecution in discharging its burden in the face of the plea of legal insanity has merely to prove the basic fact and rely upon the normal presumption of law that everyone knows the law and the natural consequences of his act.

### **DRUNKENNESS (INTOXICATION) [Ss. 85 & 86]**

#### **Statutory provisions**

Sections 85 and 86 of the Code deal with cases wherein an offence has been committed by a person while he is in a state of intoxication. Section 85 states that nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law, provided that the thing which intoxicated him was administered to him without his consent or against his will. Section 86 covers cases of voluntary intoxication. It imputes the same knowledge to such a man as he would have had, if he had not been intoxicated. In other words, in case of voluntary intoxication, a person is liable like any other person who had not been intoxicated. Intoxication may be caused by consumption of alcohol, liquor or wine, or by taking narcotic drugs or by smoking opium, ganja, etc.

#### **Nature and scope**

Explaining nature and scope of the provisions relating to drunkenness, the Supreme Court in Bablu v. State of Rajasthan, stated:

Basically, three propositions as regards the scope and ambit of Section 85 IPC are as follows:

- i. the insanity whether produced by drunkenness or otherwise is a defence to the crime charged;
- ii. evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had this intent; and

iii. the evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind is affected by drink so that he more readily gave to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

### **Conditions**

Before defence of intoxication is claimed, the following conditions must be fulfilled:

1. the act must have been committed by the accused under intoxication;
2. by reason of such intoxication, the accused must be
  - (a) incapable of knowing the nature of the act; or
  - (b) not knowing that what he was doing was either wrong or contrary to law; and
3. the thing which intoxicated him must have been administered
  - a. without his knowledge; or
  - b. against his will.

### **Voluntary drunkenness**

A voluntary drunkenness is no defence in a criminal trial. If a man chooses to get drunk, it is his own voluntary act. It is very different from a madness which is not caused by any act of the person. That voluntary species of madness which is in party's power to abstain from, he must answer for. It is thus an acquired madness. Voluntary drunkenness, hence, is no defence for commission of crime. The act to get drunk itself being wrongful, it supplies necessary and requisite mens rea.

This principle is reflected in well-known maxim *qui peccat ebrius, luat sobrius* (let him who sins when drunk be punished when sober).

### **Drunkenness and insanity**

Although intoxication or drunkenness may resemble insanity, there is distinction between the two. Whereas an offence committed by a person in insanity is to be considered under Section 84, an offence committed under drunkenness has to be dealt with under Sections 85 and 86 IPC. Lunacy or insanity is a disease, but drunkenness or intoxication is a vice. The former is to be pitied, while the latter should be condemned. Drunkenness is a species of madness for which a person himself is to be blamed. The criminal law is concerned with the effect and not the origin of the disease of the mind. Hence, if insanity results from intoxication or drunkenness, voluntary or involuntary, it is a good defence to a criminal charge. If actual insanity supervenes, it furnishes a good ground to a criminal charge whatever may be the cause.

But in cases falling short of insanity, evidence of drunkenness which renders the accused incapable of forming specific intent essential to constitute the crime should be taken into consideration with other facts proved in order to determine whether or not the accused had such intent.

### **Test**

The true test to apply is not the test which applies in cases of insanity, viz. whether the accused knew what he was doing was wrong or was able to appreciate the nature and quality of his act. The true test is whether by reason of drunkenness the accused was incapable of forming an intention of committing the offence.

## **Principles**

In *Basdev v. State of Pepsu*, the Supreme Court, after considering leading English cases on the point, laid down the following principles as regards liability of an accused when a defence of intoxication is set up for avoiding criminal liability:

That insanity, whether produced by 'drunkenness or otherwise, is a defence to the crime charged; That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent;

That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

### **CONSENT [Ss. 87-93]**

Sections 87 to 93 of the Code deal with consent, express, implied or constructive. They also cover cases of "no consent" or "exclusion of consent". All these sections [Ss. 87-93], therefore, should be read together.

The law relating to consent is based on well-known maxim *volenti non fit injuria* (one who consents suffers no injury). It is founded on two simple propositions:

1. every person is the best judge of his own interest; and
2. no man will consent to what he thinks hurtful to him.

Sections 87 to 89 relate to cases of harm caused with consent of victim or victim's guardian. Section 90 describes what is not consent. Section 91 clarifies that consent cannot legalise an act which is an offence. Sections 92. and 93 deal with good faith.

### **Consent: Meaning**

IPC does not define "consent". The law of contract defines "consent" thus:

13. "Consent" defined- Two or more persons are said to consent when they agree upon the same thing in the same sense.

For creation of binding and enforceable contract, consent is necessary. Where parties to the agreement are *ad idem*, i.e. when they agree to the same thing in the same sense, it can be said that there is "consent". If parties are not *ad idem* on essential elements, contract does not come into existence. In respect of criminal law, Stephen defines "consent" to mean "a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents".

### **Object**

The primary object of excluding certain acts from criminal liability on the ground of consent has been explained by Code makers thus:

We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm.

It was further stated:

Every man is free to inflict any suffering or damage on his own person and property; and if instead of doing this himself, he consents to it being done by another, the doer commits no offence. A man may give away his property; and so another who takes it by his permission does not commit theft. He may inflict self-torture or he may consent to suffer torture at the hands of another.

### **Consent: Nature and scope**

Consent is an act of reason, accompanied with deliberation, mind weighing, as in a balance, the good and the evil on each side. It is an act of a man in his character of a rational and intelligent being. It implies freedom of judgment and exercise of power with free act of mind. Mere helplessness or submission cannot be treated as consent. Consent differs from submission in that every consent involves submission but not vice versa, i.e. every submission does not necessarily mean consent. True and free consent must proceed from the will, i.e. the will without any control due to coercion, fear, misrepresentation, misconception, drunkenness, insanity, inability to understand, etc.

### **Statutory provisions**

Section 87 enacts that nothing is an offence which is not intended to cause death or grievous hurt if it has been caused with consent of a person above 18 years of age. When the accused neither intends to cause death or grievous hurt nor knows that the act is likely to cause death or grievous hurt and does such act with consent of the person who is major, i.e. above 18 years of age, he commits no offence. The illustration to Section 87 makes the position clear.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence.

It is, therefore, clear that where the accused has done the act with the intention of causing death or grievous hurt, or with the knowledge that such act is likely to cause death or grievous hurt, the consent of the victim will provide no defence. Section 88 applies to cases of consent to acts done with consent and in good faith. It states that nothing is an offence which is not intended to cause death of any person if such act is committed for his benefit in good faith and with his consent. The illustration is appropriate and explains the principle.

A, a surgeon, knowing that a particular operation is likely to cause death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

Sections 87 and 88 differ on the following points:

1. Section 87 applies to any harm other than death and grievous hurt while Section 88 applies to any harm except death.
2. Consent under Section 87 must be by a person over the age of 18 years. Consent under Section 88 does not refer to age. (This section, however, should be read with Section 90 which states that person giving consent must be of twelve years or more).
3. Section 88 expressly refers to "good faith". Section 87 makes no reference to good faith. (Illustration to Section 87, however, makes it clear that there should be no "foul play").

Section 89 is extension of principle recognised by Section 88 and provides immunity in those cases where acts have been done in good faith for the benefit of children below 12 years of age or persons of unsound mind with the consent of guardians. For claiming the benefit under this section, the following conditions must be satisfied:

1. the act must have been done for the benefit of the child or lunatic;
2. it must have been done in good faith; and
3. it must have been done with the consent of parent or guardian.

The illustration reflects legislative intent.

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

Section 90 covers cases where there is no consent in the eye of law. Section 91 declares general principle of law that consent cannot legalise an act which is an offence. Causing of miscarriage, hence, even with the consent of woman cannot justify the act.

### **Sports and games**

Sports and games afford healthy exercise and develop martial spirit. They are not illegal merely because they expose the participants to some risk of harm. Hence, injuries caused during sports and games, such as, fencing, boxing, wrestling, football, cricket, etc. are protected. Illustration to Section 87 clearly states that there is no offence in such a situation. This, however, does not apply to illegal acts. For instance, prize fighting is prohibited by law. Hence, all persons involving in, or abetting or aiding in prize fighting are guilty. Again, fighting with deadly weapons or dangerous means cannot be allowed by any civilised society. Persons involved in such unlawful games cannot seek protection of exception under the Code.

### **Punishment by parents and guardians**

Moderate and reasonable punishment to a child by a parent or guardian is no offence. Some illustrations were given by the Authors of IPC to explain this principle:

1. A, a parent, whips his child moderately, for the child's benefit. A has committed no offence.
2. A confines his child, for the child's benefit. A has committed no offence.

Where the husband desired to have the custody of his wife who had not attained the age of puberty for the purpose of having sexual relation with her, it was held that the act was not for the benefit of the wife (minor) and the husband is not protected under the exception.

### **Punishment by teachers**

A school-master, having regard to his peculiar position, represents the parent and has the parental authority delegated to him. A school-master, hence, has the right to impose moderate and reasonable corporal punishment for the purpose of correcting what is evil in the child or for enforcing discipline. This a school-master can do not only within the school but even outside school campus.

Thus, where a school boy was punished by a teacher when he was found smoking, or committing theft or for not apologising for his unruly behaviour, it was held that the cases were covered by the exception and school-master had committed no offence. But where the punishment imposed on a pupil is harsh, excessive or unreasonable, the school-master is liable. Thus, where the school-master continued to beat a child for more than two hours with thick stick or had bitten him severely, it was held that the school-master was not entitled to the benefit of exception.

Whether the punishment imposed by the school-master on the pupil is reasonable or not is a question of fact to be decided in each case. It is also pertinent to note that corporal punishment is not recognised by the present legal system. Hence, such punishment should not be imposed by parents or teaching staff. Hence, where a

school supervisor slapped a student for sitting on his scooter, his conviction under Section 323 IPC (punishment for causing simple hurt) was upheld.

### **Doctors and medical practitioners**

Doctors, surgeons and medical practitioners are also protected for their acts not intended to cause death, done by them in good faith with the consent of patients.

### **Illustration to Section 88 aptly lays down this rule.**

But the makers of the Code rightly observed that this provision does not excuse dangerous operations performed by unqualified persons. "Good faith" should be construed to mean a conscientious belief of the person (patient) that the doer (doctor) had the skill to perform the operation which will benefit him. Thus, where a person was operated for cataract and lost his eye-sight, but it was found that the operation was performed with the consent of the patient, in good faith, for his benefit and in accordance with recognised Indian method, it was held the doctor was not liable. But where a person, who had no experience as a surgeon performed an operation on a patient for internal piles by cutting them with an ordinary knife which resulted in haemorrhage and death of the patient, it was held that the accused had committed an offence punishable under Section 304-A IPC.

### **Punishment by panchayats and local bodies**

As a general rule, a panchayat or a local body has no power to try an offence alleged to have been committed by an accused. But where such person calls upon panchayat to take a decision, he must accept such decision. Thus, A made an indecent assault on a village girl and in order to save himself from serious consequences agreed to abide by the decision of the panchayat. The panchayat ordered his face to be blackened and he should be beaten with shoes which was done. It was held that the persons who enforced the decision of the panchayat had committed no offence.

### **What is not consent**

Section 90 is in negative form and describes what is not consent. In the following cases, consent cannot be said to be a consent, i.e. true consent within the meaning of IPC:

1. consent given under a fear of injury;
2. consent given under misconception of fact;
3. consent given by an insane person;
4. consent given by an intoxicated person; and
5. consent given by a child under 12 years of age.

### **Where act is an offence**

Section 91 is in the nature of proviso to Sections 87 to 89 of the Code. It clarifies that the exceptions in Sections 87 to 89 will not apply to an act which is an offence. In other words, consent by a party may condone the act of causing harm to the person giving such consent on the ground of *volenti non fit injuria* (no injury is caused to a person who consents). It, however, does not wipe off an offence. The illustration to the section is clear and states that causing miscarriage is an offence. Hence, consent of the mother for such miscarriage is irrelevant and is of no consequence.

Similarly, a person may be liable for offences of public nuisance, offences against public safety, morals, etc. This is based on the principle that consent cannot violate the law of the land.

## **GOOD FAITH [Ss. 88-93]**

Sections 88, 89, 92 and 93 cover cases of good faith. All these provisions, hence, should be read together.

### **Meaning**

The expression "good faith" has not been defined by the Code. Section 52 also deals with acts done in good faith and states that nothing can be said to be done (or believed) in "good faith" which is done (or believed) without due care and attention. If this negative form is converted into positive form, "good faith" may be defined as "every act done with due care and attention".

### **Acts done in good faith with consent**

Section 88 applies to cases of consent of the party in respect of acts done in good faith. Illustration to the said section explains the principle appropriately.

### **Acts done in good faith with consent of guardian**

Section 89 covers cases wherein acts have been done in good faith for the benefit of a child or insane person with consent of parent or legal guardian. Illustration to the said section also reflects legislative intent and clarifies the legal position.

### **Acts done in good faith without consent**

Unlike Sections 88 and 89 which provide for consent of the party or his parent or guardian, Section 92 applies to cases of "without consent". In such cases, exigency or emergency requires quick or prompt action. It states that nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if circumstances are such that it is impossible for that person to signify consent.

### **The section contains illustrative cases.**

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

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

For Section 92 to apply, the following conditions must be fulfilled:

1. the act must have been done for the benefit of the person;
2. it must have been done in good faith; and
3. the circumstances of the case must be such as to make it impossible for the person to signify consent.

The Explanation to the section clarifies that mere pecuniary benefit is not "benefit" within the meaning of Sections 88, 89 or 92.

### **Communication made in good faith**

Section 93 enacts that any communication made in good faith to a person is no offence even though it may cause harm to him if it is made for the benefit of the person. Thus, where A, a surgeon, in good faith, (and for the benefit of that person), communicates to him that he cannot live long and due to shock, the person dies,

A commits no offence. Such communications are made in good faith and for the benefit of the person concerned. Many a time, proper warning to the patient of his approaching death enables him to prepare for such situation and provides an opportunity to arrange his affairs accordingly.

### **ACT DONE UNDER COMPULSION [S. 94]**

#### **Statutory provision**

Section 94 of the Code grants immunity from criminal liability to a person for an act done by him under threat, duress or compulsion. It states that if a person does an act under the fear of instant death, he cannot be held criminally liable.

#### **Doctrine explained**

The section is based on the doctrine of compulsion, necessity and self-preservation. Again, the doctrine is founded on well-known maxim *actus ne invito factus non est mens actus* (an act done by me against my will is not my act).

#### **Applicability of Section 94**

Section 94 applies to all offences under the Code, except an offence of murder [S. 300] and offences against the State punishable with death [S. 121].

#### **Conditions**

For application of this section, the following conditions must be satisfied:

1. the act must have been committed by the accused involuntarily; and
2. the apprehension or fear must have been of instant death.

#### **Law Commission's view**

The Law Commission of India studied this provision and recommended to widen its scope to include (over and above the threat of instant death) grievous bodily harm either to the person or to any near relative.

#### **Dangers**

The doctrine of compulsion, however, has its dangers also. According to Stephen, criminal law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder: "If you do it, I will hang you". Is the law to withdraw its threat if someone else says: "If you do not do it, I will shoot you".

As it has been said, the pressure of temptation should not become an excuse for breaking the law. No man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind.

### **TRIVIAL ACTS [S. 95]**

#### **Statutory provision**

Section 95 of the Code enacts that nothing is an offence by reason that it causes a slight harm that no person of ordinary sense or temper would complain.

#### **"Trivial": Meaning**

According to the dictionary meaning, "trifling" or "trivial" means a matter, affair or circumstance of trivial nature or of very little importance.



## **"Harm": Meaning**

The expression "harm" has not been defined in IPC. In its dictionary meaning, it connotes hurt, injury, damage, impairment, moral wrong or evil. The Legislature has not used this expression ("harm") in a restricted sense.

## **Object**

Section 95 is based on one of the well-settled principles of law reflected in maxim de minimis non curat lex (law does not notice trifles). Macaulay observed that there may be several cases which may fall within the letter of the law but not within its spirit. If definitions are to be read literally, it is theft to dip a pen into another man's ink, mischief to crumble one of his wafers, assault to cover with him a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. They, however, should not be treated as crimes.

The Supreme Court also stated that the object of enacting Section 95 was to exclude from the operation of the Penal Code those cases which from the imperfection of the language may fall within the letter of the law, but are not within its spirit and are considered as innocent. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes.

## **Applicability**

Section 95 applies to cases where the act which causes harm is accidental as also intentional or deliberate.

## **Test**

Whether an act which amounts to an offence is trivial or not would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. There can be no absolute standard or degree of harm which may be regarded as so slight that a person of ordinary sense and temper would not complain of harm. It cannot be judged solely by the measure of physical or other injury the act causes.

Trivial acts: Illustrative cases

The following acts have been held to be trivial acts:

1. dipping a pen in the ink pot of someone else without his consent or knowledge;
2. dashing against someone while passing through a crowded thoroughfare;
3. taking away pods, almost valueless from a tree standing on government waste land;
4. taking away a cheque of someone having no value;
5. alleging that the complainant is a "liar" or was travelling without a ticket, etc.

**Not trivial acts: Illustrative cases**

The following acts, on the other hand, were not held to be trivial acts:

1. taking a respectable man by the ear;
2. using filthy language during cross-examination of a witness by an advocate;

## **PRIVATE DEFENCE [Ss. 96-106]**

The right of private defence or self-defence is a very valuable right and has been recognised in all civilised societies within reasonable limits. Sections 96 to 106 deal with the right of private defence. An act which otherwise may amount to an offence would be "no offence" where the act is done in exercise of the right of private defence. The right is codified and for comprehensive view of the ambit and scope of this right, all sections [Ss. 96-106] should be read together. The whole subject is based on the fundamental premise that self-help is the first rule of criminal law.

### **Rule of "retreat"**

The rule of "retreat" or doctrine of "retreat to the wall" or "retreat to the ditch" was expounded by Blackstone and followed by common law courts in England. The said rule required the party assaulted not to kill or injure the assailant but flee as far as possible by reason of some wall, ditch or other impediment and defend himself by a peaceful method of running to a safe place. It was described as the doctrine of "universal justice". But the doctrine has undergone sea change in England as also in the US. So far as IPC is concerned, the "rule of retreat" has not been accepted. It has been held in several cases that there is no rule which requires a man to run away when he can exercise right of private defence.

### **Object**

The primary object of recognising the rule of private defence is to ensure that every citizen, however law abiding he may be, should not behave like a coward when confronted with imminent danger or unlawful aggression. There is nothing more degrading to the human spirit than to run away in the face of danger.

It has been accepted in all legal systems that self help is the first principle of criminal law. The right of private defence is absolutely necessary for protection of every citizen's life, liberty and property. It has been said that protection by State Authorities and vigilance by Magistrates can never make up for safety and security of each individual on his own behalf. The fear of law can never restrain bad men so effectually as the fear of the sum total of individual or personal resistance. "Take away this right and you become in so doing the accomplice of all bad men."

As a general rule, citizens are neither expected to run away for safety when faced with grave and imminent danger to their life, liberty or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them or to punish the wrongdoer for commission of offences. The right of private defence serves a social purpose inasmuch as there is nothing more degrading to the human spirit than to run away in the face of peril. The right of private defence is designed to serve a social purpose and deserves to be fostered within the prescribed limits.

### **Right of private defence under IPC: Whether exhaustive**

Sections 96 to 106 IPC codify the entire law relating to the right of private defence of a person and property including the extent and limitation to exercise such right. The provisions are complete in themselves and the words used in the Code only have to be read for finding out the extent and limits of the right.

### **Duty of State and right of private defence**

It is undoubtedly the primary duty of the State to protect the life, liberty and property of its subjects. In a well-ordered and civilised society, therefore, it is assumed that the State would take care of its citizens. But no State, howsoever its resources, can afford to depute policeman to dog the steps of every rogue in the country. Consequently, a pro tanto right has to be conferred by the State on its subjects to take law in their hands and provide their own safety and security.

Hence, where an individual citizen is faced with a danger and the immediate aid from the State machinery is not available, he can protect himself even by use of force. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself is entitled to use should not be disproportionate to the injury or harm which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. "The exercise of the right of private defence must never be vindictive or malicious".

### **Considerations**

The right of private defence of person and property is recognised in all free, civilised, democratic societies within certain reasonable limits. Those limits are mainly dictated by two considerations:

1. the same right is available to all members of society; and
2. generally, it is the State which undertakes the responsibility for maintenance of law and order and protection of person and property of its citizens.

As a general rule, citizens are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected by use of force to right the wrong done to them by punishing the wrongdoer.

### **Basis of right of private defence**

According to Mayne, the whole law relating to the right of private defence is based on the following propositions:

1. the State has undertaken and in the great majority of cases is able to protect its subjects against unlawful attacks upon their person or property;
2. where State aid can be obtained, such course must be adopted; and
3. where State aid cannot be obtained, an individual may do everything that is necessary for the protection of his person or property; and
4. violence used in self-defence must be in proportion to the injury or harm to be averted and it should not be vindictive or malicious.

### **Interpretation**

The right of private defence is highly prized and a very valuable right. It serves a social purpose. The right of private defence, hence, should be liberally construed. Such a right not only will have a restraining influence on bad characters but it will also encourage the right spirit in a free citizen.

Situations have to be judged from the subjective point of view of the accused in the surrounding excitement and confusion of the moment confronted with a situation of peril and not by microscopic and pedantic scrutiny. In such circumstances, it is inappropriate to apply tests of detached objectivity or cool atmosphere of court. A person in fear of life is not expected to modulate his defence step by step or tier by tier. "Detached reflection cannot be demanded in the presence of an uplifted knife." In other words, the right of private defence cannot be weighed in "golden scales".

### **Scheme**

Sections 96 to 106 deal with the right of private defence or self-defence.

Section 96 lays down the general principle of law and declares that "nothing is an offence which is done in the exercise of the right of private defence."

Section 97 relates to subject-matter of private defence and states that every person has right to defend his person (body) as also his property.

Section 98 recognises right of private defence against an act of child or of person of unsound mind, etc.

Section 99 enumerates cases wherein right of private defence is not available.

Sections 100, 102, 103 and 104 deal with extent of right of private defence. Likewise, Sections 102 and 105 define and limit the commencement and continuation of right of private defence.

Section 106 extends right of private defence against an innocent person.

The right of private defence is codified in Sections 96 to 106. All these provisions have, therefore, to be read together.

### **General principle**

Section 96 of the Code declares general principle of law relating to private defence. The said provision reads thus:

96. Nothing is an offence which is done in the exercise of the right of private defence.

### **Subject-matter of private defence**

Section 97 deals with the subject-matter of right of private defence. It states that subject to restrictions contained in Section 99 (wherein there is no right of private defence), every person has such right in respect of the following:

- his own body, and the body of any other person against any offence affecting the human body; and
- his own property (movable or immovable) or property of any other person, against any act which is an offence of theft, robbery, mischief or criminal trespass or an attempt to commit any such offence.

It is, therefore, clear that Section 97 confers the right of private defence on every person:

1. to defend his own body;
2. to defend body of any other person;
3. to defend his own property; and
4. to defend property of any other person.

### **Private defence against act of child, person of unsound mind, etc.**

Section 98 recognises the right of private defence against an act of a person who may not be held criminally liable on the ground of insanity, immaturity of understanding, etc.

Two illustrations explain the principle.

- (a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.
- (b) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a housebreaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

The above illustrations make it clear that a doer of an act may not be responsible in criminal law due to his position, such as, infancy [Ss. 82 & 83], insanity [S. 84], mistake or misconception [Ss. 76 & 79], intoxication [Ss. 85 & 86], etc. That, however, does not deprive or take away the right of private defence otherwise available to a person granted by the Code. On the contrary, in such cases, the need of private defence is much more necessary.

### **No right of private defence**

Section 99 covers cases wherein the right of private defence is not available. It also controls such right and prescribes limits within which the right can be exercised.

The said section lays down the following principles:

- there is no right of private defence against acts of a public servant;
- there is no right of private defence against acts done at the direction of a public servant;
- there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities; and
- the right of private defence does not extend to cause more harm than necessary for defence.

The first part of Section 99 grants protection to public servants acting in good faith under the colour of his office even though the act may not be strictly justified by law.

The words "under the colour of his office" refer to irregular as distinguished from illegal acts. Hence, where the act done by the public officer is within his power but has been done by him irregularly, this part protects the public servant and does not confer right of private defence to the person against whom such action is taken.

Thus, where a police officer acting bona fide under the colour of his office arrests a person without authority, the person arrested has no right of private defence. Similarly, where Custom Authorities, in good faith seized certain goods believed to be smuggled goods without the requisite notification, it was held that against the said action, no right of private defence was available to the owner of the goods.

There is, however, a distinction between irregularity and illegality. Where the action of the public officer is illegal, unlawful or de hors the Act, and is without power, authority or jurisdiction, the public officer cannot get protection of Section 99 since such action cannot be said to be taken in "good faith" "under colour of his office".

Thus, where an officer attempted to execute a warrant of arrest, which was ex facie illegal, it was held that the accused was justified in resisting it. Similarly, where a police officer had attempted to search the premises of the accused without a written authority, it was held that the accused could resist such search.

Again, under part one, the right of private defence arises only in case of reasonable apprehension of death or grievous hurt being caused by the act of such public servant and not otherwise.

Thus, where an Excise Inspector pursued a smuggler and fired twice to frighten him, injury caused by the latter (accused) to the former with a knife was held within the right of self-defence.

Explanation 1 clarifies that a person is not deprived of right of private defence against the act of a public servant unless he knows (or has reason to believe) that the person doing the act is a public servant.

The second part extends the principle laid down in part one to acts done under the order or direction of a public servant.

Explanation 2, like Explanation 1, clarifies that a person is not deprived of right of private defence against an act done at the direction of a public servant unless he knows (or has reason to believe) or such person states the authority under which he acts or produces such authority that such person has acted under the order or direction of the public servant.

The third part states that there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities.

Part four of Section 99 provides that the injury to be inflicted should be proportionate to the harm caused or attempted to be caused. It should not cause more harm than it is necessary for the purpose of defence. In other words, the right of private defence must be exercised in defence and for self-protection. It should never be punitive, vindictive or retributive.

### **Extent of right of private defence**

Sections 100, 101, 103 and 104 deal with extent of the right of private defence. Section 100 applies to cases wherein the right of private defence of body (person) extends to causing of death, while Section 101 applies to other cases, i.e. cases not covered by Section 100. Likewise, Section 103 confers right of private defence of property to causing of death in certain cases while Section 104 covers other cases not falling under Section 103.

### **Right of private defence of body to cause death**

The right of private defence of body extends to the causing of death (or any other harm) to the assailant in the following cases:

1. an assault causing reasonable apprehension of death;
2. an assault causing reasonable apprehension of grievous hurt;
3. an assault with intention of committing rape;
4. an assault with intention of gratifying unnatural lust;
5. an assault with intention of kidnapping;
6. an assault with intention of abducting;
7. an assault with intention of wrongful confinement; and
8. an act of throwing acid causing reasonable apprehension of grievous hurt.

Section 100, however, has to be read with Section 99 which requires fulfilment of conditions laid down whereunder the right of private defence is not available.

### **Right of private defence of body to cause any harm other than death**

Section 101 applies to cases not covered by Section 100 and provides exercise of the right of private defence of body to cause any harm short of death.

Like Section 100, this section [S.101] also has to be read with Section 99 which requires fulfilment of conditions before the right of private defence is available to the person.

### **Right of private defence of property to cause death**

The right of private defence of property extends to the causing of death (or any other harm) to the wrongdoer in the following cases:

1. robbery;
2. housebreaking by night;
3. mischief by fire to any building, tent or vessel, used as human dwelling or for custody of property; and
4. theft, mischief or house trespass causing reasonable apprehension of death or grievous hurt.

Section 103 should be read with Section 99 which places restrictions on such right in certain cases.

## **Right of private defence of property to cause any harm other than death**

Section 104 applies to cases not falling under Section 103 and allows exercise of the right of private defence of property to cause any harm other than death. Like Section 103, Section 104 has to be read with Section 99 prescribing fulfilment of conditions before the right of private defence is exercised by the person.

## **Commencement and continuance of right of private defence of body**

Section 102 clarifies as to when the right of private defence of body commences and till what time it continues. It states that the right of the private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence though the offence might not have been committed. And such right continues as long as such apprehension of danger to the body continues.

## **Commencement and continuance of right of private defence of property**

Section 105, like Section 102, deals with commencement and continuance of the right of private defence of property. It states that the right of private defence of the property commences when a reasonable apprehension of the danger to the property commences. In respect of theft, the right of private defence continues till the offender effects his retreat with the property, or the assistance of public authority is obtained, or the property has been recovered. In case of robbery, such right continues as long as the offender causes or attempts to cause to any person, death, hurt or wrongful restraint. In cases of criminal trespass or mischief, such right continues as long as criminal trespass or mischief continues. In housebreaking, the right of private defence continues as long as house trespass or housebreaking continues.

## **Right of private defence against innocent person**

Section 106 allows the right of private defence against an innocent person. It states that where there is reasonable apprehension of death and the defender cannot effectually exercise the right of private defence without risk of harm to an innocent person, such right can be exercised even against an innocent person. The illustration makes the principle clear.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

## **Free fight**

Free fights take place when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question who attacked whom is wholly immaterial and depends upon the tactics adopted by rival commanders. In a free fight, neither party can claim right of private defence and both the parties can be convicted for their individual act.

## **Injuries to accused: Effect**

Non-explanation of injuries sustained by the accused at the time of occurrence is indeed an important circumstance which may raise a presumption that the accused was exercising right of private defence.

## **Plea of private defence**

If the case of the accused is that he had exercised the right of private defence, he should come out with such a plea and place necessary material before the court. But even if the accused has not raised such a plea, he is not debarred from showing that he had exercised the said right. He need not raise the plea of self-defence specifically. If such a ground is raised in cross-examination of prosecution witnesses or there is material on record to support such a case, it is the duty of the court to consider the issue and grant the benefit to which the accused is entitled.

## **Duty of court**

It is well-settled, that even if the accused does not plead self-defence, it is the duty of the court to consider such a plea if it arises from the material on record. It is not open to the court to ignore the material merely because the accused has not raised plea of self-defence. As observed by the Supreme Court, the crucial factor is not what the accused has pleaded but whether he had right of private defence.

## **Burden of proof**

Where an accused raises a plea of private defence, he must establish it. In other words, it is for the accused to prove that the circumstances were such which entitled him to exercise the right of private defence. The accused may discharge this burden either by leading defence evidence or from the evidence led by the prosecution or from other evidence. Under Section 105, Evidence Act, 1872, the burden of proof is on the accused to prove the right of private defence. It is not open to the court to presume private defence by the accused in the absence of relevant circumstances or material on record.

## **Standard of proof**

The standard of proof required to be discharged by the accused for claiming the right of private defence is not as strict as the standard of proof on the prosecution to establish the guilt of the accused.

There is clear distinction between the nature of burden which is on the prosecution to establish guilt of the accused under Section 101, Evidence Act, 1872 and the burden which is on the accused to prove right of private defence under Section 105, Evidence Act, 1872. In case of the former, it is for the prosecution to prove beyond reasonable doubt that the accused has committed the offence with which he is charged. In case of the latter, however, such a burden is discharged as soon as the accused establishes his plea of self-defence by preponderance of probability.

It is also an important consideration that a person faced with imminent peril of life and limb is not expected to weigh in "golden scales" the force needed to repel the danger. Even if in the heat of the moment, the accused carries his defence a little further than what would be necessary, the law should make due allowance for it. All circumstances must be weighed with pragmatism and a hyper technical view should be avoided. It is, however, not open to the court to grant benefit of the right of private defence to the accused on conjectures, surmises and imagination without there being any foundation and circumstances justifying use of such a right.

## **Principles**

In *Darshan Singh v. State of Punjab*, the Supreme Court, after referring to several cases on the point formulated the following principles on the right of private defence:

- i. (i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.
- ii. (ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.
- iii. (iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.



- iv. (iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.
- v. (v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.
- vi. (vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.
- vii. (vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.
- viii. (viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.
- ix. (ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.
- x. (x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.

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## **PUNISHMENTS**

### **Synopsis:**

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## **Introduction**

Chapter III [Ss. 53-75] deals with "punishments". It, however, does not define "punishment", but sets out various modes of punishments which may be imposed on an offender when he is found guilty of committing a crime.

### **"Punishment": Meaning**

According to dictionary meaning, "to punish" means "to inflict penalty", "to impose punishment", or "to cause the offender to suffer for an offence". The word "punish" thus signifies some offence committed by a person who is punished.

Punishment is the sanction imposed on the offender for his act or omission. Once a person is tried for an offence by a competent court and is found guilty it is the duty of the court of law to impose on him punishment prescribed by law. The law does not envisage a person being convicted for an offence without a sentence being imposed therefore.

### **Object of Punishment**

Hence, punishment to be awarded to the offender must achieve twin object; viz. 1) to prevent a person who has committed the crime from repeating it; and 2) to prevent others from committing crimes.

### **History of Punishment In India**

In primitive society, people believed in "revenge theory", i.e. "an eye for an eye and a tooth for a tooth". When a crime was committed, the aggrieved party, i.e. victim or his relatives used to take revenge.

In ancient India, administration of justice was considered as one of the primary functions of the State. The King was the head of judicial department and also fountain of justice. After hearing the parties and in consultation with pundits, he was awarded punishments on offenders. Law books were there in the form of Dharmashastras. Experts, jurists and law professors were also there like Manu, Brihaspati, Vishnu, Yajnavalkya, etc.

During the Mughal period, emperors followed the Koran. Qazis used to remain present at the time of hearing. Akbar, Jahangir, Shahjahan heard cases regularly and were well-known for doing justice. Maratha system of administration of justice was simple. Judiciary and executive were not separate. Punishment was meant for being used as corrective. After the British came here, they introduced English Law in India. As already discussed earlier, they took several steps to make the penal law rational and reasonable which ultimately culminated in the present Code of 1860.

### **Discretion of Court in Awarding Punishment**

The question of imposition of sentence is always of the discretion of the court. No hard and fast rule can be laid down applicable to all cases. Sentencing is a delicate task which requires an inter-disciplinary approach and calls for skills and talents. It has been said that trying a man is as easy as falling of a log in comparison of what to do with him when he is found guilty.

In almost all offences (barring few), Penal Code, 1860 (IPC) fixes maximum penalty which is intended only for worst cases. It leaves to the discretion of the judge to award sentence which he will exercise keeping in view the facts and circumstances before him. The word "punishable" in a penal provision is not determinative of the intention of the Legislature. The court should exercise discretion judicially and judiciously with the ultimate object "to make an offender a non-offender".

## **Considerations While Awarding Punishment**

In fixing the punishment for any particular offence, the court must take into consideration several factors, such as, the nature of offence, circumstances (extenuating or aggravating) in which the offence is committed, age and background of the offender with reference to education, home life, etc. prior criminal record (if any), degree or deliberation shown by the offender, provocation, if any, received from the victim, motive behind the offence, etc. All these and similar other considerations can, hopefully and legitimately, tilt the scales on the propriety of sentence.

It is also to be remembered that modern penology regards crime and criminal as equally important while considering and deciding the quantum of sentence. The court must, therefore, focus its attention not only on the crime but also on the criminal so as to ensure reformist component which would provide the offender an opportunity to improve, reform and rehabilitate himself by returning in the mainstream of society.

## **Theories of Punishment**

Punishment is the sanction imposed on the offender for infringement or violation of set rules and norms of society. To punish an offender is the supreme justice. Every offender should be punished by the State.

### **(a) Deterrent theory**

Deterrent punishment is considered to be the most important form of punishment. In medieval times and even in 19th century, mainly deterrent theory was in vogue. The chief end of this theory is to teach a lesson to the wrongdoer that crime never pays as it is "a bad bargain" for him. It also sets an example to all members of society by creating a fear that if they would commit a crime, they would have to pay penalty for it. Manu also said, "Penalty keeps the people under control. Penalty protects them, penalty remains awake when people are asleep, and so the wise have regarded punishment as a source of righteousness."

But this theory has been criticised also. It places too much emphasis on the crime rather than on the criminal. Again, the deterrent theory has never proved to be effective. In spite of several provisions in penal statutes for punishments, people commit crimes. It is also said that excessive and harsh punishment loses its effect and efficacy in converting "an offender to a non-offender". Once an offender is punished, deterrent effect loses its rigour. There is every likelihood that instead of correcting himself, an ordinary offender may turn to be a hardened criminal.

### **(b) Preventive theory**

Another important theory of punishment is the preventive theory. The main object of this theory is to prevent or disable the criminal from repeating the crime. Deterrent theory prevents the prospective law breakers from infringing or violating the law but preventive theory disables the criminal from repeating the act. By imposing and executing a death sentence on a murderer society is ensured that no offence can ever be committed by him. In good old days, for committing theft the hands of the accused were chopped off so that in future it was impossible for him to commit such a crime. Similarly, in case of forfeiture of office, it would be impossible for the holder of the office to misuse it again. If for rash and negligent driving, licence of the accused is cancelled, he would be disabled from driving a vehicle and causing injury to an innocent person.

The theory, however, is criticised on the ground that it does not take into account several factors, such as, motive for committing a crime, circumstances, psychological consideration, etc. It is also said that the theory may not be wholly effective, since it is based on the presumption that once a person commits a crime, he would repeat it in future. But it is not necessarily true. On the other hand, if he is punished, it is equally possible that he may be demoralised and after suffering the sentence he may repeat such "activities" in future also.

### **(c) Reformative theory**

Reformative theory of punishment is comparatively a modern theory which places emphasis on moral reform of the offender. It proceeds on the basis that even where a person commits a crime, he does, not cease to be a human being. He is a "patient" who needs "medicine", sympathy, love and affection and not punishment, penalty or sentence.

According to this theory, the object of punishment should be to reform the criminal. He should be educated and provided an opportunity to improve. He should be given a chance so that he may be able to start a new life as a peace-loving and law-abiding citizen. Under this theory, the judge is expected to keep in view the age and character of the offender, his education, family background, his placement in society, circumstances under which the offence has been committed by him, the object behind the commission of offence, etc. and only thereafter to impose sentence which would help him in returning to society to which he belongs.

But this theory is also criticised on the ground that there are many incorrigible, incurable and hardened criminals who cannot be reformed. It is also said that grant of facilities and comfort in jail may encourage such class of criminals in indulging again and again in their anti-social activities. Reformative theory of punishment, however, is desirable and should be adopted in case of juvenile offenders, youthful criminals, depraved and delinquent children, first offenders, etc.

### **(d) Retributive theory**

In primitive society, retributive theory of punishment was the only theory which was followed. This theory believes in principle of "an eye for an eye, and a tooth for a tooth". The only difference in primitive society and modern society is that in the former, the punishment was awarded by the party, i.e. by or on behalf of the victim, while in the latter, it is by the State created agencies.

According to this theory, an offence creates imbalance in society, punishment of offence is the means of restoring balance. Retributive punishment gratifies the instinct of revenge which inheres in every human being. It satisfies the feeling of pleasure that the offender is also punished. It is, therefore, said: "The criminal law stands to passion of revenge in much the same relation as marriage to the sexual appetite".

But it is said that punishment in itself is not a remedy for the act committed by the offender. In a given case, it may even aggravate the mischief. This theory ignores an important element that a crime is a disease which should be cured rather than be repeated. It should not be forgotten that punishment is not an end in itself. It is the cause of crime which should be found out and should be removed in the larger interest of society.

### **(e) Expiatory theory**

Expiatory theory is similar to retributive theory. Expiation means suffering (punishment). for an offence (act). According to this theory, guilt + punishment = innocence. Thus, punishment is a form of expiation. To suffer punishment is to pay the debt due to law that has been violated. Hence, when punishment has been suffered, the debt has been paid. It is, therefore, said, "The murderer has expiated his crime on the gibbet".

But all pitfalls applicable to retributive theory equally apply to expiatory theory as well. This theory also considers punishment as an end which is not proper. In a refined way, it approves "vengeance" and fails to be purposive in nature. It, no doubt, brings element of "proportionality" in quantum of punishment.

### **(f) Conclusions**

From what is stated above, it is clear that every theory has its own merits as also drawbacks. Every effort, therefore, should be made to ensure that ultimately, the punishment imposed on the offender serves the interest of society.

Appropriate punishment is an art which involves balancing of deterrent, retributive, preventive and reformatory elements. Considering the nature and gravity of crime, deterrent effect cannot altogether be ignored. But reformatory aspect also should not be lost sight of. Moreover, the offender may be a hardened criminal. But where he is a first offender, juvenile or having committed an offence on the spur of moment, reformatory theory should be invoked. The offender is not always a criminal, who needs to be punished. He is also a patient to be treated.

Again, by committing, a crime, the offender has created a "debt" which he must "pay" to society. In such cases, however, the "doctrine of proportionality" should always be kept in view by the court while awarding sentence so as to ensure "payment of debt" by him without giving an impression that he had not been treated fairly and thereby converting him as a hardened criminal or habitual offender.

### **Types of Punishments**

Section 53 IPC specifies the following punishments:

1. death;
2. imprisonment for life;
3. imprisonment, which may be:
  - (a) rigorous (with hard labour) or
  - (b) simple (with soft/light labour);
4. forfeiture of property; and
5. Fine.

### **Law Commission's View**

Law Commission of India studied various modes of punishment not only under IPC but also under other laws. Over and above the types of punishments mentioned in IPC, the Law Commission recommended some new forms of punishment also.

They were:

1. corrective labour;
2. community service;
3. payment of compensation;
4. public censure; and
5. confiscation or forfeiture of property, etc.

The Law Commission recommended abolition of solitary confinement describing it as "out of time with modern thinking". It, however, stated that solitary confinement could be retained as a measure of "jail discipline".

### **Punishments Under Ipc: Whether Exhaustive**

Forms of punishment enumerated in IPC [S. 53] are not exhaustive in nature of all punishments that can be imposed on an offender under the administration of criminal justice. Application of Section 53 is limited to IPC and does not cover all laws which may provide other punishments also; such as externment, payment of compensation, admonition, suspension of licence, disqualification from holding public office, payment of cost, release on probation, etc.

## **Death Sentence**

The extreme punishment which can be imposed on any offender is death sentence. It is also known as "capital punishment".

### **When death sentence may be awarded**

Death sentence may be awarded by a competent court under IPC in the following cases:

1. waging war against the Government of India [S. 121];
2. abetting mutiny actually committed [S. 132.];
3. giving or fabricating false evidence upon which an innocent person suffers death [S. 194];
4. murder [S. 302];
5. murder by a life convict [S. 303] [S. 303 is held unconstitutional];
6. abetment of suicide of a minor, insane or intoxicated person, if suicide is committed [S. 305];
7. attempt to murder by a life convict if hurt is caused [S. 307];
8. kidnapping for ransom [S. 364-A];
9. dacoity with murder [S. 396].

### **Macaulay's view**

We have already seen that Macaulay was in favour of imposing death penalty in extreme cases. The Code makers, however, were conscious that death sentence was drastic in nature. They, therefore, stated:

We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed.

### **Law Commission's view**

The Law Commission of India favoured retention of death penalty as one of the punishments which could be imposed on the offender of serious crimes. The Law Commission also did not favour any change for awarding only death penalty under Section 303 IPC. (It may, however, be stated that Section 303 IPC has been held unconstitutional.)

### **Constitutional validity**

Constitutional validity of death sentence had been challenged in various cases before the Supreme Court. But it has been held that death penalty is neither arbitrary nor unreasonable under Article 14, nor is it violative of the right to life under Article 21 of the Constitution of India. So far as Section 303 IPC is concerned, which imposed an obligation on the court to award only death sentence on a life-convict, it has been held arbitrary, unreasonable and ultra vires Articles 14 and 21 of the Constitution of India.

### **Provisions in Criminal Procedure Code (CrPC)**

The old CrPC, 1898 conferred discretion on the court when the conviction was for an offence of murder punishable with death or imprisonment for life to award any punishment. In some cases, it was held that awarding death sentence was the rule while life imprisonment was an exception. The present CrPC, 1973 enacts that when the conviction is for an offence punishable with death or life imprisonment, normal rule should be to award imprisonment for life. If the court intends to award capital punishment (death sentence), reasons should be recorded.

## **Imprisonment for Life**

Originally, IPC provided for "transportation for life". An offender sentenced to undergo transportation for life used to be deported to overseas in the Island of Andaman (known as Kaki Mani). All prisoners sentenced to transportation for life, however, were not invariably deported to Port Blair, but were confined to certain jails in India which were set apart for that purpose. The form of punishment of "transportation for life" was substituted by "imprisonment for life" by Act 26 of 1955. The amendment thus merely recognised the practice which prevailed earlier. Imprisonment for life, necessarily means "rigorous imprisonment" and cannot be "simple imprisonment". The Code has provided sentence of "imprisonment for life" in several cases. In the following cases, minimum sentence of imprisonment for life has to be imposed by the court:

1. waging war against the Government of India [S.121];
2. murder [S. 302]; and
3. kidnapping for ransom [S. 364-A].

"Imprisonment for life" normally means imprisonment for full or complete span of life. In other words, an "imprisonment for life" means a sentence whereunder the offender has to remain in jail for the entire remaining life.

## **Rigorous Imprisonment**

Section 53 IPC expressly describes imprisonment of two types:

1. rigorous; and
2. simple.

Rigorous imprisonment is imprisonment which involves hard labour, for example, the prisoner may be asked to grind corn, dig earth, crush stones, etc. In respect of some offences, the Code provides for rigorous imprisonment only, for example, robbery, dacoity, etc. In other cases discretion has been conferred on the court either to order simple imprisonment or rigorous imprisonment or to order imprisonment partly simple and partly rigorous. But even in rigorous imprisonment, hard labour must receive a humane meaning. Sense and sympathy are not enemies of penal asylums.

## **Simple Imprisonment**

Simple imprisonment means confinement of the offender in jail. It, however, does not involve hard work or labour by him. Certain offences under IPC provide for simple imprisonment only, for example, uttering words or making gestures to insult the modesty of a woman [S. 509]; appearing in a public place in drunken condition [S. 510] etc. Simple imprisonment is awarded in minor or small offences. The prisoner may be asked to do light labour in such cases.

## **Solitary Confinement**

Sections 73 and 74 IPC enable a court to impose punishment of solitary confinement on the offender. In solitary confinement, the prisoner is secluded from the sight of, and communication with, other prisoners. It is total isolation of the prisoner not only from society at large but also from co-prisoners. Solitary confinement is imposed on the offender in order that a feeling of loneliness may exert wholesome influence and reform him. It thus seeks to inflict pain on the offender.

Solitary confinement is one of the harshest form of punishments having degrading and demoralising effect on the prisoner. Constant or continuous isolation of a prisoner is abnormal and may make him insane or a lunatic. It has been held that solitary confinement should not be awarded unless there are special features such



as extreme violence or brutality in the commission of the offence. In other words, solitary confinement may be administered in most exceptional cases of unparalleled atrocity or compelling necessity.

### **The Law Commission considered this aspect and stated:**

We are of the view that this punishment is out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by any criminal court.

The Commission, however, observed that it may be necessary as a measure of jail discipline, though the Supreme Court expressed doubt even in those cases. In England, this sentence is abolished. Before solitary confinement can be ordered, the following conditions must be fulfilled:

1. the conviction must be for an offence under IPC; and
2. the court must have power to sentence the offender to rigorous imprisonment.

Code makers were conscious of the drastic nature of this sentence and they have, therefore, placed several limitations and restrictions on courts while ordering solitary confinement, such as maximum period for which solitary confinement can be ordered, intervals between the periods of solitary confinement, etc. It is submitted that normally, punishment of solitary confinement should not be imposed on an offender inasmuch as it is inhumane and cruel. But if it is used in appropriate proportion in exceptional cases, it may serve a useful purpose and may provide an opportunity to the offender to improve.

### **Imprisonment till Rising of Court**

IPC does not provide imposition of imprisonment till the rising of the court. Hence, in some cases, it has been held that such a sentence is unknown to law and is not legal. No such sentence can, therefore, be imposed on the offender. But it is not correct to say that the law does not recognise imprisonment till the rising of the court and as such it cannot be awarded on the convict. CrPC, 1973 expressly states that where the accused is sentenced to imprisonment till the rising of the court, it is not necessary to prepare or forward a warrant to a jail, and the accused may be confined in such place as the court may direct.

Thus, a sentence of imprisonment till the rising of the court is also a sentence in accordance with law. A direction that a person shall be confined in the premises of the court till the rising of the court constitutes an imprisonment. In appropriate cases, such sentence can be awarded on the person found guilty. Such a course, however, should not be lightly adopted. When a statute states that the offender shall be imprisoned, normally, he should be sent to jail. To impose sentence of imprisonment till the rising of the court is a sort of invasion of the statutory provision which is justified only in exceptional circumstances where the offence is petty, trivial or technical or there are other extenuating circumstances. Hence, where the accused in order to extort confession from a boy, who was suspected of having committed theft, set on fire both his hands, it was held that the imprisonment till the rising of the court was grossly inadequate. The sentenced was enhanced to imprisonment for one year.

### **Minimum Sentence**

The makers of the Code, in most cases, have prescribed merely the maximum punishment which can be imposed on offenders. In certain cases, however, along with maximum punishment, minimum punishment is also prescribed. In those cases, the court is enjoined to award minimum sentence subject to the provisions of IPC. The Code has provided minimum sentence in the following cases:

1. Murder by a life convict: Death sentence [S. 303], [S. 303 has been held unconstitutional];
2. Waging war against Government of India: Imprisonment for life [S.121];
3. Murder: Imprisonment for life [S. 302];

4. Kidnapping for ransom: Imprisonment for life [S. 364-A];
5. Use of deadly weapon or causing grievous hurt while committing robbery or dacoity: Seven years [S. 397];
6. Attempt to commit robbery or dacoity armed with deadly weapon: Seven years [S. 398];
7. Dowry death: Seven years [S. 304-B];
8. Rape: Seven years [S. 376(1)];
9. Rape of a woman below sixteen years [S. 376(1)];
10. Rape by a police officer, public servant, etc. in certain cases: Ten years [S. 376(1)];
11. Rape on pregnant woman: Ten years [S. 376(2.)];
12. Rape by a relative, teacher, etc.: Ten years [S. 376(2)];
13. Rape causing death or resulting in persistent vegetative state: Twenty years [S. 376-A].
14. Gang Rape: Twenty years [S. 376-D].

### **Habitual Offender**

A "habitual offender" is a person addicted to crime. A person is said to be "habitual offender" who by force of habit commits crimes repeatedly. There is continuity in commission of crimes by the person. It is the force of habit which makes a person habitual. Section 75 IPC provides enhanced punishment for persons who commit certain offences more than once. The Law Commission considered this provision and stated that it was an attempt to deal with the problem of habitual offenders and recidivism.

Such a provision is necessary for several reasons. It makes the offender realise that a life of crime does not pay. The enhanced sentence also gives a warning to others, who may be thinking of adopting "criminal career". It thereby serves public interest by protecting innocent people against those who violate the law of the land.

The Law Commission, however, rightly observed that there was no reason why Section 75 should have limited application to few offences (offences relating to coins, stamps or government property). It should be applied to "all serious offences under the Code". The Commission, therefore, recommended to extend Section 75 to all offences punishable with imprisonment of three or more years with certain conditions and qualifications.

### **Forfeiture of Property**

The Code makers proposed "forfeiture of property" as one of the punishments on persons guilty of high political offences. According to the Authors of the Code, the persons involved in such offences should be deprived of their property to ensure public peace.

In England, this punishment is abolished. In India also, absolute forfeiture of all property of the offender was abolished in 1921 by repealing Sections 61 and 62 of the Code. It has, however, been retained in respect of offences against State and by public servants. The Supreme Court has recently observed that the provisions of Sections 61 and 62 IPC should be reintroduced to act as a deterrent on those contemplating economic offences.

### **Fine**

Payment of fine by an offender is one of the punishments provided by IPC as also by several other statutes. Sections 63 to 70 deal with amount of fine, limit of imprisonment for non-payment of fine, termination of imprisonment on payment of fine, limitation for recovery of fine, etc. According to Macaulay, the punishment

of fine is appropriate where the offender appears to have committed a crime in greed for money or property. For a man who is found guilty of receiving stolen property or of embezzlement the fine should be so fixed as to reduce him to poverty. One of the important advantages of imposition of fine is to compensate the victim who has suffered.

Payment of fine may be the only punishment provided by law for an offence or it may be in addition or alternative to imprisonment. Where an amount of fine is specified, it is the maximum which can be imposed. Normally, the court has discretion to fix the amount of fine which it considers appropriate to meet the ends of justice. The amount of fine, however, should not be harsh, excessive or disproportionate but must be commensurate with the financial condition of the person.

### **Discarded Forms of Punishment**

Various forms of punishment which were in vogue in Ancient India have been abolished. Let us consider few of them.

#### **(a) Banishment**

Banishment or exile from the King's realm was a recognised punishment in ancient and medieval times. It was mainly imposed on King's enemies and political offenders. The Law Commission rightly stated that banishment can hardly be contemplated as a "judicial sentence". It may also be regarded as "serious violation of human right" and did not favour it.

#### **(b) Deportation**

Deportation is similar to banishment. In deportation, an offender is deported from the locality where he has committed an offence to some other place. It was also called "transportation". But it is said that deportation is hardly a solution to the problem. If a person is dangerous in one society, he is likely to be dangerous in another society also. Even from a practical point of view, it would create serious problems. It involves establishment of penal settlement in every State somewhat similar to the settlement in Andaman Islands where convicts sentenced to "transportation for life" used to be sent. It may also create problems for administration and management. The Law Commission, therefore, did not recommend punishment of deportation.

#### **(c) Externment**

The right of a citizen to reside in or to move freely in any part of the State has been recognised in all civilised societies. Under our Constitution, it is also a fundamental right guaranteed by Article 19. But such right has to yield to the larger interest of the community. In certain circumstances, therefore, a person may be ordered to remove from a particular place or locality.

In externment, a person who has committed some offence is externed or removed from such locality for a particular period. The underlying idea is that since he is dissociated from his surroundings, his capacity for committing crimes will be reduced. Certain statutes provide for externment of offenders, for example, Bombay Police Act, 1951. The Law Commission, however, did not recommend externment as a penalty under IPC.

#### **(d) Corporal punishment**

Corporal punishment included flogging, whipping, modulation, pillory, etc. Corporal punishment was common in ancient days as also in middle ages. In flogging and whipping, blows were administered to the offender. In pillory, the offender was placed in a frame with holes for head and hands and he was exposed to public ridicule. Narada Smriti, said to have been composed in the 6th century, prescribed punishment for Brahmin by shaving his head, banishing him from the town, branding him on the forehead with a mark of the crime committed by him. Punishment of donkey riding was also provided at certain places. All such punishments, however, are not acceptable to modern penology. The Law Commission did not favour corporal punishment.

## **Other Forms of Punishment**

There are, however, other forms of punishment, which may be considered appropriate and may be imposed on the offender.

### **(a) Payment of compensation**

In appropriate cases, a court of law may award compensation to the complainant for loss or injury suffered by him. The CrPC, 1973 provides for such compensation. It has also been held that the power of court to award compensation to a victim is not ancillary to other sentences but in addition thereto. This is indeed a constructive approach and a step forward in the correct direction ensuring the victim of his rights. It also helps the victim and his dependants in rehabilitation. The State may also frame a scheme or set up a Board for compensating victims of violence.

### **(b) Indefinite sentence**

In such cases, though the accused is sentenced to undergo imprisonment no time is fixed of such imprisonment. Once the accused shows improvement, he is released.

### **(c) Release on probation**

In certain cases, a court of law may release the accused on probation of good behaviour. The underlying object of such provision is to protect younger generations and first offenders from turning out to be hardened and habitual criminals.

### **(d) Detention in Reformatory School**

A court of law may also direct a youthful offender to be sent to a Reformatory or Borstal School rather than to jail.

### **(e) Admonition**

A court may let off the accused with admonition. Where an offence said to have been committed by the accused is not serious and there is no previous conviction, a court instead of sending the accused to jail may release him after admonition.

### **(f) Public censure**

One of the punishments which can be imposed on the accused is publication of his name, details of offence committed and sentence imposed on him. This is really a public censure. Where the offence affects a large number of people, public censure is likely to act as a greater deterrent than fine or even imprisonment. Few statutes expressly provide such public censure. For instance, the Prevention of Food Adulteration Act, 1954 enables the court to exercise such power. A similar provision is found in the Income Tax Act, 1961.

### **(g) Cancellation of licence**

In case a person is found guilty of committing an offence, over and above sentence imposed on him, his licence also may be suspended, cancelled or forfeited. Thus, an accused causing death of any person by rash and negligent driving may be punished to undergo imprisonment and his licence may also be forfeited or cancelled. This also works as "preventive theory" of punishment which makes the offender incapable of repeating the crime.

### **(h) Confiscation of property**

Confiscation or forfeiture to the State of all property belonging to the offender was provided by Macaulay in IPC. The punishment of confiscation was removed in 1921. The Law Commission also did not recommend

revival of this penalty. In *Sabha Suresh Jumani v. Appellate Tribunal*, however, the Supreme Court observed that the provisions relating to forfeiture of property [Ss. 61-62] should be reintroduced so as to have a deterrent effect on those who are bent upon accumulating wealth at the cost of society by misusing their position.

#### **(i) Corrective labour**

Corrective labour puts emphasis on reformation and rehabilitation of the offender instead of retribution. Where an offence committed by the accused is not very serious, by applying the doctrine of conditional discharge, instead of awarding imprisonment and depriving him of his liberty, the accused may be asked to do work at his own place or at some other place. A part of the amount may also be deducted from his wages. The main advantage of this punishment is that the accused is not deprived of his liberty nor separated from his family. He also remains outside hardened criminals. The Law Commission, therefore, recommended introducing "corrective labour" as one of the punishments to be imposed on an offender.

#### **(j) Community service**

A crime is an act against society or community, though the ultimate sufferer is an individual. Hence, where a crime has been committed by the accused, it is his duty to serve society or community. It is, therefore, the duty of the accused to "make amends" for the harm caused to the community and he may be asked to undertake "community service".

#### **Several Offences**

Sections 71 and 72. IPC lay down rules of punishment where the accused has committed more than one offence. Section 71 deals with limit of punishment and provides that where an offence is made up of several offences, or where an offence falls within two or more definitions, or where several acts, one or more of which constitute an offence, constitute a different offence when combined, the punishment to be imposed on the accused shall be for one offence only.

#### **Two illustrations under the section read thus:**

- (a) A gives Z fifty strokes with a stick, Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.
- (b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow to Y.

The illustrations make it clear that the section applies to "separable" offences and not to "distinct" offences. Section 72. declares that where a person is found guilty of one of several offences but it is doubtful of which of these offences he is guilty, he can be punished for the offence for which the lowest punishment is provided.

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## **ABETMENT**

### **Synopsis:**

- ▶ Introduction
- ▶ English Law
- ▶ Indian law
- ▶ Abetment: Meaning [S. 107]
- ▶ Essentials
- ▶ Types of abetment
  - ◆ Abetment by instigation
  - ◆ Abetment by conspiracy
  - ◆ Abetment by aid
- ▶ Abetment and common intention: Distinction
- ▶ Abetment and criminal conspiracy: Difference
- ▶ Abettor [S. 108]
- ▶ Punishment [Ss. 109-120]

### **Introduction**

Chapter V, Penal Code, 1860 (IPC) [Ss. 107--120] deals with "Abetment". It covers cases of indirect, remote or mediate participation in crimes. It is said that a criminal act is seldom possible without help, cooperation or participation of others. An offender consults, deliberates and discusses his plan to commit an offence with his friends and colleagues. "As the rich man requires a sentinel to guard his riches, so does a thief in his plans to rob them." "The more these preparatory acts are stopped, the greater the chance of preventing the execution of the principal crime."

### **English Law**

English Law makes distinction between person participating in a crime as 1) principals; and 2) accessories. Considering and keeping in view the role played by them, English Law divides offenders in four categories:

1. principal in first degree; i.e. a person who actually commits a crime;
2. principal in second degree; i.e. a person who aids, abets or assists in commission of crime;
3. accessory before fact; i.e. a person though absent at the time of commission of crime, aids, abets or instigates in commission of crime; and
4. accessory after fact; i.e. a person with full knowledge of commission of crime, harbours assists or helps him in escaping legal process.

### **Indian Law**

Though Indian law does not recognise strict classification of offenders in various categories, it seeks to distinguish principal offenders and accessories which is clear from various provisions of IPC.

Thus, over and above persons who commit crimes, others who directly or indirectly aid, assist or instigate actual offenders in committing crimes or in harbouring them are also liable for such acts. This is clear if one reads Sections 34 to 38, 107 to 149, etc.

### **Abetment: Meaning [S. 107]**

According to the dictionary meaning, "to abet" means to assist, help, cooperate, encourage, support, facilitate, etc. in commission of a crime. An abettor is thus a person who aids, instigates, assists or abets any other person in commission of a crime. Section 107 defines abetment, while Section 108 deals with a person who can be said to be an abettor. Sections 109-120 provide punishment for abetment in various offences.

### **Essentials**

Section 107 IPC states that a person abets the doing of a thing, who:

1. instigates any person to do that thing; or
2. engages in any conspiracy for doing of that thing; or
3. intentionally aids the doing of that thing.

In other words, abetment under Section 107 requires one of the following ingredients:

1. instigation;
2. conspiracy; or
3. aid.

Mens rea is an essential element for an offence of abetment. Abetment is a separate and distinct offence provided the thing abetted is an offence. "Abetment does not involve the actual commission of the crime abetted; it is a crime apart."

### **Types of Abetment**

IPC recognises three types of abetment:

- i. abetment by instigation;
- ii. abetment by conspiracy; and
- iii. abetment by aid.

#### **(a) Abetment by instigation**

"To instigate" means to incite, provoke or encourage to do an illegal act. If a person instigates another person to commit a crime, he can be held liable for an offence of abetment. Such instigation may be direct or indirect, active or passive, express or implied by conduct.

Thus, if A asks B to beat or kill C and B does such act, A may be held for an offence of abetment. But even in absence of express words, if a person by his conduct or behaviour encourages or approves an illegal act of another, he can be held liable for abetment of offence. Mere silence or presence at the place of offence does not make a person guilty of abetment. Thus, where A told B that he would kill C. B said "Do as you like". A then killed C. It was held that B cannot be held guilty of abetment. Explanation I to Section 107 exacts that where a person who 1) by wilful misrepresentation, or 2) by wilful concealment of a material fact which he is bound to disclose voluntarily causes a thing to be done, he is said to instigate the doing of that thing.

The illustration to the Explanation makes the legal position clear. A, a public officer is authorised by a warrant from a court of justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. B shall be held guilty of abetment for arrest of C.

As to what would constitute instigation for commission of an offence would depend upon the facts and circumstances of each case.

### **(b) Abetment by conspiracy**

Where a person engages with one or more other persons in any conspiracy for committing a crime and a crime is committed in pursuance of such conspiracy, the person can be said to have committed an offence of abetment.

Thus, where A, servant of X allowed B, C, D thieves to enter the house of X by keeping the doors open and to take away valuables from such a house, he can be held guilty of abetment by conspiracy for the offence of theft.

### **(c) Abetment by aid**

A person abets the doing of a thing when he intentionally aids, assists or helps in doing such thing.

Explanation 2 to Section 107 states that whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby helps in the commission thereof, is said to aid the doing of that act.

The words "intentionally aids" require active complicity in the mere presence at the time of commission of crime is not enough.

Thus, a priest, who officiated a bigamous marriage was held guilty of intentionally aiding in commission of an offence but not the persons who were merely present at the time of such marriage.

### **Abetment and Common Intention: Distinction**

Section 107 IPC deals with abetment while Section 34 relates to common intention. Though both the provisions deal with vicarious liability, there is difference between the two.

### **Abetment and Criminal Conspiracy: Difference**

Clause 2 of Section 107 provides for abetment by conspiracy while Section 120-A applies to criminal conspiracy.

The distinction between abetment by conspiracy and criminal conspiracy lies in the fact that in the former mere combination of persons or an agreement between them to do an illegal act is not enough and there must be such illegal act or omission. In the latter, however, mere agreement is enough and is an offence. A charge under Section 107/109 should be in combination with a substantive offence. It is, however, not necessary in case of criminal conspiracy. Criminal conspiracy under Section 120-A is punishable under Section 120-B.

Again, in abetment by conspiracy, the abettor will be liable to punishment under varying circumstances laid down in Sections 109 to 120, criminal conspiracy is punishable under Section 120-B.

### **Abettor [S. 108]**

Section 108 IPC defines an abettor. According to this provision, a person is an abettor:

1. who abets the commission of an offence; or
2. who abets the commission of an act which would be an offence if committed by a person capable of committing such offence.



*Explanation 1* relates to illegal omission. It enacts that abetment of illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Thus, A, a private person, instigates B, a police officer, to illegally abstain from duty to prevent commission of cognizable offence which was being committed in presence of B. Though A cannot be held guilty of commission of the offence of illegal omission, he can be held guilty as an abettor.

*Explanation 2* declares that the effect of abetment is immaterial. The offence of abetment is complete even if the person abetted refuses to do the thing.

*Illustrations to Explanation 2* explains this principle. "A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder". "A instigates B to murder D. B in pursuance of the instigation stabs D. D survives. A is guilty of instigating B to commit murder."

*Explanation 3* clarifies that the person abetted need not be capable of committing an offence. It is, therefore, not necessary that the person abetted must have mens rea (guilty mind) or knowledge. The emphasis is on the intention of the abettor and not on the person abetted. Illustrations to the Explanation make this position clear.

- (a) A, with a guilty intention, abets a child or lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.
- (b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death.

Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

*Explanation 4* deals with abetment of an abetment. It states that abetment of an offence being an offence, the abetment of such abetment is also an offence.

Thus, where A instigates B to instigate C to murder Z and B accordingly instigates C to murder Z and C commits that offence in consequence of B's instigation, B is liable to be punished.

*Explanation 5* says that the abettor need not be directly involved in the offence sought to be committed. Illustration to *Explanation 5* reads thus:

A conspires with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.

Section 108-A states that a person will be guilty of abetment if he abets commission of any act outside India which if done in India would constitute an offence.

### **Punishment [Ss. 109-120]**

Sections 109 to 120 provide punishment for different types of abetment. The said provisions may be summarised thus:

1. **If the act abetted is committed but there is no express provision for its punishment, then it shall be punished with the punishment provided for the offence abetted [S. 109].**
2. **If the person abetted does the act with different intention or knowledge from that of the abettor, the abettor shall be punished as if the act had been committed with the intention or knowledge of the abettor [S. 110].**
3. **If the act done is different from the one abetted, still the abettor shall be punished for the act done if it is a probable consequence of the abetment [S.111].**
4. **If the effect caused by the act abetted is different from the one intended by the abettor, still the abettor shall be punished for the effect caused if it was known to the abettor to be likely to be caused [S. 113].**
5. **If the act committed is other than the act abetted and in addition to the act abetted, the abettor is liable to cumulative punishment [S. 112].**
6. **If the abettor is present when the offence abetted is committed, he is deemed to have committed such act [S. 114].**
7. **Sections 115 to 117 prescribe punishment by special offences referred to therein where no offence has been committed in consequence of abetment, or committed only in part.**
8. **Sections 118 to 120 provide for punishment for concealment of design to commit offences.**

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## CRIMINAL CONSPIRACY

### Synopsis:

- ▶ Introduction
- ▶ Object
- ▶ Criminal Conspiracy: Definition [S. 120-A]
  - ◆ Ingredients
    - ◆ Two or more persons
    - ◆ Agreement
- ▶ Illegal act or legal act by illegal means
- ▶ Mens Rea (Guilty Mind)
- ▶ Criminal Conspiracy and Common Intention: Distinction
- ▶ Criminal Conspiracy and Abetment: Difference
- ▶ Overt Act: Whether Necessary
- ▶ Proof
- ▶ Punishment [S. 120-B]

### Introduction

Chapter V-A consists of two sections only, i.e. Sections 120-A and 120-B. It has been inserted by the Criminal Law (Amendment) Act, 1913. Section 120 -A defines "criminal conspiracy" while Section 120-B prescribes punishment. Criminal conspiracy under Chapter V-A is now a substantive offence. "Contrary to the usual rule that an attempt to commit a crime merges with the completed offence, conspirators may be tried and punished for both the conspiracy and the completed crime."

### Object

Before insertion of Chapter V-A, conspiracy per se was not an offence under Penal Code, 1860 (IPC). Under the English Law, however, it was an offence. In Halsbury's Laws of England, it is stated:

Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law.....

### Russel also stated:

The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting the others to do them, but in the forming of the scheme or agreement between the parties.

Sections 120-A and 120-B have brought IPC in line of English Law by making criminal conspiracy punishable without any overt act on the part of the persons entering into such conspiracy.

### Criminal Conspiracy: Definition [S. 120-A]

Section 120-A defines "criminal conspiracy". It states, "when two or more persons agree to do, or cause to be done 1) an illegal act, or 2) an act which is not illegal by illegal means, such an agreement is designated as criminal conspiracy."

## **Ingredients**

For proving criminal conspiracy, the following ingredients must be present:

- i. there must be two or more persons;
- ii. they must have entered into an agreement; and
- iii. such agreement must be:
  - (a) for doing an illegal act; or
  - (b) for doing a legal act by illegal means.

### **(a) Two or more persons**

For an offence of criminal conspiracy, the first requirement is that there should be two or more persons who should have entered into an agreement. One person alone cannot conspire with himself and agree to do an illegal act or legal act by illegal means. It has, therefore, been held in several cases that a single person cannot be held guilty for offence of criminal conspiracy. But it has also been held that where there is evidence to show that two or more persons were engaged in a conspiracy, one alone can be convicted and it is not necessary that others also must have been convicted.

### **(b) Agreement**

The second ingredient is agreement between the persons. The gist of the offence of conspiracy is an agreement to do an illegal act or to do a legal act by illegal means. The essence of the offence of criminal conspiracy is that there should be an agreement between two or more persons to do an unlawful actor a lawful act by unlawful means. There should be meeting of minds, common design or common intention on the part of all entering into agreement. Such agreement may be express or implied, or partly express and partly implied. It may also be inferred by conduct of parties. It is not necessary that each conspirator should be aware of all details of conspiracy nor everyone should take active part in commission of every act. It is also not necessary that each and every conspirator should be present at the place of occurrence. If all have agreed to the common design and have not resiled from the agreement, it can safely be presumed that they were members of such conspiracy and can be held guilty.

Mere knowledge, however, is not enough to hold the person guilty. Criminal conspiracy requires more than mere passive attitude towards existing conspiracy. One who commits an overt act or tacitly consents or facilitates an illegal act may be held guilty. But to constitute criminal conspiracy, there must be evidence to indicate that the accused was in agreement with other accused to do the illegal act. As has been said, the meeting of minds of two or more persons to do an illegal act or a legal act by illegal means is sine qua non of the offence of criminal conspiracy.

### **(c) Illegal act or legal act by illegal means**

The third ingredient of criminal conspiracy is that the agreement must be to do illegal act or legal act by illegal means. The expression "illegal" is defined in Section 43 IPC to mean "everything which is an offence or which is prohibited by law or which furnishes ground for a civil action".

Explanation to Section 120-A clarifies that it is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object.

Thus, an agreement to commit a crime or an offence or to commit an act prohibited by law would be covered by this section. Likewise an act of tort or even breach of contract is also illegal under this section read with Section 43. The section also states that there will be criminal conspiracy if there is an agreement to do an act which itself may not be illegal or which may be lawful but if it is done by illegal means. This is based on the principle that the end cannot justify the means.

## **Mens Rea (Guilty Mind)**

Mens rea is an essential element for the offence of criminal conspiracy. It has been said that like several crimes, criminal conspiracy also requires: 1) an act (actus reus); and 2) guilty mind (mens rea). So far as mental state (mens rea) is concerned, two elements necessary are: 1) intent to agree; and 2) intent to promote unlawful object of conspiracy. "It is intention to promote a crime that lends conspiracy its criminal cast."

## **Criminal Conspiracy And Common Intention: Distinction**

There is no substantial difference between criminal conspiracy and common intention. In both the offences, there is an agreement to commit a crime. Yet they are not one and the same.

Section 34 (common intention) is merely declaratory while Section 120-B (criminal conspiracy) is a substantive offence. Again, in criminal conspiracy, the gist, of offence is bare agreement, while in common intention, the gist of offence is commission of crime in furtherance of common intention.

## **Criminal Conspiracy and Abetment: Difference**

Though both the offences of criminal conspiracy and abetment are closely connected, their ambit and scope is different. Criminal conspiracy is somewhat wider in amplitude than abetment inasmuch as criminal conspiracy is itself a substantive offence and requires nothing more or overt act while abetment requires an illegal act. Again, in case of abetment, the abettor is liable to be punished under Sections 109 to 120 while criminal conspiracy is punishable under Section 120-B IPC.

## **Overt Act: Whether Necessary**

Proviso to Section 120-A IPC declares that no agreement, except an agreement to commit an offence, would amount to criminal conspiracy unless there is some overt act by one or more persons to such agreement. No such overt act, however, is necessary if the act itself is an offence. In other words, when the agreement is to commit an offence, the agreement itself becomes an offence without any overt act. But where the act itself is not illegal but such act is agreed to be done by illegal means, overt act is necessary.

## **Proof**

Criminal conspiracy must be proved by the prosecution by leading evidence, direct or circumstantial. But conspiracies are not hatched in the open. Direct evidence of criminal conspiracy, hence, is seldom available. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. A person may carry out his part of conspiracy without even informing co-conspirators. Since there can rarely be direct proof, conspiracy may be inferred from circumstantial evidence of cooperation between the accused and from the acts of parties to such conspiracy. The surrounding circumstances taken together on their face value must indicate meeting of the minds between the conspirators for the intended object of committing an illegal act or a legal act by illegal means. Circumstances before, during and after the occurrence and conduct, antecedent and subsequent are indeed relevant factors in determining criminal conspiracy. Cumulative effect of all the circumstances have to be considered in determining the question.

Criminal conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice or by necessity.

## **Punishment [S. 120-B]**

Section 120-B of the Code prescribes punishment for criminal conspiracy. It classifies the offence of criminal conspiracy in two categories. The first category consists of serious crimes where the offences are punishable with death, imprisonment for life or rigorous imprisonment for two years or more. In such cases, the person (conspirator) shall be punished in the same manner as an abettor, i.e. as if he had abetted the offence. In other cases, i.e. cases which are not of a serious nature, the person (conspirator) shall be punished with imprisonment up to six months or with fine or with both.

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## **CORPORATE LIABILITY**

### **Synopsis:**

- ▶ **Criminal Liability of a Corporation**
- ▶ **Evolution of corporate criminal responsibility**
- ▶ **Section 16 Offences by Companies**

### **Criminal Liability of a Corporation**

Originally, the prevalent view was that a corporation or a body incorporate, which is separate legal entity, cannot be charged of offences because of procedural difficulties. The obvious reasons were that a corporation could not be either arrested or compelled to remain present during criminal proceedings. It, owing to the absence of 'mind', could not form the required 'intention' to commit a crime. No bodily punishment could be inflicted on it. 'A corporation is devoid not only of mind but also of body, and therefore it was incapable of the usual criminal punishment'. 'Can you hang its common seal?', asked an advocate in England during the Rule of James II in 1682. They do not have a soul to be condemned or a body to be hanged. It was believed to be atrocious to send a member of a corporation to send jail or punish simply because he was its member when the corporation it committed a 'crime'.

### **Evolution of corporate criminal responsibility**

The evolution of corporate criminal responsibility is a striking instance of judicial change in law. The non-liability of a corporation soon gave way to the idea that it can be made liable for non-feasance, ie an omission to act. If a statutory duty is cast upon a corporation or a body incorporate, and not performed, the corporation or body incorporate can be convicted of the statutory offence. Over the decades, this principle has been well established. Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, enunciating the so-called alter ego or organic theory of the corporate criminal liability, observed:

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation- The Board of Directors are the brains of the company which is the body, and the company can and does act only through them.

In modern times, intent of managers and agents of a corporation is attributed ID the corporation. A governing body of a corporation is its alter ego. A corporation, therefore, can be held criminally responsible for committing an offence by a 'person' who, at the relevant time, was 'the directing mind and will' of the corporation. Lord Reid, while delving into the question of criminal liability of a corporation, has ruled, rather constructed a contemporary principle of criminal liability of a corporation premised on the alter ego theory, as under:

A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these; it must act through a living a person, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his act is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persons of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

Courts in India have also taken a similar position. In *State of Maharashtra v Syndicate Transport Company Ltd* the Bombay High Court did not see any reason for exempting a corporate body from liability for crimes committed by its directors, agents or servants while acting for or on behalf of the corporation. Recently in 2004, the Supreme Court of India, delving into the question as to whether a company can be held criminally responsible by attributing it the mens rea of those who work or are working for it, has also unequivocally endorsed that the alter ego theory is applicable in India. It held that mens rea of the persons in-charge of the affairs of a corporation can be imputed to the corporation for imposing liability on it.

However, a corporation cannot be convicted for the offences, which by nature, cannot be committed by a corporation but can only be committed by an individual human being (eg sexual offences, bigamy, perjury, murder, treason). Similarly, it cannot be held criminally liable for committing the offences that are punishable only by mandatory corporal or capital punishment, as a corporation obviously cannot be subjected to such a punishment. The Supreme Court, by majority, ruled that a court cannot impose criminal liability on a corporation if penal provision provides for imprisonment only or a minimum term of imprisonment plus fine.

In this regard, it may be noted that in most social legislations like the Essential Commodities Act 1955, the Prevention of Food Adulteration Act 1954, the Negotiable Instruments Act 1881, the Environment (Protection) Act 1986 and so on which provide that at the time of the commission of the offence, the company, as also every person who was responsible for the conduct or business of the company, shall be deemed to be liable for the offence, and if found guilty, they could be punished, not only with fine, but imprisonment as well. The typical provision is as the following provision from the Environment (Protection) Act 1986 shows:

**Section 16 Offences by Companies-** (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of, the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Even a plain reading of the provision reveals that apart from the company itself, every officer who was responsible for the management and day-to-day affairs shall be deemed guilty and liable to be punished accordingly. An important change introduced in these statutory offences is the shifting of the burden of proof from the prosecution to prove the charge or accusation, to the persons accused of committing the crime by virtue of the fact that they played a crucial role in the administration and management of the company. Thus, there is a presumption of guilt in respect of persons who are in charge of the company and the burden on the accused to show that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence.

As the Supreme Court pointed out in *Uttar Pradesh Pollution Control Board v Modi Distillery* the second clause of s 47 of the Water (Prevention and Control of Pollution) Act 1974, (which is identical to s 16 of the Environment Protection Act) is a non-obstante clause, which provides expressly, that notwithstanding anything contained in sub-sec (1), where an offence has been committed by a company, and it is proved that the offence has been committed with the consent or connivance of or attributable to the negligence of any officer of the

company, irrespective of whether the person was a director, manager or other officer, shall also be deemed to be guilty and liable to be punished. Thus, the company itself, as also its individual persons or other officers responsible for the affairs of the company, would be liable for prosecution. In that case, proceedings had been launched against the managing director and other directors of Modi Distilleries without making the company itself a party. The Supreme Court held that this was not an incurable defect in the complaint lodged before the relevant court, and directed the Chief Judicial Magistrate, Gaziabad, before whom the prosecution had been initiated, to issue afresh process to the respondents, after permitting the company also to be impleaded as an accused in the complaint filed by the UP Pollution Control Board. It is now more or less settled law that in all the special enactments, the company as well as its officers responsible for its management are equally liable for the violation of any law. Now, the Supreme Court has gone to the extent of stating that it is open to prosecute the directors or persons in charge of the company without prosecuting the company as such.

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## JOINT AND CONSTRUCTIVE LIABILITY

### Synopsis:

- General principle
- Common Intention : Section 34
- Common intention and common object: Difference
- Common intention and same or similar intention: Comparison
- Common intention and abetment: Distinction
- Common intention and criminal conspiracy: Comparative scope
- Evidence and proof

### General principle

The general principle in respect of criminal liability is that a person is responsible for what he himself has done and he cannot be held liable for an act which he has not committed but has been committed by someone else. In other words, the doctrine of "vicarious liability" or "constructive liability" which has been accepted under the law of tort cannot be imported in the administration of criminal justice.

### Exceptions

The above doctrine, however, is not absolute or unqualified. There are several exceptions to this rule. Thus, a person may be held criminally liable for acts not committed by him but committed by others in certain circumstances if it is proved that he also participated directly or indirectly, actively or passively or in furtherance of common intention, common object or in conspiracy of committing an offence, or by abetting the other person to commit an offence.

The IPC recognises this principle and holds a person vicariously or constructively liable in certain cases:

1. where the offence is committed in furtherance of common intention [S. 34];
2. where the offence is committed in prosecution of common object [S. 149];
3. where a person is found guilty for abetment [S. 109];
4. where a person is found guilty for committing offences for waging war, etc. [S.121-A]
5. where a person is found guilty for criminal conspiracy [S. 120 -B];
6. where a person is found guilty for commission of dacoity with murder [S. 396];
7. where a person is found guilty for committing an offence of house-breaking [S. 460]; etc.

### Common Intention : Section 34

Section 34 IPC reads thus:

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

Section 34 recognises the principle of vicarious as also joint liability in criminal jurisprudence which is an exception to the general rule that every person is liable only for his acts and not for acts of others. It makes a person liable for an offence not actually committed by him but by another person with whom he had shared

common intention. It is a rule of evidence and does not create a substantive offence. It enacts that where two or more persons commit a crime in furtherance of common intention, it is the same as if each of them had committed it individually. This provision has been made with a view to meet cases in which it may be difficult to distinguish between the acts of individual members of a party who have acted in furtherance of common intention of all or to prove exactly what part was played by each of them.

It has been said that many crimes would be impossible without the cooperation of others. A criminal act is seldom possible without help, cooperation or assistance of colleagues. A person committing a crime does not possess the same degree of confidence unless he has friends, advisers and accomplices to consult, suggest, support and assist him in his nefarious act. Presence of "partners in crime" thus gives encouragement, support, assurance and certainty to the person committing a crime.

The underlying object of Section 34 is to prevent miscarriage of justice wherein all persons are responsible for commission of the offence in furtherance of common intention shared by them. If, in such cases, the above rule is not applied, there will be failure of justice and confidence of common man in the legal system will be shaken.

For instance, if A and B tie a rope around the neck of C and pull opposite ends of the rope till he is dead, each can be held liable for the ultimate act, i.e. death of the victim. If each of them is held liable for his act only, each can successfully contend that the prosecution had at the most proved an attempt to kill C which might or might not have succeeded. Thus, both of them (A and B) will be acquitted of murder, and will only be convicted of an attempt to commit murder although the victim was killed by them.

Section 34 embodies the ordinary common sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. The principal object of Section 34 is to do justice in those cases wherein exact share of one of several offenders cannot be ascertained, though culpability of each is clear and identical.

In the leading case of *Barendra Kumar Ghosh v. King Emperor*, a postmaster was killed by three persons in furtherance of common intention by all. C was in courtyard outside the room and had not participated in firing, i.e. the commission of actual crime. C, therefore, contended that he could not be convicted for an offence punishable under Section 302 read with Section 34 IPC. The contention, however, was negated by the Privy Council. Their Lordships of the Judicial Committee held that once it is proved that the act was committed in furtherance of common intention of all, Section 34 gets attracted and all could be held liable irrespective of their individual act. In crimes as in life, they also serve who only stand and wait.

### **Conditions**

For the application of Section 34, the following conditions must be fulfilled:

- i. there must be two or more persons;
- ii. they must have done a criminal act;
- iii. such act must have been done in furtherance of common intention; and
- iv. there must be participation by all of them in doing such an act.

If the above conditions are satisfied, all the persons would be liable for the criminal act done by them. It is not necessary for the application of Section 34 that any overt act must be done by all persons. "Criminal sharing, overt or covert, by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of Section 34."

For invoking Section 34, it is not necessary that each and every person forming common intention to commit a criminal act must be actually or physically present at the place of occurrence or must have actively participated in the commission of crime. A person may not be present at the scene of offence. He may stand guard outside the place of occurrence either to warn his "partners in crime", or to take them safely after the "act" is over, or to facilitate in doing of criminal act by preventing any help from outside quarters or by ensuring performing of "act" by his companions or their escape. He must, however, have participated in the commission of the crime, one way or the other. Such participation may be active or passive, direct or indirect, overt or covert. To attract the doctrine of common intention, it is enough if it is shown that all the persons shared common intention to commit an offence and in furtherance thereof each one played his role by doing some act, similar or diverse.

### **Common intention and common object: Difference**

Section 34 deals with "common intention" while Section 149 speaks of "common object". There is some similarity in both the concepts. Both of them provide for constructive or vicarious criminal liability for acts of others. Both the provisions relate to combination of persons who are liable as sharers in commission of offence. They have certain resemblance. Sometimes they overlap also. But there is clear distinction between the two and furtherance of common intention cannot be equated with pursuit of common object.

The main points of difference between "common intention" and "common object" may be summarised thus:

1. Section 34 speaks of "common intention" whereas Section 149 deals with "common object". "Common intention" is different from "common object".
2. Section 34 is explanatory or declaratory in nature and does not create a substantive or an independent offence. Section 149, on the other hand, is substantive in nature and lays down a rule of criminal liability which creates a specific offence as a member of unlawful assembly.
3. For application of Section 34, there should be two or more persons (which may also be less than five). Section 149 applies where there are at least five persons (i.e. five or more).
4. While Section 34 requires actual participation in crime, no such participation is necessary in Section 149. Mere presence as a member of unlawful assembly with common object to commit an offence is enough.
5. Common intention presupposes pre-arranged plan, prior concert or meeting of minds. It is, therefore, generally, anterior to the commission of crime. Common object, however, does not require prior concert, meeting of minds or pre-arranged plan. Common object may be formed at the spur of the moment or on the spot.
6. In common intention, liability is joint, direct or primary, while in common object, the liability is vicarious, constructive or indirect.

### **Common intention and same or similar intention: Comparison**

Common intention also differs from same or similar intention. The distinction between the two though fine is nonetheless real and substantial. Common intention implies prior meeting of minds of the persons participating in the act and prearranged plan to bring about a particular result. Such meeting of mind or prearranged plan is not necessary in case of same or similar intention.

For instance, A and B, common enemies of C suddenly happen to meet at a place where they see C and start giving blows to him independently without prior concert or meeting of minds and kill him. In this case, murder of C cannot be said to have been committed by A and B in furtherance of "common intention" though the act is done with same (or similar) intention. Resultantly, each of them (A and B) will be liable individually for the acts committed by them.

### **Common intention and abetment: Distinction**

Section 34 deals with common intention while Section 107 relates to abetment. Section 34 requires participation in crime while in abetment, there is no such participation by the abettor. An abettor is a person who does not himself commit a crime but aids, instigates or encourages another person to commit a crime. In abetment, the person committing an offence is different than the person aiding, abetting or instigating to do such criminal act.

Under Section 34, all accused are "principal" offenders. In abetment, however, an abettor does not commit "criminal act" and as such, he is known as "principal in the second degree". Whereas Section 34 demands closer association and participation in actual commission of crime and is punished jointly, directly or primarily; in abetment, the abettor does not himself commit an offence but aids, instigates or encourages another person to commit offence. The abettor is, hence, punished for abetment, not as principal offender but as abettor by applying legal fiction. He need not be present at the scene of offence. In abetment, liability arises as soon as abetment (pure and simple) is proved even though no offence has been committed. No liability under Section 34 arises unless the offence is committed in furtherance of common intention. Whether the accused had played the role of principal offender or of mere abettor is a question of fact, which can be decided on the basis of evidence before the court.

### **Common intention and criminal conspiracy: Comparative scope**

Section 34 deals with common intention. Sections 120-A and 120-B relate to criminal conspiracy. There is no substantial difference between criminal conspiracy and common intention. In both, there is an understanding to commit a crime. Yet both (common intention and criminal conspiracy) are different. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. In common intention, an offence has been committed in furtherance of such intention.

Section 34 is merely declaratory and does not constitute an offence. Section 120-B is itself an offence. Mere hatching of criminal conspiracy is punishable. Thus, under Section 34, no offence can be said to have been committed by any accused unless criminal act has been done by two or more persons in furtherance of common intention. Under Section 120-B, however, once there is an agreement between two or more persons amounting to criminal conspiracy as defined in Section 120-A, the persons who have entered into such agreement are guilty of an offence and they will be punished under Section 120-B even if their agreement does not result in commission of crime.

### **Evidence and proof**

To invoke Section 34, the prosecution must prove beyond reasonable doubt that the criminal act committed by two or more persons was in furtherance of common intention of all. Direct proof of common intention, however, is seldom available. It is difficult, if not impossible, to procure direct evidence of common intention. Such intention, in the circumstances, can be gathered or inferred from the surrounding circumstances appearing from the proved facts. In other words, totality of circumstances should be considered in arriving at a conclusion whether all the persons who had committed an offence had common intention to commit such offence.

The inference as to common intention may be gathered from various circumstances, such as, the manner in which two or more persons arrived at the place of occurrence, weapons possessed and used by them, mounting of attack on the victim, part or parts of the body chosen on which injuries were inflicted, determination and concert with which the beating was given or blows were administered, acts done by others to assist those causing injuries, conduct subsequent to the commission of offence, for instance, leaving the scene of offence together, etc. Existence of common intention is a question of fact to be proved on the basis of available evidence. There cannot be uniform, inflexible or invariable rule applicable to all cases and each case has to be decided on its own facts.

## **UNIT-II**

### **GENERAL OFFENCES**

#### **Synopsis**

- ▶ Offences against State
- ▶ Offence against Public Peace
- ▶ Offence against Election
- ▶ Offence relating to Religion
- ▶ Offence against Public Justice

The provisions of the Indian Penal Code could be classified under two broad heads: 1) general principles of criminal law; and 2) specific offences / General offences. General offences against State, Offence against Public Peace, Offence against Election, Offence relating to Religion, Offence against Public Justice are classified in UNIT -II.

#### **OFFENCES AGAINST STATE [Ss. 121-130]**

#### **Synopsis:**

- ▶ Introduction
- ▶ Waging war against Government of India
  - ◆ Principle
  - ◆ "Waging war": Meaning
  - ◆ Nature and scope
- ▶ Waging war against friendly countries
- ▶ Assaulting high dignitaries
- ▶ Sedition
  - ◆ Statutory provision
  - ◆ "Sedition": Meaning
  - ◆ Nature and scope
  - ◆ Historical background
  - ◆ Constitutional validity
  - ◆ Criticism of government
  - ◆ Insult to national anthem, national flag, etc.
- ▶ Harboursing State prisoners

## **Introduction**

Chapter VI [Ss. 121-130], Penal Code, 1860 (IPC) deals with offences against State. The offences may broadly be discussed in the following categories:

- i. Waging war against the Government of India: Sections 121 to 123;
- ii. Waging war against friendly countries: Sections 125 to 127;
- iii. Assaulting high dignitaries: Section 124;
- iv. Sedition: Section 124-A; and
- v. Harboursing State prisoners: Sections 128 to 130.

## **Waging war against Government of India**

### **Principle**

Section 121 IPC states that whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life, and shall also be liable to fine.

### **"Waging war": Meaning**

The expression "waging war" has not been defined in IPC. It undoubtedly means "waging war in the manner usual in war". But the phrase has many shades and colours. The concept of war under Section 121 should not be understood in a narrow or strict sense, i.e. in the international sense of inter-country war involving military operations by and between two or more hostile countries. Apart from legislative history and decisions of various High Courts during the pre-independence days, illustration to Section 121 itself makes it clear that "war" contemplated by the section is not conventional war between two nations or sovereign entities.

Illustration to Section 121 recites: "A joins an insurrection against Government of India. A has committed the offence defined in this section".

### **Nature and scope**

In *State (NCT of Delhi) v. Navjot Sandhu* (popularly known as the Parliament Attack case), terrorists entered and attacked Parliament House at New Delhi. The Supreme Court held that it amounted to waging war against the Government of India and thereby they had committed an offence punishable under Section 121 IPC.

Section 121 also applies to an attempt to wage war as also to abetting waging war. Section 121-A makes conspiracy to wage war punishable. Section 122 applies to cases of collecting arms, ammunition as also preparations to wage war. Section 123 covers cases of concealment of design to wage war if the intention of such concealment is to facilitate waging war. In the Parliament Attack case, the plan of conspirators was concealed by the accused. Holding that such information ought to have been disclosed to the police, the Supreme Court convicted the accused under Section 123 IPC.

### **Waging war against friendly countries**

Sections 125 to 127 seek to promote friendly relations and peaceful co-existence with neighbouring countries. This is in consonance with general principles of International Law. Article 51 of the Constitution of India also enjoins the State to endeavour to promote international peace and security, maintain just and reasonable relation between nations, foster respect for international law, encourage settlement of international disputes by arbitration, etc.

Section 125 makes it an offence to wage war against the government of a friendly State. Section 126 makes deprecation punishable. Section 127 attempts to prevent persons from knowingly receiving property obtained by waging war against friendly countries.

### **Assaulting high dignitaries**

Section 124 makes assault or wrongful restraint on high dignitaries (President of India, Governor of State, etc.) an offence. The Law Commission suggested change in this provision and recommended to include other high dignitaries also such as Vice President, Speakers, Chief Justices, etc.

### **Sedition**

#### **Statutory provision**

Section 124-A, as inserted by Act 27 of 1870 defines "sedition". It is interesting to note that though the marginal note refers to this expression, the word "sedition" does not find place in the body of section.

Section 124-A reads thus:

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

*Explanation 1-* The expression "disaffection" includes disloyalty and all feelings of enmity.

*Explanation 2-* Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

*Explanation 3-* Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.]

#### **"Sedition": Meaning**

According to dictionary meaning, "sedition" means incitement of discontent or rebellion against government established by law; any action, especially in speech or in writing promoting such discontent or rebellion. It is disloyalty in action or revolt against legitimate authority.

#### **Nature and scope**

Sedition is a crime against the State or society nearly allied to treason. The difference between sedition and treason is that the former contains preliminary steps while the latter entails overt act for carrying out the plan. Sedition thus frequently precedes treason by a short interval.

Sedition induces discontent and insurrection by inciting people to rebellion. It is disloyalty in action. Such activities create public disorder leading to civil war and bringing hatred and contempt against the sovereign government. No government established by law can afford threat to its existence by secessionist activities.

#### **Historical background**

It is true that the section has been enacted during the British regime. It is also true that it has been said that the offences included in Chapter VI IPC had "the flavour of the approach of Empire builders". It also cannot be denied that "torch bearers" of movement of national independence like Bal. Gangadhar Tilak, Mahatma Gandhi

and several others were not only tried under these provisions but were convicted. But it also cannot be disputed that "every State, whatever its form of Government, has to be armed with the power to punish those who by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder".

### **Ingredients**

Before Section 124-A is invoked, the following conditions should be satisfied:

1. bringing or attempting to bring into hatred;
2. exciting or attempting to excite dissatisfaction;
3. such act should be done (a) by words, spoken or written; or (b) by signs; or (c) by visible representation; or (d) otherwise; and
4. such act must have been done against the government established by law.

### **Constitutional validity**

The provisions of Section 124-A are constitutional and do not violate the fundamental right guaranteed by Article 19(1)(a) of the Constitution of India.

In *Kedar Nath v. State of Bihar*, the Constitution Bench of the Supreme Court held that Section 124-A imposes reasonable restrictions on the fundamental freedom of speech and expression. It was observed that the provisions of law read as a whole along with Explanations make it reasonably clear that they aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence.

The Explanations appended to the section make it clear that criticism of public measures or comment on government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, signs, etc. which have the pernicious tendency or intention creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. Thus, the section strikes a just and correct balance between individual fundamental rights of the citizen and larger public interest.

### **Criticism of government**

Article 19(1)(a) of the Constitution of India guarantees freedom of speech and expression. Article 19(2) imposes reasonable restrictions on such right.

It is, therefore, clear that every citizen has the right to criticise government. Explanations 2 and 3 of Section 124-A IPC allow disapprobation of measures of government with a view to obtain their alteration by lawful means without exciting hatred, contempt or dissatisfaction.

While upholding the constitutional validity of Section 124-A, in *Kedar Nath v. State of Bihar*, the Supreme Court held that the two Explanations (Explanations 2 and 3) make it clear that criticism of public measures or comment on government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words have the intention of creating disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order.



### **Insult to national anthem, national flag, etc.**

In *Bijoe Emmanuel v. State of Kerala*, certain children were expelled from school since they refused to join in singing the national anthem. The Supreme Court held that the expulsion violated the fundamental right guaranteed under Article 19(1)(a) of the Constitution of India.

The Law Commission of India had rightly suggested insertion of Section 124-B providing insult to Constitution of India, national flag and national anthem punishable. The salutary suggestion, however, has not been implemented so far.

### **Harbouring State prisoners**

Sections 128 to 130 deal with offences of harbouring of prisoners of war or State prisoners. They are aggravated forms of offences of harbouring or allowing escape of culprits.

Whereas Section 128 applies to cases where a public servant voluntarily allows prisoners of war or State prisoners to escape from custody, Section 129 operates in cases where such escape is due to negligence of a public servant. Section 130 covers cases of aiding or assisting or escaping such prisoners.

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**OFFENCES AGAINST PUBLIC TRANQUILLITY / OFFENCE  
AGAINST PUBLIC PEACE [Ss. 141-160]**

**Synopsis:**

- ▶ Introduction
- ▶ UNLAWFUL ASSEMBLY
  - ◆ Definition
  - ◆ Ingredients: Essentials
  - ◆ Five or more persons
  - ◆ Common object
  - ◆ Common object and common intention: Difference
  - ◆ Unlawful objects
  - ◆ Vicarious liability
  - ◆ Substantive offence
  - ◆ No overt act necessary
  - ◆ Proof
  - ◆ Duty of court
  - ◆ Mere presence: Whether culpable?
  - ◆ Conviction of less than five persons
  - ◆ Alteration of conviction under Sections 149 to 34
  - ◆ Sentence
- ▶ RIOTING
  - ◆ "Riot": Meaning
  - ◆ "Rioting": Definition
  - ◆ Ingredients
  - ◆ Riot and unlawful assembly: Difference
  - ◆ Force or violence
  - ◆ Punishment
  - ◆ Other forms of rioting
- ▶ AFFRAY
  - ◆ Meaning
  - ◆ Definition
  - ◆ Ingredients
  - ◆ Affray and riot: Difference
  - ◆ Penalty

## **Introduction**

Chapter VIII [Ss. 141-160] deals with "group offences", i.e. offences committed by a group of persons which disturb public tranquillity or cause breach of peace. The offences enumerated in this chapter may be classified under the following heads:

- i. Unlawful assembly: Sections 141 to 145; 149 to 151; 157 and 158;
- ii. Rioting: Sections 146 to 148; 152 to 156;
- iii. Affray: Sections 159 and 160; and

## **UNLAWFUL ASSEMBLY**

### **Definition**

Section 141 of the Code defines "Unlawful Assembly". It reads thus:

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

*First-* To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

*Second-* To resist the execution of any law, or of any legal process; or

*Third-* To commit any mischief or criminal trespass, or other offence; or

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

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

*Explanation-* An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

### **Ingredients: Essentials**

In order to constitute an unlawful assembly, the following ingredients must be satisfied:

- i. there must be five or more persons; and
- ii. the common object of the assembly must be one or the other acts mentioned in Section 141.

### **Five or more persons**

The first condition to constitute an assembly as "unlawful assembly" is that it should consist of five or more persons.

If there is no finding that there were five or more persons in the assembly, the assembly cannot be termed as "unlawful assembly". It is, however, not necessary that all the members of the assembly should be identified. Even if some of the members are not identified but a finding is recorded that there were five or more members, it can be said that there was an unlawful assembly. But in absence of such finding, the charge as to unlawful assembly cannot be sustained if there are less than five persons.

## **Common object**

The second equally important ingredient of unlawful assembly is that the common object of the persons comprising such assembly is as specified in one of the clauses of Section 141.

The law does not declare illegal mere presence of a person in an assembly and hold him guilty. It must be shown by the prosecution that he had done something or omitted to do something which made him a member of unlawful assembly.

In the leading case of *Masalti v. State of U.P.*, the Supreme Court stated:

The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141.

Once it is proved that the person was a member of unlawful assembly and the common object of such assembly was one or more as mentioned in Section 141, it is totally irrelevant and immaterial that he did nothing with his own hands or did not commit any overt act. Everyone must be taken to have intended the probable and natural results of the combination of acts of unlawful assembly.

## **Common object and common intention: Difference**

There is difference between common object under Section 149 and common intention under Section 34.

## **Unlawful objects**

Section 141 enumerates the following objects as unlawful:

1. to overawe government or public servant by criminal force;
2. to resist execution of law or legal process;
3. to commit mischief, criminal trespass or other offence;
4. to obtain forcible possession of property; and
5. to compel a person by criminal force to do what he is not bound to do or omit to do what he is entitled to do.

## **Vicarious liability**

Section 149 makes every member of an unlawful assembly guilty of that offence. It reads:

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

Section 149 IPC consists of two parts. The first part of the section deals with offences committed by a member in prosecution of common object of unlawful assembly (i.e. an offence committed with a view to accomplish common object). The second part applies to other cases, i.e. offences not agreed upon but known to be likely to be committed in prosecution of that object. In such cases also, it can be held that it was committed in furtherance of common object.

## **Substantive offence**

Section 141 defines "unlawful assembly". Section 142 declares who is a member of unlawful assembly. Sections 143 to 145 provide punishment in such cases. Section 143 punishes every member of unlawful assembly. Sections 144 and 145 are aggravated forms of Section 143.

Thus, being a member of unlawful assembly is itself a substantive offence and is punishable under the Code. Section 149 makes every member of unlawful assembly guilty of offence committed in prosecution of common object.

Sections 150 and 151 makes hiring persons and knowingly joining unlawful assembly punishable. Sections 156 to 158 seek to punish harbouring or hiring persons who are members of unlawful assembly.

### **No overt act necessary**

Section 149 makes every member of unlawful assembly at the time of committing the offence guilty of that offence. It thus creates constructive or vicarious liability of all the members of such assembly for unlawful acts committed in pursuance of common object of the assembly. "Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial." Everyone must be taken to have intended the probable and natural results of the combination of acts in which he joined himself voluntarily. "It is not necessary that all the persons forming an unlawful assembly must do some overt act." The basis of constructive liability under Section 149 is mere membership of unlawful assembly with requisite common object or knowledge and nothing more.

Overt act test, though not decisive, is indeed one of the legitimate and useful tests to be applied while scrutinising the evidence. Where there is overt act right from the beginning, it can safely be said that the persons who had done overt acts were members of unlawful assembly. Sometimes, however, inaction on the part of the person goes a long way to hold that he shared common object with others.

### **Proof**

It is for the prosecution to prove that 1) there was an unlawful assembly; 2) the accused was a member of such assembly; 3) an offence was committed by members of such assembly; and 4) such offence was committed in prosecution of common object of the assembly. The burden is on the prosecution to prove these facts.

An object, being mental attitude, no direct evidence is generally available for common object of unlawful assembly. It has to be inferred from various facts and surrounding circumstances. It may also be gathered from conduct of members of assembly. Thus, common object may be ascertained from various acts, such as, weapons with which the members were armed, their movements, language used, role played by members of assembly, acts of violence committed by them, conduct and behaviour of members before and at the time of incident, etc. They are all relevant matters for forming a particular opinion. Presence or absence of even a single material fact or circumstance may make a world of difference in reaching the ultimate conclusion.

### **Duty of court**

Section 149 makes every member of unlawful assembly vicariously liable for offences committed in prosecution of common object of the assembly. It is well-settled that common object may develop on the spot. But it is also common and a known fact that there is often tendency to rope in as many persons as possible and spread the liability also on those who might not be members of unlawful assembly. Appreciation of evidence in such a complex situation is indeed a difficult task. But courts have to be careful in such cases in exercising powers in administering criminal justice. They are expected to do their best in dealing with such cases to sift the evidence carefully and to decide which part of it is true and which is not.

It is not an easy task to draw a parallel between two cases. No judgment can be cited as a precedent howsoever similar the facts may be. Each case must rest on its own facts.

### **Mere presence: Whether culpable?**

Mere presence at the place of incident may not make such person liable for offences committed by members of unlawful assembly. Presence of a person as an innocent viewer, silent spectator or mere passer-by does not

make him a member of unlawful assembly. It must be shown that such a person shared common object to commit the crime as a member of unlawful assembly. It is not uncommon that whenever any offence takes place by a group of persons, several other persons who have nothing to do with the incident assemble there not with a view to participate in the occurrence but as curious spectators. They cannot be termed as members of unlawful assembly or held guilty for offences committed by members of unlawful assembly.

The question whether a person happened to be present at the scene of offence was or was not a member of unlawful assembly is one of fact and has to be decided considering the entire evidence on record.

### **Conviction of less than five persons**

An essential ingredient of unlawful assembly is that there must be five or more persons. An assembly of less than five persons, hence, cannot be said to be an unlawful assembly within the meaning of Section 141 IPC. Therefore, where the prosecution fails to establish that there were five or more persons who committed an offence. Section 149 cannot apply and no conviction can be recorded with the help of the said section.

In many cases, several persons are charged being members of unlawful assembly committing various offences. But if some of them are acquitted and the number of remaining accused is less than five, Section 149 cannot be invoked and no conviction can be recorded.

It is, however, not necessary that for the application of Section 149, the court must hold five or more persons guilty. In a given case, it may happen that the court is satisfied that there were five or more persons who formed an unlawful assembly and committed an offence in prosecution of common object. But the evidence was not enough to establish identity of all accused and a finding is recorded that four or less than five accused alongwith other unidentified accused had committed the offence. In such case, conviction of less than five accused by the help of Section 149 cannot be said illegal or bad in law. "Such a case is one of doubt only as to identity of some participants and not as to total number of participants." (emphasis supplied)

### **Alteration of conviction under Sections 149 to 34**

A question may arise whether a person convicted for an offence with the help of Section 149, on finding by a competent court that it was not proved by the prosecution that there were five or more persons can be convicted with the help of Section 34 IPC.

Both Sections 149 and 34 prescribe vicarious liability. Both of them deal with combination of persons who become liable as sharers in the commission of offences. Both of them sometimes even overlap. It is; therefore, open to the court to convict a person charged for an offence read with Section 149 by converting it to the offence read with Section 34. Non-applicability of Section 149 IPC is no bar to convict the person for an offence said to have been committed with the aid of Section 34 IPC, if the evidence discloses that the offence has been committed in furtherance of common intention by all. "Whether such resort can be had or not must depend on the facts of each case."

(emphasis supplied)

### **(xv) Sentence**

Award of sentence is in the discretion of the court. The section creates an offence but the punishment or sentence depends on the offence for which the accused is held guilty. Uniform punishment of all accused in all cases is neither desirable nor advisable. Separate or different sentences may, therefore, be awarded by the court considering the facts and circumstances in each case.

## **RIOTING**

### **"Riot": Meaning**

According to dictionary meaning, "riot" means "a noisy or violent public disorder caused by a group or crowd of persons". It is disturbance of a public peace by a mob acting together in a disrupting manner in carrying out their private purpose.

### **"Rioting": Definition**

Section 146 IPC defines "rioting". It states: "Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

### **Ingredients**

Section 146 (rioting) has to be read with Section 141 (unlawful assembly). The basis of law as to rioting is unlawful assembly having a particular activity. Reading these two sections together, it can be said that rioting has following ingredients:

1. there must be an unlawful assembly;
2. the accused must be a member of such assembly;
3. force or violence must have been used by such assembly or a member thereof; and
4. use of force or violence must be in prosecution of common object of such assembly.

### **Riot and unlawful assembly: Difference**

In every riot, there is an unlawful assembly but vice versa is not true. Where an unlawful assembly or a member thereof uses force or violence, there is a riot not otherwise. It is the use of force or violence which makes an unlawful assembly a riot.

### **Force or violence**

The gravamen of rioting is the use of force or violence by unlawful assembly or any member thereof. The term "force" is defined in Section 349 IPC to mean force to a person, i.e. a human being. The expression "violence" is not defined in the Code. It is, however, very wide and comprehensive and includes force used against person as also against property.

### **Punishment**

Section 147 prescribes punishment for an offence of rioting (Imprisonment may extend for 2 years or fine or both). Section 148 is an aggravated form of rioting where members of unlawful assembly use deadly weapons and provides for severe punishment.

### **Other forms of rioting**

Section 151 seeks to punish persons who assault a public servant attempting to disburse an unlawful assembly or suppressing a riot. (Imprisonment may extend for 6 months or fine or both)

Section 153 punishes provocation with intent to cause riot.

Sections 154 to 156 legislatively recognise the doctrine of vicarious liability in criminal law and make the owner or occupier of land on which riot is committed liable as also a person liable for whose benefit such riot is committed.

Section 158 punishes persons who are hired for taking part in an unlawful assembly or in assisting riot.

## **AFFRAY**

### **Meaning**

The word "affray" is derived from French word "affraier" which means to frighten or to terrify. In law, "affray" means breach of peace by fighting at a public place.

### **Definition**

Section 159 defines "affray" thus; "When two or more persons, by fighting in a public place, disturb the public peace, they are said to commit an affray".

### **Ingredients**

In affray, the following ingredients must be present:

1. there must be a fight;
2. it must be between two or more persons;
3. it must be at a public place; and
4. it must have disturbed public peace.

### **Affray and riot: Difference**

There is difference between affray and riot on following points:

1. Affray can be committed only at a public place. Riot can be committed either at a public place or at a private place.
2. Affray requires two or more persons while riot requires at least five (or more) persons.
3. Rioters are members of unlawful assembly. Affray does not require unlawful assembly.

### **Penalty**

Section 160 prescribes penalty for an offence of affray. (Imprisonment for 1 month, or fine of 100 rupees, or both)

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## OFFENCES RELATING TO ELECTIONS [Ss. 171-A-171-I]

### Synopsis:

- ▶ Introduction
- ▶ "Election": Meaning
- ▶ "Candidate": Meaning
- ▶ Election offences
- ▶ Bribery
- ▶ Undue influence
- ▶ Personation
- ▶ False statement
- ▶ Illegal payment
- ▶ Failure to keep accounts

### Introduction

Free and fair election is the basis of democracy and rule of law. As early as in 1920, emphasis was placed on purity of election by the Joint Parliamentary Committee. It was felt that for good governance, elections at various levels, such as Mandals, Panchayats, Zilla Parishads, Municipalities, etc. must be free, fair and impartial.

Chapter IX-A [Ss. 171-A-171-I] was, therefore, inserted in the Code by the Indian Election Offences and Inquiries Act, 1920. It deals with offences relating to elections, provides punishment for offences and seeks to achieve purity of franchise.

### "Election": Meaning

The term "election" is defined in IPC to mean an election for the purpose of selecting members of any legislative, municipal or other public authority where such system is prescribed by law. The word "election" is of wide import and covers the whole process right from the stage of inviting nomination papers to that of taking poll and all subsequent steps upto declaration of result.

### "Candidate": Meaning

"Candidate" means a person who has been duly nominated as a candidate at an election.

### Election offences

IPC enumerates following offences as offences relating to elections:

- i. Bribery;
- ii. Undue influence;
- iii. Personation;
- iv. False statement;
- v. Illegal payment; and
- vi. Failure to keep accounts.

## **Bribery**

"Bribe" is a gift or reward or illicit payment made by one person to another to gain or obtain benefit to which he is not entitled to. "Bribery" is thus the act of voluntary giving or receiving of bribe. Section 171-B IPC defines "bribery" as giving or accepting any gratification as a reward for exercising electoral right. Such reward may be for inducing him to contest or not to contest election or to withdraw from the contest or to vote or not to vote or to vote for a particular candidate at the election, etc. It is also not restricted to pecuniary benefits or gratification in terms of money. If any of such acts is proved, it can be said that an offence of bribery has been committed.

## **Undue influence**

Section 171-C defines "undue influence" in very wide terms. It states that whoever voluntarily interferes or attempts to interfere with the free exercise of electoral right, commits the offence of undue influence at an election. Section 171-F provides punishment for undue influence. In *Baburao Patil v. Zakir Hussain*, the Supreme Court observed that the gist of undue influence at an election consists in voluntary interference or attempt to interfere with the free exercise of any electoral right. Any voluntary action which interferes with or attempts to interfere with such free exercise of electoral right amounts to undue influence.

Where any threat is held out to any candidate or voter or any person in whom the candidate or voter is interested, it would amount to undue influence. Mere canvassing for a particular candidate, however, does not amount to undue influence.

## **Personation**

Section 171-D enacts that any person who attempts in the name of any other person or in a fictitious name or attempts to vote twice is guilty of personation. Such person must be actuated by corrupt motive. The section, however, does not apply to voting by proxy permissible under any law.

## **False statement**

Section 171-G seeks to punish a person who makes false statement of fact in relation to personal character or conduct of a candidate with intent to affect the result of election. The section, therefore, cannot apply to defamatory statement about any person other than the candidate at election. The Law Commission rightly stated:

Character assassination at an election seems to us to be as reprehensible as exercising undue influence on electors or bribing them, and should be punished just as severely.

The question whether the averments would amount to allegations relating to personal character of a candidate, as distinguished from his public character is not easy to decide on abstract principles of law. It depends upon the facts of each case and no general principle of law applicable to all cases can be laid down. Again, whether the statement is a statement of fact or merely an opinion depends on facts and contents thereof.

## **Illegal payment**

Section 171-H penalises a person who without the written permission of the candidate incurs expense for the purpose of promoting or procuring his election. The object underlying this provision is to ensure submitting of correct returns of expenditure and to prevent corruption.

## **Failure to keep accounts**

Failure to keep accounts of election expenses is an offence punishable under Section 171-I if such accounts are required to be maintained by law. It has, however, been held that the section applies to non-maintenance of accounts and not to irregular maintenance of accounts.

## OFFENCES RELATING TO RELIGION

### Synopsis:

- ▶ Religious offences
- ▶ Defilement of Places of worship
- ▶ Outraging Religious Feelings of persons
- ▶ Disturbing Religious Assembly (Sec. 296)
- ▶ Constitutionality
- ▶ Duty of court

### Religious offences

The Indian Penal Code, in its Chapter-XV deals with offences relating to religion. The Chapter-XV has been framed on the principle that every man should have the full freedom to follow his or her own religion and that no man should be allowed to insult the religion of another, or religious feelings of any class of persons. This chapter makes any deliberate acts perpetrated by persons of one religious persuasion for the insult or annoyance of persons of another persuasion punishable. Everyone should respect the religious sensibilities of persons of different religious persuasions or creed.

India is a secular state. It has no religion of its own as Indian Constitution accords equal protection to all religions. Article 21(1) guarantees, the freedom of conscience and the right to propagate, practice and profess the religion of their choice. However, the freedom of religion is not an unlimited one. It is subject to public order, morality decency and health.

Chapter-XV of the IPC ostensibly helps the state in maintaining religious harmony in the country, as the state has to ensure that religious beliefs of individuals do not become a matter of hostilities, controversies and violence among people. The offences under Chapter-XV can be broadly classified into the following three divisions:

- i. Defilement of places of worship or objects of veneration (Sec. 295 & 297);
- ii. Outraging the religious feelings of persons (Secs. 295A & 298);
- iii. Disturbing religious assemblies (Sec. 296).

#### 1. Defilement of Places of worship

- i. Injuring or defiling place of worship with intent to insult the religion of any class (Sec. 295)

"Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

Section 295 requires two things to constitute an offence, namely,

1. Destruction, damage or defilement of (a) any place of worship, or (b) any object held sacred by a class of persons.
2. Such destruction, etc must have been done: (i) with the intention of insulting the religion of a class of persons, or (ii) with the knowledge that a class of persons is likely to consider such destruction, etc as an insult to their religion.

The object of Section 295 is to punish those persons who intentionally wound the religious feelings of others by injury or defiling a place of worship. Section 295 is intended to prevent wanton insult to the religious notions of a class of persons.

The essence of the offence is mens rea in addition to an act of destruction, damage or defilement of place of worship. The word 'defiles' is not to be restricted in meaning to acts that would make an object of worship unclean as a material object, but extends to acts done in relation to the object of worship which would render such object ritually impure. Defilement is not confined to the idea of 'making dirty'; but extends to ceremonial pollution. Mere defilement of a place of worship is not an offence under Section 295 without the requisite mens rea. However, the question whether there was intention or mens rea to insult is a question of fact, which can be judged depending on the facts and circumstances of each case. The intention of the person concerned can be gathered by the act itself or by words uttered or gestures, or any other circumstances that might have accompanied the act.

Generally, the words destroy or damage would mean physically or materially affecting the property concerned. It should also be understood in the physical sense of making a particular object or place unclean, dirty or foul. The word 'defilement' would not mean just physical destruction, but also include situations wherein the place of worship or the object of worship would be rendered ritually or ceremonially impure.

Another essential ingredient of religious offences is that the destruction or damage should be to a place of worship or a sacred place. Whether a particular place or object is a sacred one, is a question of fact. Generally, temples, churches, mosques, synagogues, kyaungs (of Buddhists) are all places of worship and hence sacred places.

The word 'object' in Section 295 does not include animate objects. It refers only to inanimate objects such as churches, mosques, temples, etc., and marble or stone figures representing gods. A cow is treated as sacred by Hindus. The killing of the same, by a Mohammedan, within the sight of a public road frequented by Hindus is not punishable under Section 295.

In *Shiv Shankar v. R*, it was held that damaging or destroying a sacred thread worn by a person, who is not entitled under the Hindu custom to wear it or for whom the wearing of the sacred thread was not part of his custom observed under the Hindu religion, in assertion of a mere claim to higher rank, was not an insult to his religion.

In *D.P. Titus v. L.W. Lyall*, where a pastor of the church who himself was a Christian was running a nursery school and a charitable dispensary in a portion of the church, it could not be said that by using a portion of the church property for such secular and non-religious purposes he was insulting the religion of a class of persons within the meaning of Section 295, I P C.

The offence under Section 295 is cognizable but summons should ordinarily issue in the first instance. It is non-bailable non-compoundable and is triable by any Magistrate.

ii. Trespassing on burial places, etc (Sec. 297)

"Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulchre, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any person assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

Section 297 punishes acts of three kinds:

- i. trespass in place of worship or upon the sepulchre of the dead,
- ii. indignity to a human corpse, and
- iii. disturbance in a funeral ceremony.

Places reserved for the cremation or burial of the dead are universally regarded with veneration as places sacred to the memory of the dead. They are regarded specially sacred by followers of religions in which belief in the transmigration of the souls is a recognized doctrine. A trespass upon such places is regarded as a sacrilege not lightly to be condoned. With them the performance of the funeral obsequies in accordance with the orthodox formula is a manner of strict religious injunctions, the slightest disturbance of which might imperil the response of the disembodied spirit of the departed. With others, the feeling of respect due to sympathy, and the refinement which dictates respect for the dead on account of their having entered the great unknown.

Section 297 punishes a person who trespasses on burial place or on places of sepulture. The trespass may be a civil trespass or mere encroachment or an unauthorized entry without amounting to criminal trespass. Trespass here means any violent or injurious act, committed in a place of worship with such intention or knowledge as is defined in Section 297. When some persons had sexual connection inside a mosque, they were offenders under Section 297.

The essence of Section 297 is an intention, or knowledge of likelihood, to wound feelings or insult religion and when with that intention or knowledge trespass on a place of sepulture, indignity to a corpse, or disturbance to persons assembled for funeral ceremonies, is committed it becomes an offence under Section 297.

Where a patient dies while under operation by a doctor who after the death removes the liver of the deceased for transplantation to another patient, without the knowledge and consent of relatives, the doctor would be liable under Section 297 for offering indignity to human corpse.

In *Basir-ul-Huq v. State of West Bengal*, while a person kept his dead mother's body on the funeral pyre, the accused accompanied by the Police, arrived at the cremation ground after giving complaint that the woman was killed by throttling. When the body was examined after extinguishing the fire, there were no wounds or marks of injury on it. The accused was convicted and sentenced to three months rigorous imprisonment for trespassing on the cremation ground and caused the dead body to be taken out.

An offence under Section 297 is cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate.

## **2. Outraging Religious Feelings of persons**

- i. **Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs (Sec. 295A)**

"Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both".

The points requiring proof under Section 295A are:

- i. That the accused insulted or attempted to insult the religion or the religious beliefs of a class of citizens of India;
- ii. that he did so deliberately, and
- iii. maliciously, and
- iv. with intent to outrage the religious feelings of any class, etc.

Section 295-A deals with deliberate and malicious acts intended to outrage the religious feeling. The term 'maliciously' means and implies an intention to do an act which is wrongful to the detriment of another.

Where any person wilfully does an act injurious to another without lawful excuse, he does it maliciously. The term 'maliciously' denotes wicked, perverse and incorrigible disposition. Where any unwitting or careless remark is made, which might have the effect of insulting the religious feelings of persons, but which is done without any deliberate or malicious intention to outrage the religious feelings of any class, then Section 295-A will not apply. Malice is a state of mind and very often it is not capable of direct and tangible proof. In most cases, it has to be inferred from the circumstances having due regard to the setting, background and connected facts. Malice can also be gathered from the language and behaviour of the accused. Malice, however, can be presumed on part of an individual if he has done an injurious act without any lawful and just excuse.

The expression 'outraging religious feelings' is used in Section 295-A. The word 'outrage' is somewhat stronger than the word 'would'. In a case under Section 295-A, the truth of the language of the writer can neither be pleaded nor proved. It will not suffice if the intention was merely to insult the religion without outraging the religious feelings of a community. Even the outraging of the religious feelings of some members of a class would not suffice; since what the Section 295-A contemplates is that the feeling of 'the class' as a body should be outraged. 'Outraging' is a question of fact to be decided with due advertence to the facts of each case.

An offence under Section 295-A is cognizable and warrant should issue in the first instance. The offence is non-bailable and non-compoundable; it is triable by a Magistrate of the first class. The State government may search for, seize and forfeit any publication offending against Section 295-A.

#### **ii Uttering words etc., with deliberate intent to wound religious feeling (Sec. 298)**

"Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

Section 298 requires that it must be shown:

- i. that the accused uttered any word or made any sound or gesture or placed any object;
- ii. that he did so intentionally;
- iii. that intention was deliberate;
- iv. that the deliberate intention was to wound the religious feelings of some person.

To hold the petitioners guilty of an offence under Section 298, IPC the prosecution must establish affirmatively that the act was done with the deliberate intention of wounding religious feelings of other persons. It is true that intention has to be gathered from the conduct of the parties and the surrounding circumstances.

It may be that the petitioners knew that by their action they would invade the civil rights of other persons and might possibly hurt their feelings. But a mere knowledge of the likelihood that the feelings of other person might be hurt, would not suffice to bring their act within the mischief of Section 298 IPC. The section requires that the offender should have a deliberate intention of wounding the religious feeling of a section of the public.

Section 298 allows fair latitude to religious discussion but at the same time prevents the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. No person is justified in wounding with deliberate intention the religious feelings of his neighbours by words, gestures or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by any person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for vindicating his own, does not fall under Section 298. Section 298 does not apply to a written article.

### **3. Disturbing Religious Assembly (Sec. 296)**

"Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both".

The following are the essential ingredients of Section 296:

- i. There must be assembly which is engaged in the performance of religious worship or religious ceremonies,
- ii. Such assembly and performance of religious ceremony should be lawful,
- iii. The accused must cause disturbance to such assembly,
- iv. The accused must do so voluntarily.

Congregational worship or the performance of religious ceremonies is protected by Section 296 from intentional disturbance. Section 296 does not cover individual worship. A religious procession may be regarded as lawful assembly engaged in performance of religious worship. Thus, any disturbance caused to a lawful religious procession will be an offence under Section 296. The object of Section 296 is to secure freedom from molestation when people meet for the performance of acts in a quiet spot vested for the time in the assembly exclusively, and not when they engage in worship in an unquiet place, open to all the public as a thorough fare.

When a mosque is abutting on a highway, going in a procession with music at a time when prayer is going on in the mosque, will be an offence, as such music will necessarily disturb the congregation engaged in the prayer. However, disturbance caused to a procession through a private grave does not warrant Section 296. Persons of every sect are entitled to take out religious processions with music through public streets provided that they do not interfere with the ordinary use of the streets by the public or contravene any traffic regulation or lawful directions issued by the Magistrate. A religious procession does not change its character merely because the music is temporarily stopped in front of a mosque.

The same rule applies to worshippers in a Hindu temple. All worshippers have an equal right to recite mantras, and the fact that the recitation of one is overheard by and causes disturbance to the others cannot deprive the former of his communal right to a joint worship. The rule, however, would be different if the temple was a private area in which the priest had the exclusive right of chanting mantras. But, apart from such privilege, which must be asserted and proved by those who rely upon it, no worshipper, whether a Hindu or a Mohammedan, can arrogate to himself the right of controlling the mode of performance of prayers by the others. Any disturbance the latter may cause would not then be 'voluntary' within the meaning of Section 296. The offence under Section 296 is cognizable but summons should ordinarily issue in the first instance. It is bailable but not compoundable, and is triable by any Magistrate.

#### **Constitutionality**

These provisions neither violate Article 19(1)(a) nor Articles 25 to 28 of the Constitution of India. They only seek to punish aggravated form of insult to religion when it is perpetrated with deliberate and malicious intention of outraging religious feelings of a different class. The calculated tendency is clearly to disrupt public order well within the protection of Clause (2) of Article 19.

#### **Duty of court**

Courts should be circumspect in such matters. They must pay due regard to religious feelings of different classes of persons with different beliefs irrespective of the consideration whether or not they share such beliefs or whether they are rational in their opinion.

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## **OFFENCES AGAINST PUBLIC JUSTICE [Ss. 191-229-A]**

### **Synopsis:**

- ▶ Introduction
- ▶ Giving or Fabricating False Evidence
- ▶ Causing Disappearance of Evidence
- ▶ False Personation
- ▶ Abuse of Process of Court
- ▶ False Charge of Offence
- ▶ Screening and Harboursing Offenders
- ▶ Offences by Public Servants
- ▶ Resisting Lawful Apprehension
- ▶ Violation of Valid Conditions
- ▶ Contempt of Court
- ▶ Disclosure of Identity

### **Introduction**

Chapter XI [Ss. 191-229-A] IPC deals with giving and fabricating false evidence and other offences against public justice. The range of these provisions is wide and nearly everything calculated to obstruct the administration of justice has been covered.

The Supreme Court, however, took judicial notice of decline of moral values and erosion of sanctity of oath by witnesses and unscrupulous litigants which has polluted the judicial system. The Court observed that effective and stern actions are required to be taken for prevention of perjury. "If the system is to survive, effective action is the need of the time."

Offences against public justice may be classified under the following heads:

- i. Giving or fabricating false evidence: Sections 191 to 200;
- ii. Causing disappearance of evidence: Sections 201 to 204;
- iii. False personation: Sections 205, 229;
- iv. Abuse of process of court: Sections 206 to 210;
- v. False charge of offence: Section 211;
- vi. Screening and harboursing offenders: Sections 201, 212 to 216-A;
- vii. Offences by public servants: Sections 217 to 223, 225-A;
- viii. Resisting lawful apprehension: Sections 224 and 225, 2.25-B;
- ix. Violation of valid conditions: Sections 2.27, 229-A;
- x. Contempt of court: Section 228; and
- xi. Disclosure of identity: Section 228-A.



## **GIVING OR FABRICATING FALSE EVIDENCE**

Sections 191 to 200 relate to giving or fabricating false evidence, issuing or signing false certificates, using false statements as true, etc. Section 191 defines "giving false evidence". It states that when a person who is legally bound by an oath to state the truth, makes any statement which is false, it can be said that he has given false evidence.

Illustrations given under the said section explain the principle:

- (a) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.
- (b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

Section 192 defines "fabricating false evidence". Under this section, if a person causes any circumstance to exist or makes any document containing a false statement, so as to mislead the person dealing with the matter, it can be said that he has fabricated false evidence. Three illustrations under Section 192 clarify the position:

- (a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.
- (b) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

Sections 193 to 195 provide punishment for giving false evidence or for fabricating false evidence. Section 195-A punishes a person who threatens any person to give false evidence. Sections 196 to 200 prescribe punishment for using false evidence as genuine. The Law Commission suggested issuance and use of false medical certificate punishable. This useful suggestion, however, has not been accepted by Parliament.

## **CAUSING DISAPPEARANCE OF EVIDENCE**

Sections 201 to 204 provide punishment for destroying evidence of offence, failure to give information of offence, or giving false information.

### **Nature and scope**

Section 201 punishes a person who knows that an offence has been committed, and yet destroys the evidence in order to screen the offender. The punishment varies according to the nature of offence.

Thus, where A knows that B has committed murder of C and yet assists B to hide or destroy body of C with intent to screen B from punishment, it can be said that A has committed the offence punishable under this section to screen the offender of murder.

### **Object**

The primary object of the provisions relating to causing disappearance or destruction of evidence is to screen the offender from legal consequences of his act.

## **Ingredients**

The following ingredients must be satisfied before a person is convicted for an offence of causing disappearance of evidence:

1. an offence must have been committed;
2. the accused must have been aware (or must have reason to believe) that an offence has been committed;
3. he must have caused disappearance of evidence; and
4. the act must have been done to screen the offender.

## **Sentence**

The punishment for offence of causing disappearance of evidence varies with the punishment prescribed for the main (principal) offence. In other words, the punishment depends upon the gravity of offence which was committed and which the accused knew or had reason to believe to have been committed.

In *Roshan Lal v. State of Punjab*, the Supreme Court dealt with this aspect and stated illustratively that if an accused on seeing blood marks on the ground made as a result of an offence punishable under Section 323, erases the blood mark with the intention of screening the offender whom he erroneously believes to have committed the offence of murder, he could be convicted only on the footing that an offence under Section 323 was committed and could not be convicted on the basis of his having screened a murderer. If it were so, he could be punished more severely than the main offence committed by the principal offender. It does not stand to reason that Section 201 provides for punishing a minor offence more severely than the principal offence. (emphasis supplied)

## **Omission to give information**

Section 202 punishes a person who intentionally omits to give information concerning an offence which he is legally bound to give.

## **False information**

Section 203 penalises a person who supplies false information concerning an offence.

## **Destruction of document**

Section 204 punishes a person who destroys a document or electronic record to prevent its production as evidence in a court.

## **FALSE PERSONATION**

Section 205 relates to false personation. It punishes a person who personates another in civil or criminal proceedings. Thus, if A, a witness falsely deposes in B's name in a court of law, A is guilty of offence punishable under this section. Section 229 punishes a person who personates as a juror. The section is no more useful on abolition of jury system.

## **ABUSE OF PROCESS OF COURT**

Sections 206 and 207 punish fraudulent acts designed to prevent seizure of property. Section 206 applies to a person who fraudulently removes any property with intent to prevent lawful seizure. Section 207 punishes a person who fraudulently claims such property. Section 208 seeks to prevent collusive decree for sum not due and payable. Section 209 provides punishment for making false and fraudulent claim in a court of law. Section 210 covers cases of fraudulently obtaining decrees for a sum not due and payable.

## **FALSE CHARGE OF OFFENCE**

Section 211 provides punishment for an offence of making a false charge of an offence with intent to cause injury. It covers two distinct offences:

1. institution of criminal proceedings; and
2. Preferring a false charge.

The first includes the second but not vice versa. Before this section can be invoked, the following conditions must be fulfilled:

1. the accused must have intended to cause injury;
2. he must have instituted criminal proceeding or preferred a false charge; and
3. he must have done it with knowledge that it was false; i.e. without lawful cause.

## **SCREENING AND HARBOURING OFFENDERS**

Sections 212 to 216-A deal with screening and harbouring of offenders. Section 212 provides punishment for harbouring or concealing a person who has committed an offence. The punishment varies with the gravity of the offence. The accused, must have knowledge about the commission of offence.

Sections 213 and 214 seek to prohibit unlawful compounding of offences and make culpable giving or taking of gift for such compounding. The punishment varies with the nature of offence sought to be compounded. The offence is complete as soon as a person agrees to give or take gift for concealing the offence or screening the offender. It is not necessary that he must have actually screened the offender. Section 215 punishes taking of gift for helping in the recovery of stolen property without exposing the offender. The section is primarily aimed at punishing professional trackers who by taking illegal gratification under the pretence of helping the owner to get back stolen property really screen actual offenders. Section 216 is supplementary to Section 212 and applies to harbouring of an offender who has escaped from custody. Section 216-A is an aggravated form of harbouring and specially deals with harbouring of persons who have committed or about to commit robbery or dacoity. The Law Commission recommended application of Section 216-A to offences of kidnapping and abduction also.

## **OFFENCES BY PUBLIC SERVANTS**

Sections 217 to 223 and 225-A have been enacted with a view to punish public servants for their illegal acts. Such illegal acts may be committed in the following situations:

Where a public servant knowingly disobeys direction of law or prepares false record with intent to save a person from punishment or property from forfeiture [Ss. 2.17 & 218].

Corrupt motive or malicious intention is the gist of the offence.

In *Maulud Ahmad v. State of U.P.*, the principal accused was acquitted. It was, therefore, contended by the police officer who was charged under Section 2.18 for preparation of false record to save the accused that he could not be convicted for the same.

Negating the contention, the Apex Court held that acquittal of the main accused was totally irrelevant. If the public servant has prepared false record with a view to save the accused, acquittal of the said accused would not absolve the public servant and would not affect his conviction under Section 218 IPC. "If a police officer manipulates the record, it will be an end of honest criminal investigation in our country. Such offences shall receive deterrent punishment." (emphasis supplied)

Where a public servant corruptly or maliciously makes any report, order, verdict or decision or commits a person for trial or to confinement knowing that he is acting contrary to law [Ss. 219 & 220]

Before a public servant can be convicted under these provisions it must be proved that the accused corruptly or maliciously committed a person for trial or to confinement knowing that in so doing he was acting contrary to law.

Where a public servant intentionally omits to arrest or negligently allows escape of offender [Ss. 221-223, 225-A],

In all these cases, a public servant is either bound to apprehend or arrest the offender or to continue his confinement. He, however, intentionally or negligently fails in discharging his duty which makes his act punishable.

The Law Commission rightly observed that such acts by public servants are serious in nature, reprehensible and have rightly been made punishable. Punishment is graded according to the seriousness of the offence as it should be.

### **RESISTING LAWFUL APPREHENSION**

Sections 224, 225 and 225-B apply to cases of resistance or illegal obstruction to lawful arrest or escape of persons who have been legally detained. Section 224 punishes a person who illegally resists, obstructs or opposes his own arrest. Section 225 applies where such resistance, obstruction or opposition is by a third person. All other cases of arrest are covered by Section 225-B. Resistance or obstruction must be intentional.

### **VIOLATION OF VALID CONDITIONS**

Section 227 applies to the case of a person who, having accepted conditional remission of punishment, knowingly violates condition(s) on which such remission is granted. "Remission" is reduction of quantum of punishment without changing its character. Section 432, Criminal Procedure Code, 1973 empowers appropriate government to remit whole or part of the sentence imposed on any convict with or without conditions.

This section enacts that where such remission is granted on certain conditions and the person violates those conditions or any of them, he has to undergo the sentence initially imposed on him. It has, however, been held that it must be proved that he knowingly violated the condition on which remission was granted. It is for the court to decide whether the convict had committed breach of any condition on which remission was granted. Executive (Jail Authority) has no power to decide this issue.

The Law Commission suggested three additional provisions penalising certain illegal acts; viz. 1) threatening witnesses; 2) bail jumping; and 3) carrying out or conducting vexatious search without reasonable ground. One of such suggestions has been accepted by Parliament and Section 229-A has been enacted to punish a person who is released on bail and thereafter fails to appear before the court.

### **CONTEMPT OF COURT**

Section 228 punishes a person who commits contempt of court by intentionally insulting a judge or by interrupting public servant conducting judicial proceedings. The primary object of this provision is to preserve the dignity and prestige of court. The following are essential ingredients of this offence:

1. intention;
2. insult or interruption to public servant; and
3. while conducting judicial proceedings.

## **DISCLOSURE OF IDENTITY**

**Section 228-A, as inserted by the Criminal Law (Amendment) Act, 1983 makes disclosure of identity of victim in certain offences (rape and sexual exploitation) punishable. The section aims to protect reputation of the victim of such crimes. Such provision was necessary in view of increase of offences of this nature. The primary object of this provision is to protect the victim of such crime from social victimisation and public exposure. It is, therefore, necessary that the name of the victim of sexual assault should not be mentioned even in the judgment of the court, be it the Supreme Court, High Court or the lower court. Explanation to Section 228-A clarifies that printing or publication of judgment would not amount to an offence under this section.**

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## **UNIT-III**

### **OFFENCE AGAINST HUMAN BODY**

#### **Synopsis:**

- ▶ Introduction
- ▶ Culpable homicide and murder
- ▶ Suicide
- ▶ Causing Miscarriage
- ▶ Hurt
- ▶ Wrongful Restraint and wrongful Confinement
- ▶ Assault
- ▶ Kidnapping and abduction
- ▶ Rape

#### **Introduction**

Chapter XVI [Ss. 299-377] of the Code is the longest one. With latest amendments, it contains 96 sections. It covers a wide range of offences affecting human body from assault to murder. There are petty offences as also heinous crimes. The offences under this chapter may be grouped under the following heads:

- i. Offences affecting life: Sections 299 to 318;
- ii. Offences causing bodily injury: Sections 319 to 338;
- iii. Wrongful restraint and wrongful confinement: Sections 339 to 348;
- iv. Criminal force and assault: Sections 349 to 358;
- v. Kidnapping, abduction, etc.: Sections 359 to 374; and
- vi. Sexual offences: Sections 375 to 377.

### **CULPABLE HOMICIDE AND MURDER**

#### **Synopsis:**

- ▶ Statutory provisions
- ▶ "Homicide": Meaning
- ▶ Types of homicide
- ▶ Culpable homicide
- ▶ Murder
- ▶ Culpable homicide and murder: Distinction
- ▶ Causing death ("whoever causes death")
- ▶ "Act" ("by doing an act")
- ▶ Intention ("with the intention of causing death")
- ▶ Bodily injury likely to cause death
- ▶ Act likely to cause death and injury sufficient in the ordinary course of nature to cause death:

## Distinction

- ▶ Imminently dangerous act
- ▶ Law Commission's view
- ▶ Exceptions
- ▶ Grave and sudden provocation: Exception 1
- ▶ Exceeding right of private defence: Exception 2
- ▶ Public servant exceeding power: Exception 3
- ▶ Sudden fight: Exception 4
- ▶ Death with consent: Exception 5
- ▶ Causing death of someone else
- ▶ Power and duty of courts
- ▶ Sentence
- ▶ Attempt to commit murder

Two principal offences affecting the life of a human being are: 1) culpable homicide amounting to murder; and 2) culpable homicide not amounting to murder.

## Statutory provisions

Two sections are most important in offences affecting life. They are Section 299 (Culpable homicide) and Section 300 (Murder). They read thus:

**Culpable Homicide Section 299:** Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

### Illustrations

- (a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed offence of culpable homicide.
- (b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

*Explanation 1-* A person who causes bodily injury, to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

*Explanation 2-* Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have prevented.

*Explanation 3-* The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

**Murder Section 300:** Except in the cases hereinafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or-

**Secondly-** If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-

**Thirdly-** If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

**Fourthly-** If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

#### Illustrations

- (a) A shoots Z with the intention of killing him. Z dies in consequence .A commits murder.
- (b) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

**Exception 1- When culpable homicide is not murder-** Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

**First-** That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

**Secondly-** That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

**Thirdly-** That the provocation is not given by anything done in the lawful exercise of the right of private defence.

**Explanation-** Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

#### Illustrations

- (a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.
- (b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

**Exception 2-** Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.



### Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

*Exception 3-* Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without towards the person whose death is caused.

*Exception 4-* Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

*Explanation-* It is immaterial in such cases which party offers the provocation or commits the first assault.

*Exception 5-* Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

### Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

### **"Homicide": Meaning**

The term "homicide" is derived from Latin words homo (man, human being) and cido (kill). Thus, homicide means killing of a human being by another human being. It is the highest form of bodily injury which results in death of a human being. But every death is not culpable. Culpability depends on the nature of the act said to have been committed by a person. Thus, homicide may be intentional, unlawful or culpable. But it may be excusable, justifiable or legitimate. It may also be accidental or negligent. Lawful homicide covers cases falling in General Exceptions. Unlawful or culpable homicide includes the following:

1. murder;
2. culpable homicide not amounting to murder;
3. rash or negligent homicide;
4. dowry death; and
5. suicide.

### **Types of homicide**

Every civilised system of administration of criminal justice has drawn a distinction between different kinds of homicide. IPC recognises three degrees of culpable homicide:

1. culpable homicide of the first degree, which is the gravest form of culpable homicide known as "murder"; punishable under Section 302;
2. culpable homicide of the second degree, i.e. culpable homicide not amounting to murder which is the middle form of culpable homicide, punishable under the first part of Section 304; and
3. culpable homicide of the third degree, which is also culpable homicide not amounting to murder and is the lowest form of culpable homicide punishable under the second part of Section 304.

## Culpable homicide

Culpable homicide is defined in Section 299. It is a kind of unlawful homicide covering extenuating circumstances whereunder the act of killing a person does not amount to murder. Every culpable homicide not amounting to murder has the following essential elements:

1. causing of death of human being;
2. by doing an act; and
3. such act must have been done:
  - a. with intention of causing death; or
  - b. with intention of causing such bodily injury as is likely to cause death; or
  - c. with knowledge that such act is likely to cause death.

## Murder

Murder is defined in Section 300. It is an aggravated form of culpable homicide as defined in Section 299. Section 300 opens with the words "Except in the cases hereinafter excepted", which means that where the act by which death is caused falls within any one of the four clauses of Section 300, the offence would be of murder, unless the case is covered by one or more of the five exceptions mentioned in the said section. Section 300 should be read with Section 299. Conjoint reading of two sections makes it clear that every murder has the following essential elements:

1. causing of death of human being;
2. by doing an act;
3. such act must have been done:
  - (a) with intention of causing death; or
  - (b) with intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom harm is caused; or
  - (c) with intention of causing bodily injury to any person sufficient in the ordinary course of nature to cause death; or
  - (d) with the knowledge that the act is so imminently dangerous that it must in all probability cause death; and
4. the case is not covered by any exception under Section 300.

## Culpable homicide and murder: Distinction

Culpable homicide [S. 299]	Murder [S.300]
A person commits culpable homicide, act by which the death is caused is done.	Subject to certain exceptions, culpable homicide if the is murder, if the act by which the death is caused is done.
<b>Intention</b>	
(a) With the intention of causing death; [Illustration (a)]	(1) With the intention of causing death; [Illustration (a)]
	(2) With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; [Illustration (b)]
(b) With the intention of causing such bodily injury as is likely to cause death; [Illustration (b)]	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. [Illustration (c)]
<b>Knowledge</b>	
(c) With the knowledge that ... the act is likely to cause death. [Illustration (c)]	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death. [Illustration (d)]

From the above chart, the following principles emerge:

1. Clause (a) of Section 299 is identical to clause (1) of Section 300.

Causing death of a human being with intention to cause death is culpable homicide amounting to murder (subject to exceptions under Section 300).

2. Clause (b) of Section 299 corresponds to clause (2) of Section 300 with certain distinguishing features.

Culpable homicide falling under clause (b) of Section 299 may amount to murder under clause (2) of Section 300 if the offender knows that such bodily injury is likely to cause death of the person to whom it is caused. In other words, clause (2) of Section 300 applies to a case where the offender is aware that the victim is in such a state of health that the harm caused to him is likely to result in his death. Illustration (b) to Section 300 clarifies this principle.

The distinction between (1) and (2) is that whereas in the former there is intention to cause death, in the latter, there is intention to cause bodily injury only. Intention to cause death is not an essential requirement of clause (b) of Section 299 as also clause (2) of Section 300.

3. Clause (b) of Section 299 and clause (3) of Section 300.

Culpable homicide falling under clause (6) of Section 299 may amount to murder under clause (3) of Section 300 if there is intention on the part of the offender to cause bodily injury to any person which is sufficient in the ordinary course of nature to cause death.

The difference between clause (b) of Section 299 and clause (9) of Section 300 is the degree of probability of death. It is the degree of probability of death which determines whether the bodily injury is likely to cause death or whether it is sufficient in the ordinary course of nature to cause death. The word "likely" conveys the sense of probability. The words "sufficient in the ordinary course of nature" clearly indicate that death would be the most probable result of the injury.

4. Clause (c) of Section 299 corresponds to clause (4) of Section 300 with special feature as to nature of act.

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge as to the probability of the act causing death. Neither of them refers to intention or bodily injury. It is the knowledge which determines whether the act falls under Section 299 or Section 300.

Where the knowledge is that the act is likely to cause death, the offence is culpable homicide under Section 299. But where the act is so imminently dangerous that in all probability, cause death, the offence would be murder under Section 300. The knowledge envisaged by clause (4) of Section 300 is "the highest degree of probability", as against "general probability" under clause (c) of Section 299.

### **Causing death ("whoever causes death")**

The first inquiry in all cases either of culpable homicide amounting to murder or not amounting to murder is that death must have been caused. "Death" is defined as death of a human being. Hence, in every death, there should be killing of a human being by another human being. Thus, where the accused assaulted a man believing in good faith to be a ghost and killed him, he committed no offence. It is neither murder [S. 300] nor culpable homicide [S. 299].

## **"Act" ("by doing an act")**

The death must have been caused by doing some act. The term "act" has not been defined in the Code but it ("act") includes "illegal omission". "Act" also includes a series of acts. Thus, where death of a human being has been caused by any act, series of acts or by illegal omission, it can be said that the act of causing death has been committed.

## **Intention ("with the intention of causing death")**

The first part of Section 299 and the first clause of Section 300 declare that the death (of a human being) must have been caused by an act (by series of acts or by illegal omission) with the intention of causing death. Intention (mens rea) is thus an essential element of the offence of culpable homicide. Once the intention to kill is proved, the case is covered by the first clause of Section 300 (murder) unless it falls within one (or more) of the exceptions in which case the Offence would be reduced to culpable homicide not amounting to murder.

## **Bodily injury likely to cause death**

The second part of Section 299 enacts that the act must have been done "with the intention of causing such bodily injury as is likely to cause death". The intention of the offender may not be to cause death of the victim. But if his act of causing bodily injury is such which is likely to cause death of the victim, the offence committed by the accused will be of culpable homicide not amounting to murder. This (second) part of Section 299 may be compared with clause (2) of Section 300 which refers to an act done "with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused". In such case, the offence committed by the accused would amount to murder.

The difference between the two expressions ("with the intention of causing such bodily injury as is likely to cause death") in Section 299 and ("with the intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused") in Section 300 is the difference of degrees of criminality. In the former, i.e. in Section 299, it is at a lower level, whereas in the latter, i.e. in Section 300, it is at a higher level because of offender's knowledge.

It is the special circumstance which converts culpable homicide [S. 299] into murder [S. 300]. This special knowledge must be in relation to the victim. Where such special knowledge is there on the part of the offender, the offence would be of murder even if the injury caused may not be sufficient in the ordinary course of nature to cause death of the victims. Clause (2) of Section 300 is thus "subjective" to the offender.

## **Act likely to cause death and injury sufficient in the ordinary course of nature to cause death: Distinction**

Section 299 states that where death has been caused by a person by any act with the knowledge that such act is likely to cause death, the offence is culpable homicide not amounting to murder. Section 300, on the other hand, enacts that where the bodily injury to any person is sufficient in the ordinary course of nature to cause death, the offence is murder.

The difference, as already noted earlier, is the degree of probability of death. Likelihood of death is at a lower level in case of culpable homicide [S. 299] than in murder [S. 300] where the injury is sufficient in the ordinary course of nature to cause death which is certainly at a higher level. Whether the injuries caused to the deceased were "sufficient in the ordinary course of nature to cause death" is purely an objective fact.

The prosecution must prove the following facts before it can bring a case under Section 300;

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

### **Imminently dangerous act**

Clause (4) of Section 300 applies where the act of the doer is so imminently dangerous that it must, in all probability, cause death (or such bodily injury as is likely to cause death). This clause does not refer to intention at all. It, however, applies to actions which are inherently dangerous in themselves.

Illustration (d) to Section 300 explains the principle. If a person fires a loaded gun (without any excuse) into a crowd of persons and kills one of them, he is guilty of murder. It is not because he intended to cause murder or to kill any person, but his act of firing at a crowd was so imminently dangerous that in all probability it would have caused death or such bodily injury as was likely to cause death. Again, where the accused poured kerosene upon the clothes of the deceased and set her on fire, it was held that the accused must have known that it would result in death of the victim.

### **Law Commission's view**

The Law Commission of India considered Sections 299 (Culpable homicide) and 300 (Murder). It also noted criticism of Sir James Stephen regarding the two offences. The Commission noted that the two sections make culpable homicide the genus and murder a species. It observed that what was sought to be achieved by the two sections was primarily a definition of murder as one species of the genus culpable homicide, and then a definition of the other species of the same genus, namely, culpable homicide not amounting to murder. But the object could not be fully achieved. The Law Commission, therefore, rightly suggested to revise and redraft the two sections retaining formulation of ideas in both the provisions as interpreted by various courts. The Law Commission proposed to define "murder" in Section 299 and "culpable homicide" not amounting to murder in Section 300.

### **Exceptions**

Once the court comes to the conclusion that the case falls under Section 300 IPC, the accused must be held to have committed an offence of murder punishable under Section 302. But the opening words of Section 300 state: "Except in the cases hereinafter excepted." The section contains five exceptions. It is, therefore open to the offender to claim any one or more exceptions. If he is able to prove any of the exceptions, the offence which otherwise would be "murder" would still be "culpable homicide not amounting to murder". The burden to prove any exception, however, is on the accused.

IPC recognises only five exceptions in Section 300 which reduce a case of murder into one of culpable homicide not amounting to murder. It is, therefore, not open to any court to allow or permit any other ground to convert an offence of murder into an offence of culpable homicide not amounting to murder; for instance, killing of children by a mother on account of extreme poverty. It is also pertinent to note that on proof of any of the exceptions, the accused is not entitled to an acquittal but his offence of murder is reduced to culpable homicide not amounting to murder, i.e. a lesser offence.

## **Grave and sudden provocation: Exception 1**

Exception 2 of Section 300 states that culpable homicide is not murder if the offender, whilst deprived of his power of self-control by grave and sudden provocation, causes death of the person who provided such provocation.

### **Conditions**

The following conditions must be satisfied before this exception can be invoked:

1. the deceased must have provided provocation;
2. such provocation must be grave and sudden;
3. the accused must have been deprived of his power of self-control; and
4. he must have caused death of the victim during such deprivation of power of self-control.

### **K.M. Nanavati v. State of Maharashtra**

The leading case on the point is *K.M. Nanavati v. State of Maharashtra* (*K.M. Nanavati*). In that case, accused Nanavati (N) was a Naval Officer. His wife Sylvia had illicit intimacy with one Ahuja (A). On coming to know about that fact, N took his wife and three children to a cinema, left them there, took his revolver under a false pretext and went to the office of A. A was not there. N hence went to A's residence. There was heated exchange of words between the two. N then shot A dead.

At the trial, one of the pleas raised by N was of grave and sudden provocation. The Supreme Court, however, rejected the plea observing that N had sufficient time of about three hours to cool down and regain self-control. The mere fact that before shooting A, N abused A and in turn A gave abusive reply ("Am I to marry every woman I sleep with?") could not become a ground for murder. Accordingly, N was held to have committed an offence of murder under Section 300 of the Code. But where the accused found his wife and the deceased (a neighbour in a compromising position and killed both of them, it was held that he was entitled to be benefit of this exception. Similarly, when the accused saw the deceased committing an act sodomy on his son and killed him, it was held that the case was covered by this exception (grave and sudden provocation) and the accused was entitled to the benefit of Exception I.

### **Nature of provocation**

It is, however, necessary to remember that the provocation contemplate by Exception I must be both: 1) grave; and 2) sudden. It should not be grave or sudden; but grave and sudden. Hence, where such provocation is grave but not sudden or vice versa, i.e. sudden but not grave, the accused is not entitled to the benefit of this exception.

### **Exceptions**

Moreover, Exception 1 must be read with three provisos which further (curtail the benefit of the exception. The first proviso states that the provocation must come from the deceased and not from the accused. Where the accused himself provides provocation, he cannot claim benefit of this exception. In other words the provocation should not be an excuse for killing a human being. The second proviso enacts that the benefit of Exception I cannot be claimed against anything done in accordance with or in obedience to law.

The third proviso bars claim of Exception 1 by the accused where the deceased was exercising the right of private defence. This is obvious since the Code itself recognises the right of private defence in certain circumstances and does not hold the doer of the act criminally liable. Naturally, therefore, no person can claim any benefit so as to deprive him of the right conferred by the Code by allowing the accused the plea of grave and sudden provocation. The Explanation to Exception 1 clarifies that whether the provocation was grave and sudden is a question of fact. Such question has to be decided by the court considering the facts and circumstances of each case.

## **Test**

In *K.M. Nanavati*, the Supreme Court observed that the test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. The Court further stated that the fatal blow should be clearly traced to the influence of passion arising from such provocation. The provocation and the resulting reaction need to be measured from the surrounding circumstances. The provocation must be such as will upset not a hasty, hot-tempered or hypersensitive person but an ordinary and reasonable man with normal behaviour in the given situation.

## **Approach of court**

In determining whether the accused had acted in grave and sudden provocation, the court must consider whether the offender had acted as a reasonable and average person. If the reply is in the affirmative, the accused would be entitled to the benefit of Exception 1. But if the reply is in the negative, Exception 1 would not apply and the accused would be guilty of an offence of murder.

It has been said that the whole doctrine is based on sudden and temporary loss of self-control whereunder malice or mens rea which is the formation of intention to kill is negated. Consequently, where the provocation inspires an intention to kill, the accused cannot claim the benefit. It is neither possible nor desirable to lay down any standard with precision; it is for the court to decide in each case, having regard to the relevant circumstances whether the case is governed by Exception 1. The following warning should always be kept in mind by every court while dealing with Exception 1:

The law cannot permit ill-temper and other abnormalities to become assets for the purpose of committing murder, for if it did a bad tempered man will be entitled to a light verdict of manslaughter where a good tempered one would be convicted for murder.

## **Onus of proof**

Onus of proof to establish Exception 1 is on the accused where he is claiming the benefit of that exception.

## **Exceeding right of private defence: Exception 2**

Exception 2 of Section 300 enacts that culpable homicide is not murder if the offender has exceeded his right of private defence without premeditation and without intending more harm than necessary.

## **Object**

The chief object of this exception is that when the law itself has granted right of private defence in certain circumstances, it must distinguish murder and culpable homicide even if the offender has exceeded such right.

## **Conditions**

Before the accused is entitled to this exception, the following condition must be satisfied:

1. the act (death) must have been committed in exercise of private defence;
2. the said right (of private defence) must have been exceeded;
3. the act must have been done in good faith; and
4. it must have been done:
  - (a) without premeditation; and
  - (b) without any intention of doing more harm than necessary.

## **Onus of proof**

Burden is on the accused to prove that the act was done by him while exercising right of private defence. If the accused is the aggressor, he cannot invoke Exception z. It is settled law that an aggressor has no right of private defence.

## **Public servant exceeding power: Exception 3**

Exception 3 applies to cases of public servants (or aiding public servants) acting for the advancement of public justice by exceeding their power or authority.

## **Object**

The underlying object of this provision is to extend the benefit of this exception to those who act in good faith for advancement of justice and exceed their powers without towards the deceased.

## **Conditions**

For this exception to apply, the following conditions must be fulfilled:

1. the offender must be a public servant (or aiding a public servant);
2. he must be acting in the advancement of justice;
3. he must have exceeded his power;
4. the act must have been done in good faith; and
5. it must have been done without any towards the victim.

## **Onus of proof**

The burden to prove the above conditions is on the accused.

## **Sudden fight: Exception 4**

Exception 4 of Section 300 says that culpable homicide is not murder if it is committed in sudden fight and without premeditation.

## **Exceptions 1 and 4: Comparison**

Exception 4 should be compared with Exception 1 which covers cases of grave and sudden provocation. Both these exceptions are thus based on the same principles. In both there is absence of premeditation or taking undue advantage. There is heat of passion and deprivation of self control. Exception 4, therefore, should have been placed after Exception I.

## **Conditions**

Exception 4 can be invoked if the following conditions are present:

1. there was a sudden fight;
2. there was no premeditation;
3. the act was committed in a heat of passion; and
4. the assailant (a) had not taken any undue advantage; or (b) had not acted in a cruel manner.



## **Onus of proof**

The onus is on the assailant to prove that his case falls under this exception. But if prosecution evidence itself spells out presence of all conditions of Exception 4, the court must grant benefit thereof to the accused.

## **Death with consent: Exception 5**

Exception 5 of Section 300 states that culpable homicide is not murder when such death has been caused with the consent of the victim.

### **Illustration**

Thus, if A is suffering from cancer and being satisfied that there is no hope of recovery, requests B to relieve him from agony and B obliges him by killing A, B can be held guilty of culpable homicide not amounting to murder.

## **Conditions**

For this exception to apply, the following conditions should be fulfilled:

1. the deceased must have given consent; and
2. he must be above eighteen (18) years of age.

It goes without saying that the consent must be legal, real and free consent.

## **Onus of proof**

Where the accused claims the benefit of this exception, burden is on him to prove consent of the victim.

## **Interpretation**

It has also been held that this exception must be strictly construed. The alleged consent by the deceased must be considered with close scrutiny. Such consent cannot be inferred or presumed by implication.

## **Causing death of someone else**

Section 301 IPC enacts that if a person intends to cause the death of A but causes the death of B which he never intended, he would still be liable for such act and would be punished accordingly. Thus, if A aims his shot at B, but it misses B and hits C who dies, A is liable for committing murder of C under Section 300 read with Section 301 and will be punished under Section 302. Again, where A gave poisoned halva to B so that B may eat and die and it was eaten by C and D who died, it was held that A had committed an offence of double murder. This is known as the doctrine of "transferred malice".

## **Power and duty of courts**

It is power as also duty of every court to do justice. It must consider all relevant facts and circumstances. It also should try to separate grain from chaff by appreciating the evidence as a whole on the yardstick of reasonable probabilities and not on fantastic or imaginary possibilities. The court must start with the presumption of innocence of the accused. It is the duty of the prosecution to prove guilt of the accused beyond doubt. No conviction can be recorded against the accused unless the prosecution has discharged the burden placed on it. But where the accused pleads a special defence, exception or circumstance within his knowledge, it is the duty of the accused to prove such defence. There is, however, a difference between "proof beyond reasonable doubt" on the part of the prosecution and "proof on the basis of preponderance of probability" on the part of the accused.

A court of law must always remember that it has to do justice to both, i.e. to the accused as also to the victim and society as a whole. A judge does not preside over a criminal court merely to see that no innocent man is punished. He is also supposed to ensure that a guilty man does not escape. "Both are public duties". It has been rightly said, "Miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent". A judge is, therefore, expected to actively participate in conduct of criminal trial.

No undue importance should be given to unnecessary omissions or minor contradictions. A court cannot ignore the ground reality that an honest and truthful witness also may not remember minute details of the incident. But where inconsistencies and/or contradictions, improvements and variations are major or substantial in nature and go to the root of the matter, creating doubt as to the genesis of the case of the prosecution, the court may not place implicit reliance on it. All incriminating circumstances should be put to the accused by the court so as to enable him to explain them. In serious crimes, investigation must be fair, honest and above board. Inordinate delay may create suspicion and may give rise to an apprehension that investigation was biased or one-sided. Defective investigation, however, should not become a ground to acquit a culprit where trustworthy and reliable evidence is on record to prove the guilt of the accused. Bentham has rightly described witnesses as "eyes and ears" of justice. Evidence of a witness, hence, must be considered carefully keeping in view the nature of evidence, i.e. whether he is an eye witness, injured witness, relative witness, chance witness, interested witness, rustic witness, etc. The court must also consider the evidence of experts, such as, handwriting experts, doctors, ballistic experts, etc.

Oral evidence should be tested on its inherent consistency and probability. If it is trustworthy and otherwise reliable, it can be accepted. On the other hand, if drawbacks and infirmities are vital, basic in nature or essential, the court may not rely on such evidence and grant benefit of doubt to the accused. It is well-settled that there is long distance between "may" and "must". It is fundamental principle of criminal jurisprudence that the accused must be and not merely may be guilty. "The mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. No judicial decision can be a guide on facts. Each case has its own peculiarities and special circumstances which cannot be regarded as a "precedent" or a guide for other cases except on a "pure question of law".

### **Sentence**

Punishment or sentence is an act of punishing the offender or wrongdoer. It is a penalty for infringement of law. The law does not contemplate a person being convicted and no penalty is imposed on him.

### **Proper sentencing: Delicate issue**

Awarding proper sentence is indeed a complex question and delicate task. It has been rightly said that trying a man and holding him guilty is not difficult. The real difficulty starts when he is found guilty and the question comes up of awarding punishment. It is at that stage that the court is supposed to exercise utmost care. Proper sentencing requires balancing of interests at different levels. On the one hand, it has to protect society at large and the victim in particular; and on the other hand, it should take care of the offender by providing him with an opportunity to improve and make him a "non-offender".

### **Considerations**

In fixing proper sentence, a court of law must take into account several factors, such as the nature of the offence, circumstances in which the offence has been committed, age, education, home life, background, etc. of the offender, prior criminal record, if any, motive behind the crime, and a host of other components. The sentence should neither be too lenient nor too harsh. The former does not deter while the latter may make him a habitual offender or a hardened criminal.

## **Murder: Death sentence**

Section 302 enacts that whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to pay fine. Thus, where a person is convicted for an offence of murder as defined in Section 300 IPC, he shall be punished with 1) death sentence; or 2) imprisonment for life. He shall also be liable to pay fine under Section 302.

This section, however, must be read with Section 354 (3), Criminal Procedure Code, 1973 which states that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life, normally, sentence of imprisonment for life should be awarded. If the court intends to impose the death sentence, it should record reasons for doing so. We have seen that over and above Section 302, there are several other provisions which provide sentence of death. The normal or general rule, however, is to impose imprisonment for life in such cases. It has been held in several decisions by the Supreme Court that death sentence can be awarded only in the "rarest of rare" cases. The court for deciding the question must consider aggravating circumstances and mitigating factors and take an appropriate decision.

### **Aggravating circumstances**

Where a person is found guilty for committing an offence punishable with death or imprisonment for life, the court is bound to consider circumstances- aggravating as also extenuating or mitigating- and should award appropriate punishment. The following are aggravating circumstances which may call for extreme penalty of death or capital punishment:

1. pre-planned, cold-blooded or brutal murder;
2. killing of all family members;
3. rape with murder;
4. killing of kiths and kins- father, mother, son, daughter, wife, husband, children, dowry death, bride burning, etc.
5. killing of an innocent, defenceless child or old or infirm person;
6. double, triple or several murders;
7. killing through hired professional murderers;
8. killing of several persons by throwing bombs; by organised crime, terrorism, etc.
9. killing by an offender convicted in the past and having a previous criminal record; and
10. something unusual or uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for extreme penalty.

### **Mitigating factors**

The following circumstances, on the other hand, are held to be extenuating circumstances or mitigating factors for not awarding extreme penalty (death):

1. age of the offender- too young, too old, etc;
2. suffering from socio-economic, psychic or other compulsion;
3. others similarly situated were not awarded extreme penalty;
4. offence without premeditation or oblique motive;
5. long lapse of time or unreasonable delay;

6. moral justification of the act; for example, infidelity of wife, saving honour of family, etc.
7. mental condition of the offender;
8. where there is only circumstantial evidence;
9. subsequent remorse by the offender; and
10. difference of opinion as to sentence among judges; etc.

It is, however, impossible to lay down a rigid rule which may be applicable uniformly in all cases. The court, while considering the case on hand, will take into account above illustrative circumstances alongwith a host of other factors and award appropriate sentence on the offender.

### **Murder by life convict: Death sentence**

Section 303 IPC enacted, "Whoever, being under sentence of imprisonment for life commits murder, shall be punished with death." The section thus made it obligatory or compulsory for the court to impose capital punishment in case a life convict committed murder. In *Mithu v. State of Punjab*, constitutional validity of Section 303 was challenged inter alia on the ground that the provision conferred no discretion on the court to impose any sentence other than the death. Such a provision must be held to be arbitrary, discriminatory, irrational and ultra vires Articles 14 and 21 of the Constitution of India. The Constitution Bench of the Supreme Court upheld the contention and declared Section 303 ultra vires and unconstitutional on two grounds:

1. there was no rational or reasonable basis for classifying offenders into two categories: (a) committing murder; and (b) committing murder while suffering imprisonment for life. The so-called classification had no rational basis and was violative of Article 14 of the Constitution; and
2. mandatory sentence of death penalty with no discretion left to the court was arbitrary and violative of Articles 14 and a" of the Constitution.

It is respectfully submitted that the first ground which weighed with the court for declaring the provision ultra vires cannot be said to be well-founded. Classification between 1) offenders undergoing sentence of imprisonment for life for committing murder; and 2) others not undergoing a similar sentence must be held to be valid, constitutional and rational based on reasonable classification. It also sought to achieve the object underlying the provision, i.e. to impose death penalty on a particular class of offenders. Such a provision, in the opinion of the authors, could not be held arbitrary, discriminatory, irrational or violative of Articles 14, 19 or 21 of the Constitution of India.

### **Culpable homicide: Sentence**

Section 304 creates no offence. It merely prescribes punishment for an offence of culpable homicide not amounting to murder. Code recognises three degrees of culpable homicide:

1. culpable homicide amounting to murder (first degree), punishable under Section 302;
2. culpable homicide not amounting to murder (second degree), punishable under Section 304; and
3. culpable homicide not amounting to murder (third degree), also punishable under Section 304.

Section 304 reads thus:

304. Whoever commits culpable homicide not amounting to murder, shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

The section is in two parts and divides the offence of culpable homicide not amounting to murder in two categories. Part I of Section 304 applies to cases where the act by which death is caused, is done 1) with the intention of causing death; or 2) with the intention of causing such bodily injury as is likely to cause death. In either case, the death has been caused with intention. The first part, therefore, enacts that in such cases, i.e. cases falling under the first part of Section 304, the offender is liable to be punished with imprisonment for life or imprisonment which may extend to 10 years, i.e. the minimum for the offence.

The second part covers cases of death wherein there is no intention. It applies to those cases where the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death. In such cases, the offender is liable to be punished with imprisonment which may extend to 10 years, i.e. the maximum for the offence. The law makers thus made a distinction between intentional homicide (Part I) and unintentional homicide (Part II) and provided higher sentence for the former category.

The Law Commission considered this provision. It also noted that the distinction was based on intentional and unintentional homicide. Surprisingly, however, it stated that the distinction was "unnecessary" and recommended simplification by amending the provision.

Simplification of section recommended- Section 304 may, accordingly, be simplified as follows:

**304. Punishment for culpable homicide not amounting to murder-** Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

It is submitted that the Law Commission was not right in observing that the distinction, "though theoretically sound, is unnecessary in practice". In the opinion of the authors, the distinction between "intention" and "unintention" is theoretically sound, practically feasible and legally permissible and on the basis of such distinction (intentional homicide and unintentional homicide), appropriate punishment can always be awarded by the court either under Part I or under Part II of Section 304.

## **Attempt to commit murder**

### **Statutory provision**

Sections 307 and 308 deal with offences of attempt to commit murder and attempt to commit culpable homicide not amounting to murder, respectively. Section 307 states that an attempt to commit murder is an act done with such intention or knowledge and under such circumstances that if the doer by that act causes death, he would be guilty of murder. Illustrations to the section explain the principle clearly.

- (a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.
- (b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

### **Ingredients**

For bringing the case under this section, the prosecution must prove the following essentials:

1. death of human being must have been attempted;
2. such attempt must be intentional or with knowledge of the death of a human being; and
3. had death been caused by such act, it would have been murder.

An offence of attempt to commit murder under this section thus requires both the essential elements of crime, viz.

1. mens rea (guilty mind); and
2. actus reus (actual act).

Only thing is that the action falls short of a complete act, i.e. murder. In other words, the act must be such that but for the intervention of some circumstance it would, (if completed) have resulted in death.

### **Evidence and proof**

To justify conviction under Section 307, it is not necessary that bodily injury capable of causing death must have been inflicted. Nature of injury caused by the accused may often provide considerable assistance in recording a finding as to intention of the accused. But such intention may be gathered from other circumstances also. The court has to consider whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. If it is so, the accused can be convicted even though the act might not have yielded the intended result. The determinative issue is the intention or knowledge and not the nature of injury. Whether there was intention or knowledge on the part of the accused to cause death of the victim is a question of fact and depends upon facts and circumstances of each case.

### **Sentence**

So far as sentence is concerned, the section [S. 307] deals with three situations.

*Firstly*, where the act is done with such intention or knowledge that if by that act death is caused, the offender may be punished with imprisonment up to 10 years.

*Secondly*, if hurt is caused in such attempt, the punishment may be for imprisonment for life.

*Thirdly*, where the person committing the offence is under sentence of imprisonment for life and if hurt is caused to the victim, the offender may be punished with death penalty.

### **Attempt to commit culpable homicide**

Section 308 punishes attempt to commit culpable homicide not amounting to murder. It is similar to Section 307. The only difference is that the said section, i.e. Section 307 applies to culpable homicide amounting to murder. A person can be said to commit an offence of culpable homicide not amounting to murder if his act is under Section 299 or falls under one or more exceptions to Section 300 IPC. Illustration to Section 308 explains this principle. It states that A, on grave and sudden provocation, fires pistol at Z, under such circumstances that if he thereby caused the death of Z, he would be guilty of culpable homicide not amounting to murder. A has committed the offence as defined in Section 308.

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# SUICIDE

## Synopsis:

- ▶ Introduction
- ▶ "Suicide": Meaning
- ▶ Abetment of suicide
- ▶ Attempt to commit suicide
  - ◆ Statutory provision
  - ◆ Constitutional validity
  - ◆ Hunger strike
  - ◆ Euthanasia
  - ◆ Sentence

## Introduction

Three sections, viz. Sections 305, 306 and 309 deal with suicide. The first two [Ss. 305 & 306] make abetment of suicide punishable and apply when suicide is in fact committed. Section 309 seeks to punish an attempt to commit suicide. It is the sole provision in IPC which ceases to apply once the act is committed or is over obviously because the "offender" is no more available. It makes an attempt punishable.

## "Suicide": Meaning

"Suicide" means self-killing. It is taking of one's own life. It means self-killing to the same extent as homicide means killing someone else. It is intentional or voluntary self-destruction.

## Abetment of suicide

Section 305 makes abetment of suicide of a child, an insane person, an idiot, an intoxicated person, etc. punishable. Section 306 punishes abetment of suicide.

## Attempt to commit suicide

### Statutory provision

Section 309 enacts; "Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both".

### Constitutional validity

In *P. Rathinam v. Union of India* (P. Rathinam), the Supreme Court was called upon to consider the constitutional validity of Section 309 IPC. Holding that Article 2,1 of the Constitution of India which guarantees a "right to life" would also include "right to die", the Court declared the section ultra vires and unconstitutional. In *Gian Kaur v. State of Punjab*, however, the Constitution Bench of the Supreme Court overruled P. Rathinam and held that Section 309 IPC does not violate Article 2.i of the Constitution. The Court also rightly observed that "right to life" does not necessarily include "right to die" or "right not to live". Considering and putting emphasis on "sanctity of life", it was held that suicide which is unnatural termination of life is incompatible and inconsistent with the concept of "right to life". Recently, however, in *Aruna Ramachandra Shanbaug v. Union of India*, the Supreme Court observed that the time has come to delete Section 309 IPC by Parliament as it has become anachronistic. "A person attempts to commit suicide in depression. He needs help rather than punishment."

## **Hunger strike**

Hunger strike till death is suicide by starvation. Where a person decides to commit suicide by starving himself to death, it can be said to be a "hunger strike" till death. This step is taken for various reasons. History takes note of freedom struggle and several leaders including the "father of the nation" (Mahatma Gandhi) had adopted this mode for getting independence during satyagraha movement. It is also resorted to for getting demands of strikers fulfilled or accepted.

Whether the person going on hunger strike has or has not committed an offence punishable under Section 309 is a difficult question. The peculiar problem is that it is a long drawn process, which can be interrupted or given up at any stage. Hence, in absence of clear declaration of intention to that effect, it cannot be concluded that the person has committed the offence. Even where a person has gone on fast and declared his intention to fast to death, it is difficult to say that he really intended to observe to the bitter end. The accused may change his mind and break his fast before it becomes dangerous.

Where, however, a person openly declares that he will fast to death and also proceeds to refuse all nourishment until the stage is reached when there is imminent danger of death ensuing, he can be held guilty of the offence of attempt to commit suicide.

## **Euthanasia**

"Euthanasia" or "mercy killing" means causing or hastening of death particularly of a patient suffering from or undergoing incurable illness at his own request. It has been said that life of a human being is a precious gift by God. Every human being has a right to live. It is basic and natural right. Though death is certain and inevitable, suicide is not a feature of normal life. A man is a social animal. As a member of society, he has duties towards himself, his family and friends and towards society at large. He cannot overlook his duties and end his life abruptly and abnormally.

At the same time, however, where a person is terminally ill, seriously sick or is suffering from unbearable pains and living a miserable life, it is improper as also inhumane to force him to live a painful life and suffer agony. It is an insult to humanity. A person may not be allowed to die with a view to avoid his social obligations but if he is unable to take care of himself due to physical ailments or mental imbalances, he cannot be compelled to live a vegetative life. It would amount to cruelty not to allow him to die. Right to live must mean right to live with human dignity. If one has right to live, one must have right to die with dignity.

Distinction, however, must be drawn between suicidal deaths and mercy killings. The former is not permissible, but the latter permits the person's agony to come to an end. They are not cases of extinguishing life voluntarily but of accelerating process of natural death which has already commenced. Allowing such a process would really result in the end of his suffering. Detailed discussion is found in a recent decision of the Supreme Court in *Aruna Ramachandra Shanbaug v. Union of India*.

## **Sentence**

The Code provides punishment for an attempt to commit suicide with simple imprisonment up to one year or with fine or with both. It is, however, necessary to remember that normally, no reasonable and prudent person in his senses would like to end his life by committing suicide. It is only when he is tired of a miserable life on account of extreme poverty, family quarrels, loss of "near and dear" ones, intolerable illness, unbearable sufferings, etc., that he decides to quit the world. A court of law must take into account all these factors. It should consider the victim as a "patient" who deserves "medicine", love and affection and not a "culprit" who is exposed to penalty, punishment or sentence. Imposition of sentence or payment of fine may result in much more pain, shock and suffering and add to his agony. The approach of the court in such cases, therefore, should be extremely liberal, kind and charitable.



## **CAUSING MISCARRIAGE**

### **(SECTIONS 312-314)**

#### **Synopsis**

- ▶ Meaning of Miscarriage
- ▶ Causing Miscarriage with the consent of the victim
- ▶ Ingredients of Section 312
- ▶ Causing Miscarriage without woman's consent
- ▶ Death caused by act done with intent to cause miscarriage

#### **Meaning of Miscarriage**

The term 'miscarriage' is nowhere defined in the IPC. Miscarriage means premature expulsion of the child or foetus from mother's womb before the completion of natural gestation period. The word 'miscarriage' is used synonymously with the word 'abortion'. As per Modi's Medical jurisprudence, "Legally, miscarriage means the premature expulsion of the product of conception, and ovum or a foetus from the uterus, at any period before the full term is reached. Medically, three distinct terms, namely, abortion, miscarriage and premature labour, are used to denote the expulsion of a foetus at different stages of gestation. The term 'abortion' is used only when an ovum is expelled within the first months of pregnancy, before the placenta is formed. 'Miscarriage' is used when a foetus is expelled from the fourth to the seventh month of gestation, before it is viable. Premature labour, is the delivery of a viable child, possibly capable of being reared, before it has become fully mature.

#### **Causing Miscarriage with the consent of the victim**

Section 312 of the Indian Penal Code states that

"Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Explanation** - A woman who causes herself to miscarry, is within the meaning of this section."

#### **Ingredients of Section 312 :**

- 1) Voluntarily causing a woman with child to miscarry;
- 2) Such miscarriage should not have been caused in good faith for saving the life of the pregnant woman.

Section 39 of the IPC defines 'voluntarily' to mean intending to cause an effect or employing means which a person knows or has reason to believe is likely to cause the intended effect. Thus, intention to cause miscarriage or mens rea is an essential ingredient of the offence.

'A woman with child' means a pregnant woman. The moment a woman conceives and the gestation period or the pregnancy begins, then a woman is said to be with child.

The term 'quick with child' refers to a more advanced stage of pregnancy. 'Quickening' is the perception by the mother that the movement of the foetus has taken place or the embryo has taken a foetal form. This term arises from the old notion that a foetus becomes endowed with life and secures an identity apart from the mother, when the movements are felt by the mother. However, causing miscarriage of a woman 'quick with child' is considered a much graver offence, than causing miscarriage of a 'woman with child'.

Miscarriage technically refers to spontaneous abortions, whereas the voluntary causing of miscarriage, which forms the offence under the Code stands for criminal abortion.

Section 312 makes voluntary miscarriage an offence in two situations: (i) when a woman is with child for which punishment is imprisonment of either description for a term which may extend to three years, or with fine, or with both; and (ii) when a woman is quick with child for which the punishment is imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The explanation to Section 312 makes it clear that the offender could be the woman herself or any other person. In *Re Ademma*, a woman was charged for causing herself to miscarry, though she had been pregnant for only one month and that there was nothing which could be called as a foetus or child. The lower court acquitted the woman, taking a lenient view of the matter. The High Court, however, held the acquittal is bad in law, and emphasised that it was an absolute duty of a prospective mother to protect her infant from the very moment of conception.

A person who aids and facilitates a miscarriage is liable for the abetment of the offence of miscarriage under Section 312 read with Section 109 of the Code, even though the abortion did not take place. A person who aids and facilitates a miscarriage is liable for attempt to commit abortion under Section 312 read with Section 511, IPC.

Section 312 permits abortion on therapeutic (medical) grounds in order to protect the life of the mother. Acts of doctors and nurses which facilitate or accelerate delivery cannot be treated as offences under these provisions, for the reason that otherwise, the delivery would have been delayed; particularly when the child is born alive and no injury is caused to the mother or the child.

Section 312 exempts persons who cause miscarriage in good faith for the purpose of saving the life of the woman. In such situations, the person is not liable under Section 312. For more information relating abortion permitted please see 'Medical Termination of Pregnancy Act, 1971, & Rules 1975, 'Prenatal Diagnostic Techniques (Protection of Sex Selection conception and Misuse) Act, 1994. The offence under Section 312 is non-cognizable, non-compoundable, but bailable and shall be enquired by a Magistrate of the first class.

### **Causing Miscarriage without woman's consent**

Section 313 of the Indian Penal Code provides that

"Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Section 313 of the Code is in continuation of Section 312. In the offence under Section 312, the pregnant woman's consent is inherent. In the offence under Section 313, there is no consent of pregnant woman, hence only the person who causes the abortion is punished and the woman is not punished while in Section 312 the woman who causes herself to miscarry is also punished. The offence under Section 313 is an aggravated form of the offence and it is considered a much more grave offence and as per Section 313, it is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. The offence under Section 313 is cognizable, non-bailable, non-compoundable and shall be tried by the Court of Session.

## **Death caused by act done with intent to cause miscarriage**

**Section 314 of the Indian Penal Code provides that**

**"Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;**

**if act done without woman's consent:— and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.**

**Explanation- It is not essential to this offence that the offender should know that the act is likely to cause death."**

**Section 314 of the Code applies when miscarriage results in death. The act of the accused must have been done with intent to cause the miscarriage of a woman with child.**

**Causing the death of the woman, while causing miscarriage, is a further aggravated form of the offences described under Sections 312 and 313. As per Section 314 of the IPC, when an act is done with the intention of causing miscarriage, but which act results in death, then it is an offence liable for punishment up to 10 years. As per this provision, it is sufficient if the intent is only to cause miscarriage and not death. In other words, intention to cause death is not an essential element of this crime. It is sufficient to show that an act which is carried out with intent to cause miscarriage resulted in the death of the woman. To bring home the offence under this section, a direct nexus between acts done by the accused and the death of the woman needs to be proved. The explanation to Section 314 provides that it is not even essential that the offender should know that the act is likely to cause death.**

**Under Section 314 if the miscarriage resulting in the death of the woman is done without her consent, then the punishment prescribed is harsher which can include life imprisonment. In *Maideen Sab v. State of Karnataka*, the pregnant woman was admitted at the hospital-cum-house of the accused-doctor by her son-in-law. The doctor gave the medicine for abortion. The woman fell unconscious and died. The deceased was buried as it was decomposed. The accused absconded from the city. He made extrajudicial confessions to three different persons to the effect that the death took place during abortion. Basing on circumstances established and proved the court punished him with five years R.I. This offence is cognizable, non-bailable and non-compoundable and triable by the Court of Sessions.**

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## HURT

### Synopsis:

- ▶ Introduction
- ▶ Simple hurt
- ▶ Grievous hurt
- ▶ Rash or negligent acts causing hurt or grievous hurt

### Introduction

Sections 319 to 338 deal with offences causing bodily injury. They may conveniently be discussed under the following three heads:

- (i) Simple hurt: Sections 319, 321, 323, 324, 327, 328, 330, 332 and 334;
- (ii) Grievous hurt: Sections 320, 322, 325, 326, 326-A, 316-B, 329, 331, 333 and 335; and
- (iii) Rash or negligent acts causing hurt or grievous hurt: Sections 336 to 338.

### Simple hurt

Section 319 defines (simple) hurt. It states that whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. Section 321 defines the offence of "voluntarily causing hurt". It states that whoever does any act with the intention of causing hurt or with knowledge that he is likely to cause hurt and thereby causes hurt is said "voluntarily to cause hurt".

Bodily pain may be caused by direct physical contact or otherwise. Thus, if a person administers blow on the chest with an umbrella, he is said to have caused hurt. But it is not necessary that visible injury should be caused to the victim. Hence, where a person deliberately set out to shock to someone with a weak heart and succeeded in doing so, he is covered by this section. If a person communicates a disease to another person, he would be guilty of causing hurt. Thus, a person suffering from a venereal disease may cause hurt to a woman if he has sexual intercourse with her communicating the disease to her.

Infirmity has been interpreted to mean physical inability of an organ to perform its normal function which may either be temporary or permanent. Where bodily pain, disease or infirmity has been caused with the intention of causing hurt or with the knowledge that hurt is likely to be caused, the offence of voluntarily causing hurt can be said to have been committed. Section 323 prescribes punishment for the offence of causing hurt. Sections 324, 327, 328, 330 and 332 are aggravated forms of hurt. Section 334 covers cases of causing hurt on provocation.

Section 324 applies to cases of causing hurt by dangerous weapons, such as, any instrument of shooting, stabbing, cutting or any instrument which as a weapon of offence is likely to cause death. The section thus puts emphasis on the mode adopted or means used by the offender and prescribes more punishment.

Section 327 punishes one who causes hurt to extort property, or to constrain the victim to do an illegal act, or to facilitate commission of an offence. Section 328 can be invoked where hurt is caused by means of poison, intoxicating drug, etc. Section 330 punishes an offence of causing hurt for the purpose of extorting a confession. The primary object of the provision is to prevent torture by police authorities.

IPC has explained this principle by giving the following illustrations:

- (a) A, a police officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.
- (b) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

Section 332 penalises a person causing hurt to a public servant with a view to deter him from discharging his duty. Section 334 covers cases of causing hurt on grave and sudden provocation.

### **Grievous hurt**

We have noted that Section 319 defines hurt, i.e. simple hurt. Section 320 defines grievous hurt. It does not create a substantive offence. The following are grievous hurts:

*First- Emasculation.*

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

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

*Fourthly- Privation of any member or joint.*

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

*Sixthly- Permanent disfiguration of the head or face.*

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

*Eighthly- Any hurt which endangers life or which causes the sufferer to be during the space of 20 days in severe bodily pain, or unable to follow his ordinary pursuits.*

The Code makers were aware that it was difficult to draw a line between simple hurt and grievous hurt. They, however, thought it better to draw such line so as to distinguish bodily hurts which are serious and those which are slight.

Section 322 defines the offence of "voluntarily causing grievous hurt". It states that causing hurt with intention to cause such hurt or with knowledge that such hurt is likely to be caused and thereby he causes "grievous hurt", is said "voluntarily to cause grievous hurt".

Section 325 provides punishment for voluntarily causing grievous hurt. Sections 326, 326-A, 326-B, 329, 331 and 333 are aggravated forms of grievous hurt. Section 335 covers cases of causing grievous hurt on provocation. Section 326 covers cases of causing grievous hurt by dangerous weapons or means. Sections 326-A and 326-B apply to cases of grievous hurt by use of acid. Section 329 is attracted where grievous hurt is caused to extort property or to constrain the victim to do an illegal act or to facilitate commission of an offence. Section 331 applies to cases of causing grievous hurt to extort confession. Section 333 punishes a person causing grievous hurt to a public servant with a view to deter him from discharging his duty. Section 335 relates to cases of causing grievous hurt on grave and sudden provocation.

### **Rash or negligent acts causing hurt or grievous hurt**

Section 336 makes rash or negligent act, endangering human life or personal safety punishable. It neither requires intention nor knowledge on the part of the person doing such act. It is also not necessary that injury or harm should have been caused. Section 337 applies where such act results in causing hurt to any person. Section 338 can be invoked where there is grievous hurt.

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## **WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT**

### **Synopsis:**

- ▶ Wrongful Restraint
- ▶ Punishment for wrongful restraint
- ▶ Wrongful Confinement
- ▶ Punishment for wrongful confinement
- ▶ Distinction between wrongful restraint and wrongful confinement
- ▶ Aggravated Forms of Wrongful Confinement

### **Wrongful Restraint**

According to Section 339 of the Indian Penal Code, "Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

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

#### **Illustration**

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

### **Punishment for wrongful restraint**

As per Section 341 of the Indian Penal Code, "Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both."

### **Ingredients of Wrongful Restraint**

The essential ingredients of 'Wrongful Restraint' are :

- 1) Voluntary obstruction of a person;
- 2) The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

### **Object**

Object of this section is to protect the freedom of a person to utilise his right to pass in his way. Every man's person is sacred and that it is free, the law visits with its penalties those who abridge his personal liberty, though he may have no design upon his person. The offence of wrongful restraint is complete if one's freedom of movement is suspended by an act of another done 'voluntarily' that is to say, done with that intention or with the knowledge or belief in its likelihood.

### **Definition of Terms**

#### **Voluntarily**

According to Section 39 of IPC, "A person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

The term 'voluntarily' implies the exercise of volition or will in causing the effect with the intention of causing it, or at least, with the knowledge that it was likely to be so caused.

## **Obstruction**

'Obstruction' in Section 339 means physical obstruction, though it may be caused by the use of physical force as well as by the use of menaces or threats.

## **Person**

By a person is meant a human being. A child of a tender age who cannot walk of his own is also a person.

## **Wrongful Restraint**

Wrongful restraint means the keeping a man out of a place where he wishes to be, and has a right to be. The expression 'wrongful restraint' implies the keeping a man out of a place where he wishes and has a right to be.

The 'wrong' defined is a wrong against a 'person' and if a man is prevented from taking his animal or cart along with him in one direction, that will not be an offence within the section.

In wrongful restraint there need not be any stoppage of the movement; it may be directed into a channel different from the direction in which the victim intends to move. Physical presence of the obstructor is not necessary nor is actual assault necessary, the fear of immediate harm restraining a man out of place where he wishes to be and has a right to be is sufficient to constitute an offence under Sections 339 & 341. The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go provided he does so in a lawful manner, cannot be justified and is punishable. It is only on two occasions there will be no offence for obstruction : (i) the obstruction of a private way over land and water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence; (ii) a person who bona fide believing in his right to a property asserts his claim thereto cannot be convicted of this offence.

Mere verbal prohibition does not constitute wrongful restraint. Mere direction or demonstration will not constitute wrongful restraint. Obstruction to vehicle alone does not constitute 'wrongful' restraint as defined in Section 339 as obstruction of a person only comes within its purview. However, an obstruction caused to a vehicle carrying passengers, amounts to wrongful restraint of the passengers. The fact that the passengers are free to get down and proceed in the desired direction does not take the obstruction to the passengers outside the ambit of wrongful restraint.

## **Illustrations of Wrongful Restraint**

The following illustrations given in the original Draft Code elucidate the meaning of Section 339 :

- a) A builds a wall across a path along which Z has a right to pass. Z is thereby prevented from passing. A wrongfully restrains Z.
- b) A illegally omits to take proper order with a furious buffalo which is in his possession and thus voluntarily deters Z from passing along a road along which Z has a right to pass. A wrongfully restrains Z.

All persons have a right to use a public place or public way in a lawful manner and no one has right to prevent another from using it without incurring the risk of being penalised under Section 339.

The following are some of the illustrations of wrongful restraint:

- 1) A has taken a house from B on rent. A has gone out after closing the house. B puts his own lock on the premises in A's absence.
- 2) The accused, a landlord obstructed the tenant from using the bathroom. The accused was held guilty of wrongful restraint.

This offence is cognizable, bailable, compoundable and is triable by any Magistrate.

## **Wrongful Confinement**

According to Section 340 of the Indian Penal Code, "Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said to "wrongfully confine" that person.

### **Illustrations**

- a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.
- b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z."

## **Punishment for wrongful confinement**

As per Section 342 of the Indian Penal Code, "Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

Earlier, 'wrongful confinement' was called 'false imprisonment'. According to Winfield, it means 'the infliction of bodily restraint which is not expressly or impliedly authorised by law. However in IPC, 'false imprisonment, was substituted by 'wrongful confinement' -

## **Ingredients of Wrongful Confinement**

The essential elements of Wrongful Confinement are:

- 1) Wrongful restraint of a person or total restraint or complete deprivation of liberty without lawful justification.
- 2) Such restraint must prevent the person from proceeding beyond certain circumscribing limits.

'Wrongful confinement' is a species of 'Wrongful restraint. In wrongful restraint there is only a partial suspension of one's liberty or locomotion, while in wrongful confinement there is a total suspension of liberty 'beyond certain circumscribing limits'. Section 340 refers only to a confinement which is wrongful in the sense of its being 'illegal'.

Confinement is a form of restraint in which a person is restrained from going beyond certain prescribed limits and it becomes 'wrongful' if the restraint is illegal and the person is prevented from going where he has a right to go.

To support a charge of wrongful confinement, proof of actual physical obstruction is not necessary. It is sufficient, if such an impression was produced on the mind of the victim as to create a reasonable apprehension that he was not free to depart and that he would be forthwith restrained, if he attempted to do so. The mere threat of some future harm in case of departure will not be sufficient if the victim knows that it is open to him to go away and he refrains from doing so. But if the circumstances are such as to justify and create the belief that he cannot depart without being seized immediately, then it would amount to wrongful confinement.

The detention of the person wrongfully confined must be involuntary. He must be unwilling to remain within the circumscribed limits prescribed for him. If he submits, because he must, it is no willingness.

The offence of wrongful confinement is an offence affecting human body and cannot be said to have been committed if a person is not confined himself but the liberty of going in the conveyance in which he wishes to go or taking the article which he wishes to carry and without which he is not willing to proceed is denied to him.

Detention through the exercise of moral force, without the accompaniment of physical force or actual conflict, is sufficient to constitute wrongful confinement. Malice is not an essential requirement in the offence of wrongful confinement.



The time during which a person is kept in wrongful confinement is immaterial, except with reference to the extent of punishment. Section 343 to 348 deal with aggravated cases of confinement.

Section 340 of the Code defines the offence of 'wrongful confinement' which is, as such, punishable under Section 342. Section 342 refers only to a confinement for less than three days only. After the confinement of 3 days, the penalty incurred for the offence is that provided in Section 343. Section 343 again, is confined to the offence, the duration of which does not exceed ten days, after which a still higher penalty, as provided in Section 344, is incurred. Besides prolonged confinement, there are other circumstances of aggravation, such as confinement of a person for whose liberation a writ has been issued (Sec. 345), or confinement in secret (Sec. 346), or confinement for the purpose of extortion of property (Sec. 347), or a confession (Sec. 348) in which cases the aggravating factors are the same as enhance the penalty ordinarily incurred for causing hurt (Sections 300, 331). The procedure for redress in a case of wrongful confinement will be found set out under Section 342.

### Illustrations of Wrongful Confinement

The following are some of the illustrations of wrongful confinement:

1) In *Jay Engineering Works v. State of West Bengal* a large number of labourers gheraoed the management staff without giving them freedom to move above and gherao (physical blockade of a target, either by encirclement intended to blockade the ingress or egress from and to a particular office, workplace, etc.) was held to be illegal amounting to the criminal offences of wrongful restraint and wrongful confinement.

2) In *Behary Sing v. R*, it was held that police officers are empowered to arrest and detain persons in custody for a period of twenty-four hours and any detention beyond that period would, therefore, be necessarily illegal.

Section 342 prescribes punishment for wrongful confinement, which may extend to imprisonment of either description for one year, or fine up to 500 rupees or with both.

This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable as well as compoundable, and is triable by any Magistrate.

### Distinction between wrongful restraint and wrongful confinement

Wrongful Restraint	Wrongful Confinement
1. In wrongful restraint, a person is restrained from proceeding in some particular direction, though free to proceed elsewhere.	In wrongful confinement, a person is restrained from proceeding in an direction beyond a certain area.
2. Wrongful restraint is genus	Wrongful confinement is a species of wrongful restraint.
3. Wrongful restraint is an offence, which prevents a person from proceeding in a direction in which that person has a right to proceed.	Wrongful confinement is an offence, which keeps a person within certain circumscribing limits. The person wrongfully confined cannot go out of circumscribing limits, even if he wishes to go.
4. In wrongful restraint, there is only a partial suspension of one's liberty.	In Wrongful confinement, the restraint is total or absolute.
5. Wrongful restraint is not a very serious offence and is punishable with lesser punishment	Wrongful confinement is a more serious offence and is punishable with severe punishment than in wrongful restraint.
6. Punishment for wrongful restraint is imprisonment to one month or fine of Rs. 500/- or with both.	Punishment for wrongful confinement is imprisonment to one year or fine of Rs. 1000/- or with both.

## **Aggravated Forms of Wrongful Confinement (Sections 343-348)**

### **I. Wrongful confinement for three or more days (Sec. 343)**

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

Under Section 343 the penalty is the same whatever the period of confinement be, three hours or three days, provided that the third day is not completed. The days will count as from the moment of illegal confinement, and such a day will change every twenty-four hours, irrespective of the diurnal motion of the earth. This section 6, applies for wrongful constraint up to ten days. This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable, but is compoundable only when permission is given by the court before which the prosecution is pending and is triable by any Magistrate.

### **II. Wrongful confinement for ten or more days (Sec.344)**

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

Section 344 provides the maximum penalty of three years in addition to an unlimited fine, whatever may be the length of confinement in excess of ten days. The commencement of the time of the illegal confinement marks the commencement of a day within the meaning of Section 343 (as given above). This offence is cognizable, but summons should ordinarily issue in the first instance. It is bailable and non-compoundable with the permission of court and is triable by any Magistrate.

### **III. Wrongful confinement of person for whose liberation writ has been issued (Sec. 345)**

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

The points requiring proof under Section 345 are :

1. That accused kept a certain person in confinement;
2. The confinement was wrongful;
3. That a writ for the liberation of such person had been duly issued;
4. That accused kept the person wrongfully confined after knowing that a writ for the liberation of the person had been duly issued.

Section 345 of the Code only provides for an additional penalty for an offence, which is in the nature of a contempt; for continuing to keep in confinement a person after knowing of a writ of liberation duly issued for him. If the accused continues to hold a person captive in defiance of the writ, he does so in defiance of the law which has sanctioned his enlargement.

In the first place, Section 345 requires that in order to make the accused penalised, he must know of the writ of liberation. Such knowledge, but not mere hearsay gossip, must come to him through the medium of senses. If he merely suspects or believes that such a writ is likely to be issued or must have been issued, he is not bound to act upon his suspicion or belief on pain of rendering himself liable to the enhanced penalties of Section 345.

The offence under Section 345 is cognizable and a summons should issue in such a case. The offence is bailable, but is non-compoundable and is triable by a Magistrate of the first class.

#### **Wrongful confinement in secret (Sec. 346)**

"Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement"

The points requiring proof under Section 346 are:

1. That the accused obstructed a person;
2. That such obstruction was caused voluntarily;
3. That it prevented the person from proceeding in a direction in which he had a right to
4. proceed;
5. That such confinement was secret;
6. That the secrecy was against:
  - a. any person interested in the captive; or
  - b. a public servant; or
  - c. discovery of the place of confinement.

This offence is cognizable, bailable, compoundable and is triable by a Magistrate of the first class.

#### **Wrongful confinement to extort property, or constrain to illegal act (Sec. 347)**

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

The points requiring proof are:

1. That the accused confined a certain person;
2. That such confinement was wrongful;
3. That such confinement was for the purpose of :
  - a) extorting property; or
  - b) valuable security; or
  - c) constraining the doing of anything illegal; or
  - d) giving information which might facilitate the commission of an offence.
4. That the person confined was one from whom any of the objects mentioned in (3) were to be secured, or was one in whom someone else was interested from whom any of the said objects was to be secured.

This offence is cognizable, bailable, not compoundable and is triable by any Magistrate.

**Wrongful confinement to extort confession, or compel restoration of property (Sec. 348)**

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

This section is against the provisions of which the police are likely to offend most, for they are primarily charged with the duty of investigation, and are therefore apt to torture persons whom they suspect of being concerned in the commission of crime, or being in possession of any information likely to lead to its detection.

The points requiring proof are:

1. That the accused confined a person;
2. That such confinement was wrongful;
3. That such confinement was for the purpose of:
  - a) extorting a confession; or
  - b) information which may lead to the detection of an offence or misconduct; or
  - c) restoration of property or valuable security; or
  - d) to satisfy any claim or demand.

This offence is cognizable, but summons for the appearance of the accused shall ordinarily issue in the first instance. It is bailable but not compoundable, and triable by any Magistrate.

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# ASSAULT

## Synopsis:

- ▶ Introduction
- ▶ Force
- ▶ Criminal Force
- ▶ Assault
- ▶ Essential ingredients of an assault
- ▶ Punishment for Assault or Criminal Force
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  - ◆ Assault or criminal force to deter public servant from discharge of his duty
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  - ◆ Assault or criminal force with intent to dishonour person, otherwise than on grave provocation
  - ◆ Assault or criminal force in attempt to commit theft of property carried by a person
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  - ◆ Assault or criminal force on grave provocation

## Introduction

An understanding of the term 'force' is necessary to understand the definition of 'criminal force' and 'assault'.

## Force

'Force' means efficacy and signifies strength, vigour, might, energy, power, violence, armament, necessity. The definition nearest to the exact meaning of the word 'force' is violence; power exerted against will or consent.

Section 349 of the Indian Penal Code provides that: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling:

Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described,-

*Firstly:-* By his own bodily power.

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

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

Section 349 of the Code merely explains what amounts to 'force' but it does not constitute any offence. The term 'force' contemplates force used by a human being on another human being. It does not contemplate the use of force against inanimate object. 'Force' as defined in clause (i) of Section 349 of the Code contemplates the

presence of the person to whom it is used that is to say, it contemplates the presence of the person the force and of the person to whom the force is used. Thus, a motion or change of motion or cessation of motion caused to property without affecting a human being is not the 'use of force to another; within the meaning of Section 349.

The term 'force' has been defined in minute detail in this section. To put the entire first paragraph in one sentence: force is the exertion of energy or strength producing a movement or change in the external world. The second paragraph merely deals with a situation, where some other body is interposed between the person using the force and the person on whom the force is used.

In *Chandrika Sao v. State of Bihar*, the accused snatched the account books from the hands of officer which were being inspected. The Supreme Court observed it would be clear from a bare perusal of the section that one person can be said to have used force against another if he causes motion, change of motion or cessation of motion to that other. By snatching away the books which the official was holding the accused necessarily caused a jerk to the hand or hands. Further, the natural effect of snatching the books from the hand or hands of the official would be to affect the sense of feeling of the hands of the official. The Court, therefore held that the action of the accused amounts to use of force as contemplated by Section 349 of the Code.

### **Criminal Force**

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

#### **Illustrations**

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

According to Section 350 of the Code, force becomes criminal (i) when it is used without consent and in order to the committing of an offence; or (ii) when it is intentionally used to cause injury, fear or annoyance to another to whom the force is used.

### **Ingredients of Section 350**

- i) The intentional use of the force to any person;
- ii) Such force must have been used without the person's consent;
- iii) The force must have been used-
  - a) in order to the committing of an offence; or
  - b) with the intention to cause, or knowing it to be likely that it will cause, injury, fear or annoyance to the person to whom it is used.

The term 'battery' of English law is included in 'Criminal force'. 'Battery' is the actual and intentional application of any physical force of an adverse nature to the person of another without his consent, or even with his consent, if it is obtained by fraud, or the consent is unlawful, as in the case of a prize-fighting.

The criminal force may be very slight as not amounting to an offence as per Section 95 of the Code. Its definition is very wide so as to include force of almost every description of which a person may become an ultimate object. Criminal force is the exercise of one's energy upon another human being and it may be

exercised directly or indirectly. So if A raises his stick at B and the latter moves away, A uses force within the meaning of Section 350. Similarly, if a person shouts, cries and calls a dog, or any other animal and it moves in consequence, it would amount to the use of force. In the use of criminal force no bodily injury or hurt need be caused.

Where A spits over B, A would be liable for using criminal force against B because spitting must have caused annoyance to B. Similarly if A removes the veil of a lady he would be guilty under Section 350 of the Code. The word 'intentional' excludes all involuntary, accidental or even negligent acts. An attendant at a bath, who from pure carelessness turns on the wrong tap and causes boiling water to fall on another, could not be convicted for the use of criminal force.

The word 'consent' should be taken as defined in Section 90, IPC. There is some difference between doing an act 'without one's consent' and 'against his will'. The latter involves active mental opposition to the act. According to Mayne, "where it is an element of an offence that the act should have been done without the consent of the person affected by it, some evidence must be offered that the act was done to him against his will or without his consent".

The various illustrations under Section 350 exemplify the different ingredients of the definition of force given in Section 349. Of these illustrations, illustration (a) exemplifies motion in Section 349; illustration (b) 'change of motion'; illustration (c) 'cessation of motion; illustrations (d), (e), (f), (g) and (h) 'cause to any substance any such motion'. Clause (1) of Section 349 is illustrated by illustrations (c), (d), (e), (f) and (g); clause (2) of Section 349 is illustrated by illustration (a); and clause (3) of Section 349 is illustrated by illustrations (b) and (h).

## ASSAULT

As per Tomlins Law Dictionary, assault is "An attempt with force and violence, to do corporal hurt to another as by striking at him with or without a weapon. But no words whatsoever, be they ever so provoking can amount to an assault, notwithstanding the many ancient opinions to the contrary".

An assault is (a) an attempt unlawfully to apply any of the least actual force to the person of another directly or indirectly; (b) the act of using a gesture towards another, giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid; (c) the act of depriving another of his liberty, in either case, without the consent of the person assaulted, or with such consent if it is obtained by fraud.

Section 351 of the Indian Penal Code provides that: "Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

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

### Illustrations

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

## **Essential ingredients of an assault**

- 1) That the accused should make a gesture or preparation to use criminal force;
- 2) Such gesture or preparation should be made in the presence of the person in respect of whom it is made;
- 3) There should be intention or knowledge on the part of the accused that such gesture or preparation would cause apprehension in the mind of the victim that criminal force would be used against him;
- 4) Such gesture or preparation has actually caused apprehension in the mind of the victim, of use of criminal force against him.

Assault is generally understood to mean the use of criminal force against a person, causing some bodily injury or pain. But, legally, 'assault' denotes the preparatory acts which cause apprehension of use of criminal force against the person. Assault falls short of actual use of criminal force. An assault is then nothing more than a threat of violence exhibiting an intention to use criminal force accompanied with present ability to effect the purpose.

According to Section 351 of the Code, the mere gesture or preparation with the intention or knowledge that it is likely to cause apprehension in the mind of the victim, amounts to an offence of assault. The explanation to Section 351 provides that mere words do not amount to assault, unless the words are used in aid of the gesture or preparation which amounts to assault.

The apprehension of the use of criminal force must be from the person making the gesture or preparation, but if it arises from some other person it would not be assault on the part of that person, but from somebody else, it does not amount to assault on the part of that person. The following have been held to be instances of assault:

- i. Lifting one's iota or lathi
- ii. Throwing brick into another's house
- iii. Fetching a sword and advancing with it towards the victim
- iv. Pointing of a gun, whether loaded or unloaded, at a person at a short distance
- v. Advancing with a threatening attitude to strike blows.

Though mere preparation to commit a crime is not punishable, yet preparation with the intention specified in this section amounts to an assault.

Another essential requirement of assault is that the person threatened should be present and near enough to apprehend danger. At the same time there must have been present ability in the assailant to give effect to his words or gestures. If a person standing in the compartment of a running train, makes threatening gesture at a person standing on the station platform, the gesture will not amount to assault, for the person has no present ability to effectuate his purpose.

The question whether a particular act amounts to an assault or not depends on whether the act has caused reasonable apprehension in the mind of the person that criminal force was imminent. The words or the action should not be threat of assault at some future point in time. The apprehension of use of criminal force against the person should be in the present and immediate.

The gist of the offence of assault is the intention or knowledge that the gesture or preparations made by the accused would cause such effect upon the mind of another that he would apprehend that criminal force was



about to be used against him. Illustration (b) to Section 351 exemplifies that although mere preparation to commit a crime is not punishable yet preparation with intention specified in Section 351 amounts to assault.

The offence under Section 351 is non-cognizable, bailable, compoundable, and triable by any Magistrate.

### **Punishment for Assault or Criminal Force**

Section 352 of Indian Penal Code provides that: "Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

*Explanation:* - Grave and sudden provocation will not mitigate the punishment for an offence under this section,

- if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or
- if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant, or
- if the provocation is given by anything done in the lawful exercise of the right of private defence.

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

Offence under Section 352 of IPC is non-cognizable and it's triable by any Magistrate.

Section 352 of the Code provides punishment for assault or use of criminal force when there are no aggravating circumstances provided in Sections 353 to 358 of the Code.

### **Aggravated forms of Assault or Criminal Force**

#### **I. Assault or criminal force to deter public servant from discharge of his duty**

Section 353 of the Indian Penal Code provides that: "Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

#### **Ingredients of offence under Section 353**

1. The victim must be a public servant.
2. When assaulted, he must have been acting

i) In execution of his official duty;

ii) and the assault was intended to deter him from discharging his duties;

iii) that it was in consequence of anything done or attempted, to be done by such person in the lawful discharge of his duty.

Under Section 353, the public servants get protection when he acts in the discharge of a duty imposed by law on him. An act which is the very contrary of the duties of a public servant cannot be said to be done by a public servant while acting or purporting to act in the discharge of his official duties. An assault on a public servant who is not discharging a duty imposed on him by law when he is assaulted falls under Section 352.

Section 353 has no application when the public servant was acting under an order which was illegal although he might not himself have been aware of that illegality. Section 353 will not protect the public servant for an act done in good faith under colour of his office.

Offence under Section 353 of IPC is cognizable, non-bailable and is triable by any Magistrate.

## **II. Assault or criminal force to woman with intent to outrage her modesty**

Section 354 of the Indian Penal Code provides that: "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

The points requiring proof under Section 354 are:

1. That the person aggrieved was a woman.
2. That the accused assaulted or used criminal force to her.
3. That he did so intending to outrage her modesty or knowing that he was likely to do so.

The word 'woman' means the female human being of any age. It will be thus obvious that if assault is committed or criminal force used with the intention or knowledge specified in Section 354, the offender would be guilty, irrespective of the age of the female victim.

Section 509 of the Indian Penal Code provides that: "Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both".

### **Ingredients of Section 509 of the Code**

1. Intention to insult the modesty of a woman,

2. The insult-

i) must be caused by uttering any word or making any sound or gesture or exhibiting any object intending that such word or sound shall be heard or that gesture or object shall be seen by such woman; or

ii) must be caused by intruding upon the privacy of such woman.

Offence under Section 509 of I.P.C., is cognizable, bailable and is triable by any Magistrate.

## **III. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation**

Section 355 of the Indian Penal Code provides that: "Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The intention to dishonour may be supposed to exist when the assault or criminal force is by means of gross insults. Offence under Section 355 of I.P.C., is non-cognizable, bailable and is triable by any Magistrate (in Orissa non-bailable).

#### **IV. Assault or criminal force in attempt to commit theft of property carried by a person**

Section 356 of the Indian Penal Code provides that: "Whoever assaults or uses criminal force to any person, in attempting to commit theft of any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both".

Section 356 provides for punishment for assaulting or using criminal force in attempting to commit theft of the property which the victim is bearing or carrying. It is directed mainly against pick-pockets. The provision becomes inapplicable the moment theft is committed.

Offence under Section 357 of I.P.C., is cognizable, bailable and is triable by any Magistrate.

#### **V. Assault or criminal force in attempting wrongfully to confine a person**

Section 357 of the Indian Penal Code provides that: "Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both".

Section 357 comes into play when the accused uses criminal force in attempting to secure the wrongful confinement of a person. Offence under Section 356 of I.P.C., is cognizable, bailable and is triable by any Magistrate.

#### **VI. Assault or criminal force on grave provocation**

Section 358 of the Indian Penal Code provides that: "Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

*Explanation:-* The last section is subject to the same explanation as Section 352."

Section 358 of the Code provides for mild punishment if the assault or criminal force is the result of grave and sudden provocation. Section 358 is an attenuated form of the offence which is otherwise punishable under Section 352 of the Code.

Offence under Section 358 of I.P.C, is cognizable, bailable and is triable by any Magistrate.

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## KIDNAPPING AND ABDUCTION

### Synopsis:

- ▶ Introduction
- ▶ Kidnapping
  - ◆ Kidnapping: Meaning
  - ◆ Kinds of kidnapping
- ▶ Abduction
  - ◆ Abduction: Meaning
  - ◆ Statutory provision
- ▶ Kidnapping and abduction: Distinction
- ▶ Aggravated forms of kidnapping
- ▶ Aggravated forms of abduction
- ▶ Trafficking in human beings

### Introduction

Sections 359 to 369 deal with kidnapping, abduction and their aggravated forms. Sections 370 and 370-A relate to trafficking of persons. Section 371 deals with slavery. Sections 372 and 373 apply to offences of selling or buying of minor for prostitution. Section 374 punishes compulsory labour.

### Kidnapping : "Kidnapping": Meaning

The term "kidnapping" is not defined in IPC. But it is derived from two words: 1) kid (child), and 2) nap (to steal, to take away, to abduct). "Kidnapping" is thus an act of stealing, abducting or carrying away of a human being by force or fraud often with a demand for ransom.

### Kinds of kidnapping

IPC divides kidnapping into two classes:

1. kidnapping from India; and
2. kidnapping from lawful guardianship.

### Abduction : "Abduction": Meaning

According to dictionary meaning, "to abduct" means to carry, to take away, especially a human being, by force, fraud, deception or by inducement.

### Statutory provision

Section 362 of the Code enacts that "whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

## Kidnapping and abduction: Distinction

Kidnapping and abduction differ from each other on several points.

<b>Kidnapping [S.361]</b>	<b>Abduction [S.3621]</b>
1. Kidnapping from guardianship can be committed in respect of a minor.	Abduction can be committed of any person, irrespective of age.
2. Kidnapping must be from lawful guardianship.	Abduction has reference only to the person abducted.
3. In kidnapping, there is element of taking or enticing.	In abduction, there is force, fraud or compulsion.
4. In kidnapping, the intention of the doer is not at all relevant.	In abduction, intention of the doer is all relevant and material.
5. Kidnapping is a substantive offence.	Abduction is not a substantive offence.
6. In kidnapping, consent of the person is immaterial.	Free and voluntary consent condemns abduction.
7. Kidnapping is not a continuing offence. Once there is kidnapping, the offence is complete.	Abduction is a continuing offence and it continues so long as the act of abduction continues.

### Aggravated forms of kidnapping

Section 363-A applies to a person who kidnaps a minor for begging. Section 364 covers cases of kidnapping in order to murder such person. Section 364-A provides punishment for kidnapping for ransom, i.e. demand for sum of money or release of prisoner, detenu, etc. This is a grave offence which provides for capital punishment. Section 365 punishes kidnapping with intent to confine a person kidnapped. Section 366 applies to kidnapping of a woman to compel her marriage. Sections 366-A and 366-B cover cases of procurement or importation of girls for immoral purposes. Section 367 relates to kidnapping in order to subject such person to grievous hurt, slavery or unnatural lust. Section 368 applies to a person who assists in concealing in confinement a person who is kidnapped. Section 369 seeks to punish kidnapping of child below 10 years with intent to steal ornaments from his/her person.

### Aggravated forms of abduction

**Abduction itself is not a substantive offence.** It is when an act of abduction is accompanied by certain intentions that it becomes punishable. Thus, abduction is punishable when it has been done in order to murder such person [S. 364]; or with intent to confine him [S. 365]; or of a woman to compel her marriage [S. 366]; or in order to cause such person to grievous hurt, slavery or unnatural lust [S. 367]. A person assisting in wrongfully concealing an abducted person can also be punished [S. 368], An act of abduction of a child below 10 years with intent to steal ornaments or other movable property on his/her person is punishable [S. 369]

### Trafficking in human beings

Sections 370 and 370-A seeks to punish trafficking of any person and in employing a trafficked person in any form of labour.

Section 371 punishes a slave-trader who is habitually engaged in buying, selling or trafficking human beings.

Sections 372 and 373 penalise traders, i.e. buyers and sellers of mimes for the purposes of prostitution.

Section 374 provides punishment for unlawful compulsory labour.

Article 23 of the Constitution of India prohibits traffic in human beings, beggar and other forms of forced labour.

## RAPE

### Synopsis:

- ▶ Meaning
- ▶ Statutory provisions
- ▶ Nature of offence
- ▶ Essential Elements
- ▶ Rape and adultery: Difference
- ▶ Leading cases
- ▶ Appreciation of evidence
- ▶ Sentence
- ▶ Compensation
- ▶ Special cases

### Meaning

According to the dictionary meaning, "rape" is the act of sexual intercourse by a man with a woman without her consent or against her will. It is an act of ravishment of a woman by force, fear, fraud or misrepresentation.

### Statutory provisions

Section 375 defines "rape". After the latest amendments in 2013, the expression is defined thus:

[375. A man is said to commit "rape" if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions-

*First-* Against her will.

*Secondly-* Without her consent.

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

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

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

Sixthly- With or without her consent, when she is under eighteen years of age.

Seventhly- When she is unable to communicate consent.

*Explanation 1-* For the purposes of this section, "vagina" shall- also include labia majora.

*Explanation 2-* Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

*Exception 1-* A medical procedure or intervention shall not constitute rape.

*Exception 2-* Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]

**Section 376 prescribes punishment for rape.**

**It reads thus:**

[376 (1) Whoever, except in the cases provided for in sub-section (2.), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever-

- a) being a police officer, commits rape-
  - (i) within the limits of the police station to which such police officer is appointed; or
  - (ii) in the premises of any station house; or
  - (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or
- b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
- c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or
- d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
- e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
- f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

- g) commits rape during communal or sectarian violence; or
- h) commits rape on a woman knowing her to be pregnant; or
- i) commits rape on a woman when she is under sixteen years of age; or
- j) commits rape, on a woman incapable of giving consent; or
- k) being in a position of control or dominance over a woman, commits rape on such woman; or
- l) commits rape on a woman suffering from mental or physical disability; or
- m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or
- n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

**Explanation-** For the purposes of this sub-section,-

- (a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;
- (b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention rehabilitation;
- (c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);
- (d) "women's or children's institution" means an institution, wiled called an orphanage or a home for neglected women or children a widow's home or an institution called by any other name, which established and maintained for the reception and care of women children.]

Sections 376-A to 376-E deal with various offences relating to &no intercourse/assault.

### **Nature of offence**

Rape is the most hated crime. It is a sexual violence and unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour. It offends her self-esteem and dignity. It degrades and humiliates the victim and leaves her behind a traumatic experience.

A rapist not only causes physical injuries but also leaves a scar on the most cherished possession of a woman, i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative to victims fundamental right, viz. right to life enshrined in Article 21 of the Constitution of India.

### **Essential Elements**

An offence of rape can be said to have been committed if the following conditions are fulfilled:

1. a man must have committed sexual intercourse with a woman; and



2. such act must have been committed under any of the following circumstances:

- a. against her will; or
- b. without her consent; or
- c. with consent obtained under fear of death or hurt; or
- d. with consent given under the belief that the man is her husband; or
- e. consent given by a woman of unsound mind, under intoxication, etc; or consent given by a woman below eighteen years; or
- f. when a woman is unable to communicate consent.

### **Rape and adultery: Difference**

Though both these offences (rape and adultery) relate to sexual intercourse by a man with a woman, there is difference between the two.

### **Leading cases**

There are several leading cases on this subject. We may, however, refer to some of them.

#### *Delhi Domestic Working Women's Forum*

In *Delhi Domestic Working Women's Forum v. Union of Indian*, the Supreme Court expressed serious concern on increase in violence against women and trauma of victims due to rape as also further agony during legal proceedings. Taking into account defects in present legal system, the Supreme Court directed the National Commission for Women to evolve a scheme assisting the victims of rape.

#### *Mathura*

*Tukaram v. State of Maharashtra* (known as the Mathura case) is indeed a disturbing decision of the Supreme Court on the subject. In that case, Mathura (prosecutrix) and her husband were called at a police station. A1 committed rape on her. A2 who was drunk was unable to commit sexual intercourse. He, therefore, fondled private parts of the prosecutrix. Criminal proceedings were initiated against the accused. They were acquitted by the trial court but the High Court convicted them. The matter was taken to the Supreme Court by the accused. Allowing the appeal and setting aside the conviction, the Supreme Court held that absence of injury on the person of the prosecutrix went a long way to indicate that "the alleged intercourse was a peaceful affair" and the story of stiff resistance was "false". The say of the prosecutrix that she had been shouting loudly for help was a "tissue of lies".

It is submitted that Mathura did not lay down correct proposition of law on the point. The decision was severely criticised by jurists, lawyers, women organisations and public at large. Parliament also took notice of such criticism and amended the law by inserting certain provisions dealing with special situations [Ss. 376-A-376-D]. After Mathura, however, the Supreme Court took into consideration the ground reality and in *State of Maharashtra v. Prakash (Nirmala)*, it convicted a police constable who committed rape on a rustic woman. According to the Court, the victim had to surrender herself involuntarily and under duress to the police constable. "To these poor rustic helpless villagers, the police constable represents absolute authority. They had no option but to submit to his will."

#### *Nirbhaya*

Very recently, in December 2012, in Delhi (capital of the country), a para medical student of 23 years of age was beaten and gang raped in a bus. Later on she died of injuries caused to her. The incident generated

widespread anger, protest, excitement, agitation and condemnation at national as also international level. A demand was made to provide adequate security to women and also to amend the law to deal with cases of offences against women. Several political parties raised the issue in Parliament. The government took note of the situation and appointed a Commission, headed by J.S. Verma J, former Chief Justice of India and submitted its report suggesting amendments in criminal law to sternly deal with sexual assault cases. On the basis of recommendations of the Commission, Parliament amended several provisions of the IPC.

### **Appreciation of evidence**

Normally, sexual offences are not committed in public in presence of other persons. Eye witnesses are generally not available in such cases. Every court, hence, has to consider circumstantial evidence coupled with evidence of the prosecutrix, medical examination of the victim as also of the aggressor (accused) and come to the conclusion whether individually or collectively whether there is a complete chain to hold the accused guilty of the offence.

Injuries on the person of the victim, particularly on private parts of her body or on the male organ may be relevant, but not decisive. A court must consider the circumstances, such as, the age of the victim, her status, i.e. whether married or unmarried, threat, fear or force used or administered by the accused, consent under duress, helpless submission as against free volition, consent under fraud, misrepresentation or misconception of facts, consent of a person of unsound mind or of a minor, consent under the influence of intoxication, etc. and must decide the matter.

Late filing of an FIR is not necessarily fatal. In various decisions, the Supreme Court has held that cases of sexual assault are different than cases of other offences under IPC and this important aspect has always to be borne in mind by every court. A court must also keep in view the fact that ordinarily a woman does not come forward with the allegation of rape since such allegations would adversely affect her in day-to-day life. It has also been held that in cases of rape, the prosecutrix is not an accomplice but a victim, i.e. an injured witness. It is, therefore, open to the court to base conviction on the sole testimony of the prosecutrix if her version is reliable and trustworthy.

An offence of rape pushes a woman in deep emotional crisis and leaves her behind a traumatic experience. In the circumstances, every court is expected to take suitable steps so as to ensure justice to her. Such steps would include non-disclosure of identity of the victim, holding trials in camera, proper atmosphere in court during examination, cross-examination and other legal proceedings, availability of legal assistance and, last but not the least, utmost sensitivity on the part of the judge administering justice in such cases. It has been rightly said, "A socially sensitized Judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it." No undue sympathy or leniency should be shown to the accused while awarding sentence in offences of sexual assault. In appropriate cases, the court should treat the offender with a "heavy hand". It is open to the court to award compensation to the victim if such a case has been made out.

### **Sentence**

Rape is a heinous crime. It destroys the psychology of a woman and takes her into a deep emotional crisis. It administers a serious blow to the supreme honour of a woman and offends her dignity, honour and chastity. It has, therefore, been held that such offences should be dealt with a "heavy hand". Leniency in such matters is not only undesirable but also against public interest.

Taking into account seriousness of the crime, Parliament has also provided minimum sentence in cases of this nature. A court of law must keep in mind this legislative mandate and impose appropriate sentence on all offenders who are held guilty of such crimes.

## **Compensation**

In appropriate cases, it is open to a court of law to award compensation to the victim of rape. It is open to a court to take into consideration pain, shock and suffering of the victim of such a heinous crime and to pass an appropriate order for payment of compensation and rehabilitation of the person aggrieved.

## **Special cases**

Sections 376-A to 376-E deal with special situations, not covered by Section 376.

- a. Section 376-A provides punishment for causing death or resulting in persistent vegetative life of the victim;
- b. Section 376-B punishes husband who commits sexual intercourse with his wife during separation;
- c. Section 376-C penalises a person in authority committing sexual intercourse with a woman by abusing his position;
- d. Section 376-D provides punishment in cases of gang rape;
- e. Section 376-E prescribes more punishment for repeat offenders; and
- f. Section 376(2) applies to custodial rape and provides punishment in such cases.

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## UNIT- IV

### OFFENCE AGAINST PROPERTY

#### Synopsis

- ▶ Introduction
- ▶ Theft
- ▶ Extortion
- ▶ Robbery
- ▶ Dacoity
- ▶ Criminal Misappropriation of property
- ▶ Criminal breach of trust
- ▶ Cheating
- ▶ Mischief
- ▶ Offences relating to documents

#### INTRODUCTION

In this unit we intend to discuss offences against property and other incidental offences.

Chapter XVII [Ss. 378-462] Chapter XVIII [Ss. 463-489-E] and Chapter XIX [Ss. 490-492] deal with offences against property. One of the basic motives behind unlawful activities is greed which leads to commission of crime relating to property. In such offences, there is "wrongful gain" to one person and "wrongful loss" to another. These offences may be classified under different heads:

- Theft: Sections 378 to 382;
- Extortion: Sections 383 to 389;
- Robbery: Sections 390, 392 to 394, 397 to 398, 401;
- Dacoity: Sections 391, 395 to 400, 402;
- Criminal Misappropriation of property: Sections 403 to 404;
- Criminal breach of trust: Sections 405 to 409;
- Cheating: Sections 415 to 420;
- Mischief
- Offences relating to documents

The Code makers made no provision for theft, destruction or damage to public property. Experience, however, has shown that during strikes, dharnas, bandhs, etc., it is public property which is damaged or destroyed. The Law Commission considered this issue and recommended amendments in Sections 380 and 381, Penal Code, 1860 (IPC). But Parliament did nothing.

The Supreme Court, however, took a "serious note" of various instances of damage or destruction of public properties in the name of agitations, bandhs, hartals and initiated suo motu proceedings. On the basis of Committees appointed by the Court, it issued several guidelines also.

## **THEFT**

### **(a) Definition**

Section 378 defines "theft". It states that theft is dishonest removal of movable property out of possession of any person without his consent.

### **(b) Illustrations**

The following illustrations explain the principle:

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

### **(c) Ingredients**

To constitute theft, the following elements must be present:

1. the accused must have dishonest intention to take away property;
2. such property must be movable;
3. it must have been taken out of possession of another person;
4. it must have been done without the consent of that person; and
5. the property must have been actually removed.

### **(d) Mens rea: Dishonest intention**

The offence of theft consists in taking away or removing movable property with dishonest intention. Such dishonest intention exists when the person taking the property intends to cause wrongful gain to himself or wrongful loss to the other. Without this the offence of theft is not complete.

Bona fide claim over the property is therefore, a good defence in prosecution for theft. "Movable property" is defined in Section 22.

### **(e) Aggravated forms of theft**

Sections 380 to 382 are aggravated forms of theft. They apply to theft in dwelling house [S. 380]; theft by clerk or servant [S. 381]; and theft after preparation of causing death, hurt or restraint [S. 384]

### **(f) Punishment**

An offence of theft is punishable with imprisonment which may extend to three years. Aggravated forms of theft prescribe more punishment.

## EXTORTION

### Synopsis:

- ▶ Definition
- ▶ Illustrations
- ▶ Ingredients
- ▶ Theft and extortion: Distinction
- ▶ Aggravated forms of extortion
- ▶ Punishment
- ▶ Blackmailing

### (a) Definition

Section 383 defines "extortion". Stated simply, "extortion" is the dishonest obtaining of property by putting any person in fear of injury (i.e. any harm illegally caused in body, mind, reputation or property).

### (b) Illustrations

Four illustrations explain this principle:

(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion.

### (c) Ingredients

The following are the main ingredients of this offence:

1. the accused must have put any person in fear of injury;
2. such act must be intentional;
3. the accused must thereby have induced the person to deliver any property; and
4. such inducement must have been done dishonestly.

### (d) Theft and extortion: Distinction

There are certain common features in both the offences of theft and extortion. Both are offences against property. The underlying object of both the offences is wrongful gain to one and or wrongful loss to other. Both are, therefore, punishable under IPC.

They, however, differ in certain respects. Such differences are as under:

<b>Theft [S.378]</b>	<b>Extortion [S. 383]</b>
1. Theft relates only to movable property.	Extortion relates to movable as also to immovable property
2. In theft, there is no consent of the owner.	In extortion, consent is obtained by fear of injury.
3. In theft, there is no element of force.	In extortion, force, i.e. fear of injury is present.
4. In theft, property is taken away by the offender.	In extortion, property is delivered by the owner to the offender.

### **(e) Aggravated forms of extortion**

Sections 386 to 389 are aggravated forms of extortion. They apply in the following cases:

1. by putting a person in fear of death or grievous hurt [S. 386];
2. by attempting to put a person in fear of death or grievous hurt [S.3 87];
3. extortion by threat of accusation of an offence punishable with death or imprisonment for life or imprisonment up to 10 years [S. 388]; and
4. by attempting to put a person in fear of accusation as mentioned in Section388[S.389].

### **(f) Punishment**

An offence of extortion is punishable with imprisonment which may extend to three years. Aggravated forms of extortion provide for severe punishment.

### **(g) Blackmailing**

The term "blackmail" is derived from two words "black", i.e. illegal or unlawful and "mail", i.e. rent, money, coin or other thing. Thus, "blackmail" means rent, money or amount recovered from land owners for protection of their property from robbers, criminals or mafias.

In modern times, the term is used to signify extortion of money by threatening letters or by exposure or by bodily harm. It implies involuntary payment under such threat, exposure or harm. Such conduct is indeed reprehensible and should be made punishable.

The Law Commission considered this issue and suggested that such blackmailing should be made an offence punishable for imprisonment up to seven years.

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## ROBBERY

### Synopsis:

- ▶ Definition
- ▶ When theft is robbery
- ▶ When extortion is robbery
- ▶ Illustrations
- ▶ Aggravated forms of robbery
- ▶ Attempt to commit robbery
- ▶ Punishment
- ▶ Minimum sentence
- ▶ Theft and robbery: Difference
- ▶ Extortion and robbery: Difference

### (a) Definition

Robbery is defined in Section 390 as: i) either theft; ii) or extortion. Robbery is, therefore, an aggravated form of theft or extortion.

### (b) When theft is robbery

Theft is robbery when the offender voluntarily causes or attempts to cause death, hurt or wrongful restraint to any person.

### (c) When extortion is robbery

Extortion is robbery when the offender at the time of committing extortion puts a person in fear of death, hurt or wrongful restraint.

### (d) Illustrations

Section 390 explains robbery by the following illustrative cases:

(a) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence, A has therefore committed robbery.

### (e) Aggravated forms of robbery

Sections 392, 394, 397 and 398 are aggravated forms of robbery. They apply to cases where robbery is committed on highway between sunset and sunrise [S. 392], causing hurt while committing robbery [S. 394, use of deadly weapons at the time of committing robbery [S. 397] and attempt to commit robbery with deadly weapons [S. 398].



**(f) Attempt to commit robbery**

An attempt to commit robbery is punishable [Ss. 393 & 398].

**(g) Punishment**

An offence of robbery is punishable with imprisonment which may extend to 10 years. More punishment is provided for aggravated forms of robbery. Section 401 punishes a person belonging to a gang of thieves, habitually committing robbery.

**(h) Minimum sentence**

The code prescribes minimum sentence of imprisonment for seven years in the following cases:

1. robbery by use of deadly weapons or by attempting to cause death or grievous hurt [S. 397];  
and
2. attempt to commit robbery armed with deadly weapons [S. 398].

It is clear that neither Section 397 nor 398 create any substantive offences. Both the sections only regulate the quantum of punishment.

**(i) Theft and robbery: Difference**

Though both the offences relate to property, there are certain points of difference:

1. Theft can be committed in respect of movable property only. Robbery can be committed in respect of either movable or immovable property.
2. Theft becomes robbery where the offender voluntarily causes or attempts to cause death, hurt or wrongful restraint to any person.
3. In theft, there is no element of force. In robbery, element of force is present.
4. In theft, there is taking away of property. In robbery, there is delivery of property.

**(j) Extortion and robbery: Difference**

There is difference between extortion and robbery. The points of difference are as under:

1. Robbery is a special or aggravated form of extortion.
2. Extortion becomes robbery where the offender puts a person in fear of death, hurt or wrongful restraint.

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## **DACOITY**

### **Synopsis:**

- ▶ Definition
- ▶ Ingredients
- ▶ Stages
- ▶ Aggravated forms of dacoity
- ▶ Punishment
- ▶ Minimum sentence
- ▶ Robbery and dacoity: Distinction

### **(a) Definition**

Dacoity is defined in Section 391 to mean robbery committed by five or more persons. Dacoity is thus an aggravated form of robbery. In other words, there is no difference between robbery and dacoity except in the number of offenders. If they are less than five, it is robbery. But if they are more than five, it is dacoity.

### **(b) Ingredients**

The following are the essential elements of dacoity:

1. there must be five or more persons;
2. they must have committed robbery; and
3. they must have acted conjointly.

Every dacoity is, therefore, robbery but vice versa is not true, i.e. every robbery is not dacoity. It is only in those cases where robbery is committed by five or more persons that it becomes dacoity.

### **(c) Stages**

Dacoity is the only offence which makes four stages punishable:

1. Assembling for the purpose of committing dacoity: Section 402.;
2. Preparation for committing dacoity: Section 399;
3. Attempt to commit dacoity: Section 399; and
4. Act of committing dacoity: Section 395.

### **(d) Aggravated forms of dacoity**

Sections 396, 397 and 398 are aggravated forms of dacoity. Section 396 punishes dacoity with murder. Section 397 applies to cases of causing death or grievous hurt with deadly weapons. Section 398 covers cases of attempt to commit dacoity armed with deadly weapons.

### **(e) Punishment**

An offence of dacoity is punishable with imprisonment which may extend to 10 years or for life. Dacoity with murder is punishable with death, imprisonment for life or imprisonment for 10 years. If dacoity is committed with deadly weapons in the above circumstances or there is an attempt to cause death or grievous hurt, minimum sentence provided is imprisonment for seven years.

This is the only offence which makes several stages punishable.

**(f) Minimum sentence**

IPC prescribes minimum sentence of seven years in the following cases:

1. dacoity by use of deadly weapons or by attempting to cause death or grievous hurt [S. 397]; and
2. attempt to commit dacoity armed with deadly weapons [S. 398].

As already noted, these two sections do not create any substantive offence. They merely provide for minimum sentence in certain cases.

**(g) Robbery and dacoity: Distinction**

There is no substantial difference between robbery and dacoity. Apart from the fact that both the offences relate to property, movable as also immovable and in both of them, there is element of force, the distinction relates to a number of persons committing the offence.

1. Robbery can be committed even by a single individual, dacoity can be committed by five or more persons.
2. In every robbery, there can be one or more and maximum four persons while in dacoity, there should be minimum five persons.
3. Robbery committed by five or more persons is thus dacoity. In every dacoity, there is robbery but vice versa is not true, i.e. in every robbery, there is no dacoity. Robbery becomes dacoity where the offenders are five or more.

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## CRIMINAL MISAPPROPRIATION OF PROPERTY

### Synopsis:

- ▶ Definition
- ▶ Ingredients
- ▶ Temporary misappropriation: Explanation 1
- ▶ Finder of goods: Explanation 2
- ▶ Property of dead person
- ▶ Punishment
- ▶ Theft and criminal misappropriation: Difference

Sections 403 and 404 deal with offences relating to dishonest misappropriation of property.

### (a) Definition

Section 403 defines dishonest misappropriation of property. It reads thus:

403. Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

#### Illustrations

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

Explanation 1- A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

#### Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2- A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if: at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

#### Illustrations

(a) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(b) A finds a letter on the road, containing a banknote. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

#### (b) Ingredients

To constitute an offence of misappropriation of property, the following ingredients must be present:

- i. the property must belong to someone else, and not to the accused;
- ii. the accused must have misappropriated it; and
- iii. he must have done it dishonestly.

If any of the three elements is wanting there is no misappropriation of property by the accused.

#### (c) Temporary misappropriation: Explanation 1

Explanation 2 of Section 403 declares that temporary misappropriation is also misappropriation within the meaning of this section. Hence, where it is proved that there was misappropriation of property by the accused, it is no answer or defence that the amount was later on paid or reimbursed. The offence can be said to have been committed.

The illustration makes the principle clear.

#### (d) Finder of goods: Explanation 2

Explanation 2 of Section 403 clarifies that a finder of property, not in possession of any person, commits no offence even if he takes such property if there is no dishonest intention on his part. But once he comes to know as to who the real owner is and thereafter appropriates such property for his own use, he commits the offence.

Illustrations to Explanation 2 explain the principle.

#### (e) Property of dead person

Section 404 is an aggravated form of offence of dishonest misappropriation of property. It seeks to protect the property in possession of a person who dies. The object of the provision is to punish servants, strangers, etc. who have no right over such property and being placed in a peculiar category or class, they are in a position to take undue advantage of their position and misappropriate such property.

Illustration to Section 404 recites:

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

**(f) Punishment**

An offence of dishonest misappropriation of property is punishable with imprisonment which may extend to two years.

An offence of dishonest misappropriation of property of dead person is an aggravated form of offence and is punishable with imprisonment which may extend to three years. But it also states that if the offender is an employee of the deceased, for example, clerk, servant, etc; such imprisonment may extend to seven years.

**(g) Theft and criminal misappropriation: Difference**

Though both the offences of theft and misappropriation relate to movable property and in both of them there is dishonest intention, there is distinction between the two. The points of difference are as under:

<b>Theft [S. 378]</b>	<b>Criminal misappropriation [S. 405]</b>
In theft, the offender dishonestly takes the property. In other words, there is dishonest intention from the very beginning.	In criminal misappropriation, the property comes into possession of the accused innocently, but he subsequently retains it unlawfully.
In theft, there is no consent of the owner for taking away property by the offender.	In criminal misappropriation, the offender comes into possession of property with the consent of the owner.
In theft, taking away or moving the property is itself an offence.	In criminal misappropriation, taking away or moving of property is no offence. It is subsequent dishonest intention which makes the act an offence.
In theft, dishonest intention is manifested in the act of moving the property.	In criminal misappropriation, such dishonest intention comes into play by actual misappropriation or conversion of property.

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## CRIMINAL BREACH OF TRUST

### Synopsis:

- ▶ Introduction
- ▶ Criminal breach of trust: Definition
- ▶ Ingredients
- ▶ Entrustment
- ▶ "Dishonestly misappropriates or converts to his own use"
- ▶ Mens rea: Guilty mind
- ▶ Aggravated forms of criminal breach of trust
- ▶ Punishment
- ▶ Criminal misappropriation and criminal breach of trust: Difference
- ▶ Theft and criminal breach of trust: Difference

### Introduction

Sections 405 to 409 deal with offences relating to criminal breach of trust. Section 405 defines criminal breach of trust while Section 406 provides penalty. Sections 407 to 409 are aggravated forms of criminal breach of trust.

#### (a) Criminal breach of trust: Definition

Section 405 defines "criminal breach of trust". It reads thus:

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

[Explanation 1.—A person, being an employer [of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not] who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

[Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

## Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

### (b) Ingredients

The following are the essential elements of an offence of criminal breach of trust:

1. the accused must have been entrusted with the property; and
2. (a) he must have dishonestly misappropriated (or converted to his own use) such property, or (b) dishonestly used or disposed of such property or wilfully suffered any other person so to do:
  - i. in violation of law; or
  - ii. in violation of legal contract (express or implied).

### (c) Entrustment

The first essential ingredient of the offence of criminal breach of trust is that the accused must have been entrusted with property.

The term "entrustment" is neither a term of law nor a term of art. The expression is used in wide sense and carries with it all cases in which the property is handed over by one person for a specific purpose and is dishonestly misappropriated by the other person.

In entrustment, the person handing over property to another person continues to remain to be the owner. He (the owner) must have confidence in the person to whom the property has been entrusted which creates fiduciary relationship between them. Whether there was entrustment of property or not is a question of fact to be decided in each case.

### (d) "Dishonestly misappropriates or converts to his own use"

Dishonest intention is one of the essential features of the offence of criminal breach of trust and it must be established by the prosecution. Every breach of trust or mere retention of property by a person does not ipso facto result in criminal breach of trust, unless there is dishonest intention or guilty mind to convert such property to his own use. An act of breach of trust simpliciter involves civil wrong for which the aggrieved party may take appropriate proceedings for damages in a civil court.

### (e) Mens rea: Guilty mind

Mens rea or guilty mind is an essential element of the offence of criminal breach of trust. Breach of trust coupled with criminal intention makes the act punishable under the code.

A given set of facts may make out:

1. purely a civil wrong; or
2. purely a criminal offence; or
3. a civil wrong as also a criminal offence.



**(f) Aggravated forms of criminal breach of trust**

Sections 407 to 409 are aggravated forms of criminal breach of trust. They apply to cases of criminal breach of trust by carrier, wharfinger, warehouse-keeper [S. 407] or by a clerk, servant or an employee [S. 408] or by a public servant, banker, merchant, broker, attorney, agent, etc. [S. 409].

**(g) Punishment**

A person committing an offence of criminal breach of trust may be ordered to undergo imprisonment up to three years [S. 406]. Severe punishment is provided for aggravated forms of criminal breach of trust covered by Sections 407 to 409.

Criminal breach of trust by a person in charge of public property is considered to be of a serious nature. The said offence is punishable with life imprisonment.

**(h) Criminal misappropriation and criminal breach of trust: Difference**

Both the above offences relate to property: Criminal misappropriation by a person entrusted with property amounts to criminal breach of trust and as such it can be said to be a species of criminal misappropriation (genus).

But there is distinction between the two offences in respect of the following:

<b>Criminal misappropriation [S. 403]</b>	<b>Criminal breach of trust [S. 405]</b>
1. In criminal misappropriation, the property comes into possession of the offender in any capacity.	In criminal breach of trust, the property is entrusted to the offender.
2. In criminal misappropriation, there is no contractual relationship between the parties.	In criminal breach of trust, the relationship between the parties is contractual in nature.
3. In criminal misappropriation the offender dishonestly misappropriates property which comes in his possession.	In criminal breach of trust, the offender dishonestly misappropriates property entrusted to him.

**(i) Theft and criminal breach of trust: Difference**

There is also difference between theft and criminal breach of trust.

<b>Theft [S.378]</b>	<b>Criminal breach of trust [5.405]</b>
1. In theft, original taking of property is itself wrong and dishonest.	In criminal breach of trust, the property is delivered to the offender. The initial entrustment is legal and lawful.
2. In theft, there is no consent of the owner of property to give property to the offender.	In criminal breach of trust, the owner entrusts property to the offender.
3. In theft, from the very beginning, the intention of the offender is unlawful and dishonest.	In criminal breach of trust, the offender dishonestly misappropriates the property which was entrusted to him.

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## CHEATING

### Synopsis:

- ▶ "Cheating": Definition
- ▶ Doctrine explained
- ▶ Ingredients
- ▶ Mens rea
- ▶ Cheating by personation
- ▶ Cheating person whose interest offender is bound to protect
- ▶ Aggravated forms of cheating
- ▶ Punishment
- ▶ Law Commission's view

Sections 415 to 420 deal with offence of cheating and its aggravated forms and provide punishment for such offences.

### (a) "Cheating": Definition

Section 415 defines cheating. It reads thus:

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation,- A dishonest concealment of facts is a deception within the meaning of this section.

#### Illustrations

- (a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.
- (b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

### (b) Doctrine explained

Section 415 which defines "cheating", is in two parts.

The first part relates to delivery of property. Under that part, the offender fraudulently or dishonestly induces the person deceived to deliver any property. The second part does not necessarily relate to property. Under that part, the person deceived is induced to do or omit to do something which causes him damage or harm in body, mind, reputation or property.

Explanation to Section 415 declares that a dishonest concealment of fact is deception within the meaning of this section.

### **(c) Ingredients**

To constitute an offence of cheating, the prosecution has to prove the following:

1. there must be deception of any person;
2. by such deception, the person must be fraudulently or dishonestly induced:
  - a. to deliver any property to any person; or
  - b. to consent that any person shall retain any property; or
3. intentionally inducing that person to do or omit to do something which he would not do or omit to do if he were not so deceived and which act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property.

### **(d) Mens rea**

Mens rea or guilty mind is one of the essential elements of the offence of cheating. In other words, before a person is convicted for an offence of cheating, it must be established by the prosecution that the accused had fraudulent or dishonest intention from the beginning.

Illustration (g) to Section 415 makes this position clear that mere failure to deliver goods in breach of agreement would not amount to cheating though it may create civil liability.

### **(e) Cheating by personation**

"To personate" means to create a wrongful appearance of being someone other than oneself, whether fictitious or real; or to represent by fictitious or assumed character. Cheating by personation thus consists of the act of cheating by pretending, representing or substituting some other person. It is an aggravated form of cheating. The Explanation clarifies that the individual personated may be real or imaginary person.

Two illustrations to Section 416 explain this principle.

- a. A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.
- b. A cheats by pretending to be B, a person who is deceased (dead). A cheats by personation.

The offence of cheating by personation is punishable with imprisonment up to three years.

### **(f) Cheating person whose interest offender is bound to protect**

Section 418 applies to cases of cheating by a person who is in a fiduciary position in relation to the person cheated. Being placed in a particular position, such as, guardian of a minor, a trustee, a solicitor, a lawyer, an agent, karta or manager of Hindu joint family, etc., he is bound to protect interests of those whom he represents. If he commits an offence by cheating those persons, he shall be punished with imprisonment up to three years.

This is also an aggravated form of cheating.

### **(g) Aggravated forms of cheating**

Sections 416, 418 and 420 are aggravated forms of cheating. They cover cases of cheating by personation [S. 416]; cheating persons whose interest the offender is bound to protect [S. 418] and cheating and dishonestly inducing another person to deliver property [S. 420].

### **(h) Punishment**

An offence of cheating is punishable with imprisonment up to one year. Aggravated forms are more serious and provide for harsher punishments.

Awarding of appropriate sentence is in the discretion of the court. Where the offence said to have been committed by the accused is technical in nature, or there is long delay, or the matter is compromised between the parties, liberal view can be taken. But in case of white collar crimes or systematic efforts, serious view is called for.

### **(i) Law Commission's view**

The Law Commission of India considered the problem of large-scale cheating of the government by dishonest contractors and misappropriation of public revenue and recommended to make a specific provision penalising such persons. It also suggested that public employees taking bribe should be punished.

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## MISCHIEF

### Synopsis:

- ▶ Introduction
- ▶ "Mischief": Definition
- ▶ Doctrine explained
- ▶ Ingredients
- ▶ Aggravated forms of mischief
- ▶ Punishment

### Introduction

Sections 425 to 440 deal with an offence of mischief as also its aggravated forms and prescribe punishments. In awarding sentence, it takes into account relevant factors, such as, nature of property, value thereof, subject-matter, mode of offence, means used, utility of the property, consequences likely to ensue, etc.

#### (a) "Mischief": Definition

Section 425 "clearly and neatly" defines "mischief". The section reads:

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

*Explanation 1-* It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

*Explanation 2-* Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

#### Illustrations

- (a) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.
- (b) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

#### (b) Doctrine explained

Mischief is one of the offences against property, movable as well as immovable. The doctrine dealt with in Section 425 IPC is based on well known maxim *sic utere tuo ut alienum non laedas* (use your own property so as not to injure your neighbour's). Whereas Section 426 provides penalty for mischief, Sections 427 to 440 are aggravated forms of the offence.

**(c) Ingredients**

For application of Section 415, the following ingredients must be present:

1. intention or knowledge of likelihood to cause wrongful loss or damage to public or any person;
2. causing destruction of some property or any change therein or in its situation; and
3. such change must destroy or diminish value or utility of property or affect it injuriously.

**(d) Aggravated forms of mischief**

Sections 427 to 440 are aggravated forms of mischief. They cover cases of committing mischief and thereby causing damage to a particular amount [S. 427]; mischief by killing maiming or rendering useless animals [Ss. 42.8 & 429]; mischief by injury to works of irrigation, or to public road, bridge, river, or to public drainage, etc., [Ss. 430-432] mischief by destroying or rendering less useful lighthouse, sea-mark, land-mark, etc. [Ss. 433 & 434]; mischief by fire or explosive substance or making unsafe decked vessel, building etc. [Ss. 435-439]; mischief committed after preparation made for death, hurt or wrongful restraint [S. 440].

**(e) Punishment**

An offence of mischief is punishable with imprisonment which may extend to three months. Aggravated forms of mischief are more serious and more punishment is provided for those offences.

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## OFFENCES RELATING TO DOCUMENTS

### Synopsis:

- ▶ Introduction
- ▶ "Forgery": Definition
- ▶ Ingredients
- ▶ Mens rea
- ▶ Making false document
- ▶ Aggravated forms of forgery
- ▶ Punishment
- ▶ Possessing forging instruments
- ▶ Falsification of accounts

### Introduction

Chapter XVIII [Ss. 463-489-E] deals with offences relating to documents (forgery, etc.) false property marks, counterfeiting property marks and counterfeiting currency notes and bank notes. Offences relating to documents consist of 1) forgery and its aggravated forms; 2) possessing forging instruments; and 3) falsification of accounts.

#### (a) "Forgery": Definition

Section 463 defines "forgery" to mean making any false document or false electronic record with intent to cause damage or injury to public at large 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 contract or with intent to commit fraud.

#### (b) Ingredients

Conjoint reading of Sections 463 and 464 make following essential ingredients of forgery:

1. false document or electronic record must have been made;
2. it must have been made dishonestly or fraudulently; and
3. it should be with intent:
  - a. to cause damage or injury to public or 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 contract; or
  - e. to commit fraud.

#### (c) Mens rea

Forgery is making of false document with fraudulent or dishonest intention. The words "with intent to cause damage or injury" clearly indicate that mens rea or guilty mind is an essential element of the offence of forgery. If mens rea is not proved, a person cannot be held guilty for an offence of forgery.

### **(d) Making false document**

Section 464 states as to when a person may be said to have made a false document. It reads thus:

**464 [A person is said to make a false document or false electronic record-**

**First.-Who dishonestly or fraudulently-**

- a. makes, signs, seals or executes a document or part of a document;
- b. makes or transmits any electronic record or part of any electronic record;
- c. affixes any [electronic signature] on any electronic record;
- d. makes any mark denoting the execution of a document or the authenticity of the [electronic signature],

with the intention of causing it to be believed that such document or part of a document, electronic record or [electronic signature] was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly- Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with [electronic signature] either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly- Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his [electronic signature] on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or electronic record or the nature of the alteration.]

#### **Illustrations**

(a) A has a letter of credit upon B for Rs 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.

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

#### **Illustrations**

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

(b) A writes the word "accepted" on a 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.

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



## Illustration

A 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.

[Explanation 3- For the purposes of this section, the expression "affixing [electronic signature]" shall have the meaning assigned to it in clause (d) of sub-section (r) of Section 2 of the Information Technology Act, 2000]

Making of false document with any one or more intents specified in Section 463 constitutes forgery.

### **(e) Aggravated forms of forgery**

Sections 466 to 469 and 471 are aggravated forms of forgery. They apply to special cases; such as forgery of record of court or of public register [S. 466]; forgery of valuable security [S. 467]; forgery for the purpose of cheating [S. 468]; forgery to cause harm to reputation [S. 469]; using as genuine forged document [S. 471], etc.

### **(f) Punishment**

An offence of forgery is punishable with imprisonment up to two years [S. 465]. Aggravated forms of forgery are more serious and provide for severe punishment.

### **(g) Possessing forging instruments**

Sections 472 to 476 seek to punish making or possessing any instrument for the purpose of forging documents. They are similar to offences relating to coins and government stamps.

Section 477 applies to cases wherein a document cancelled, destroyed or tempered with is a will, valuable security, etc.

### **(h) Falsification of accounts**

Section 477-A is enacted to punish falsification of accounts by a clerk, officer, servant, etc. acting in that capacity.

As held by the Supreme Court, in order to bring home an offence under this provision, the prosecution has to establish that t) at the relevant time, the accused was a clerk, officer or servant, 2) acting in that capacity, he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or was in possession of his employer or had been received by him for and on behalf of his employer; and 3) he did so wilfully and with intent to defraud.

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## UNIT-V

### OFFENCE RELATING TO MARRIAGE AND REPUTATION

#### OFFENCE RELATING TO MARRIAGE

##### Synopsis

- ▶ Introduction
- ▶ Mock or Deceitful Marriages
- ▶ Bigamy
- ▶ Adultery
- ▶ Criminal Elopement
- ▶ Cruelty by Husband and Relatives

##### Introduction

Marriage is one of the oldest and ancient institutions in human life. It forms basis of family life in every society. Chapter XX [Ss. 493-498] deals with offences relating to marriage. Chapter XX-A [S. 498-A] seeks to prevent cruelty to wife by her husband and her in-laws. The primary object of these provisions is to preserve purity and sanctity of marriage by punishing conjugal infidelity and by affording protection to weaker section, i.e. female community.

These offences may be discussed under the following heads:

- Mock marriages: Sections 493 and 496;
- Bigamy: Sections 494 to 496; (iii) Adultery: Section 497;
- Criminal Elopement: Section 498; and
- Cruelty: Section 498-A.

##### Mock Or Deceitful Marriage

Sections 493 and 496 relate to mock or Deceitful or fraudulent marriages.

Section 493 punishes a man who induces a woman to falsely believe that she is lawfully married to him to have sexual intercourse with him under that belief. Such person shall be punished with imprisonment which may extend to 10 years. This offence is very near to rape as defined in Clause Fourthly of Section 375 under which consent is given by the woman for sexual intercourse under the belief that the man was lawfully married to her. Section 496 punishes a person who dishonestly or fraudulently goes through marriage ceremony with a man or woman but there is no la marriage between them.

##### *Sections 493 and 496: Difference*

Though both the provisions [Ss. 493 & 496] relate to offences relating marriage and they cover cases of mock or fraudulent marriages, there distinction between the two. Section 493 requires deception by a man whereas Section 496 covers man as also a woman. Thus, an offence under Section 493 can only be committed by a man, while an offence under Section 496 can be committed either by a man or by a woman. In the former, cohabitation or sexual intercourse is sine qua non no offence can be said to have been committed by a man without this ingredient, while in the latter, sexual intercourse is not necessary.

The offence under Section 493 presupposes deception by a man on a woman and sexual intercourse as a consequence thereof. Section 496 requires dishonest or fraudulent marriage ceremony either by a man or by a woman. Cohabitation or sexual intercourse is not a necessary requisite.

## **BIGAMY**

Sections 494 to 496 deal with bigamy. Section 494 punishes an offence of bigamy. It states that a person marrying again during the lifetime of husband or wife shall be punished with imprisonment up to seven years.

### **Object**

The object underlying this provision is to punish persons who enter into a second marriage during the subsistence of the first marriage.

### **Ingredients**

The following are the necessary ingredients of the offence:

1. the accused must have contracted the first marriage;
2. he must have married again;
3. the first marriage must be subsisting; and
4. the spouse must be living.

### **Conversion and second marriage**

In *Sarla Mudgal v. Union of India*, the Supreme Court ruled that second marriage by a Hindu husband after embracing Islam would not automatically dissolve the first marriage. The husband, therefore, is liable to punishment under Section 494 IPC.

### **Exceptions**

Section 494 carves out two exceptions wherein the second marriage does not become an offence:

1. where the first marriage is declared void by a competent court of law; and
2. where the other spouse is continually absent for seven years.

### **(f) Aggravated form of offence**

Section 495 is an aggravated form of offence under Section 494 and applies to cases of second marriage concealing the prior marriage. Section 496 punishes a person fraudulently going through marriage ceremony without lawful marriage.

## **ADULTERY**

Section 497 punishes an offence of adultery.

### **(a) Definition**

Section 497 defines adultery. It reads thus:

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

## **(b) Ingredients**

To constitute an offence of adultery, the following ingredients must be established:

- i. the accused must have sexual intercourse with a woman;
- ii. such woman must be the wife of another person;
- iii. the accused must be aware (or had reason to believe) that she is the wife of another person;
- iv. sexual intercourse should not amount to rape; and
- v. such sexual intercourse must have been without consent or connivance of the husband.

## **(c) Object**

The primary object of this provision is to protect right of the husband over his wife, to preserve sanctity of marriage and prevent matrimonial infidelity.

## **(d) Constitutional validity**

Constitutional validity of Section 497 IPC was challenged in some cases but the Supreme Court negated the challenge and upheld the validity thereof. In *Yusuf Abdul v. State of Bombay*, vires and validity of the last sentence of Section 497 ("in such case the wife shall not be punishable as an abettor") was challenged on the ground that it offended the doctrine of equality enshrined under Articles 14 and 15 of the Constitution of India.

The Constitution Bench, in a cryptic order, negated the challenge observing that it was a special provision made for women and as such was saved by clause (3) of Article 15. The court also observed that sex is a sound discrimination and a provision made for women cannot be held ultra vires. It was urged that the operation of clause (3) of Article 15 should be confined to the provisions which are beneficial to women and cannot be used to give them a licence to commit and abet crimes.

It is submitted that the constitutional issue raised by the appellant was indeed very important having far-reaching consequences. The court in the circumstances, ought to have considered it in detail on principle of equality. The court stated, "We are unable to read any such restriction" overlooking an important argument that it was because of absence of such restriction that the court was called upon to test its validity and vires on the anvil of the doctrine of equality.

In *Sowmithri Vishnu v. Union of India*, again, constitutionality of Section 497 IPC was questioned being violative of Articles 14, 15 and 21 of the Constitution on various grounds. The court rejected all grounds. It stated that the offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, as an act which is committed by a man, as is generally is.

It is submitted that the reasons put forward in justification of constitutionality of the provision by the court are not only legally unsound but factually incorrect. If the provision is held intra vires on the ground of matrimonial sanctity as claimed by the court, such sanctity must be observed by both the parties to the marriage. While observing that such an act (offence) is generally committed by a man, the court totally ignored and overlooked the most material fact that in all cases of adultery, the other party to the act (female) is also a married woman who had with an open eye and consent committed breach of matrimonial sanctity.

If men who defile matrimonial sanctity have been brought "within the net of the law" as observed by the Court, one fails to understand why women who knowingly and willingly defile the same matrimonial sanctity should not be brought "within the (same) net of the law". True it is that the Legislature has not thought it fit to bring them under the law. But then it is precisely on that ground that constitutional validity of the provision

was challenged. It is submitted that the Court, considering the ambit and scope of Articles 14, 15, 19 and 21 of the Constitution in their proper perspective, ought to have declared the provision ultra vires and unconstitutional.

The Court also gave some instances which were neither relevant nor germane to the issue. It stated that for an offence of robbery, maximum punishment prescribed is imprisonment for ten years while for an offence of adultery, it is only five years (?) "Breaking matrimonial home is no less serious a crime than breaking open a house".

It is submitted that the simile is ill-founded. "House breaking" and "breaking of matrimonial home" are incomparable and, hence, they could not have been compared. The Court ought to have kept in view the basic and fundamental principle of the doctrine of equality which requires "equals to be treated equally" and "comparables to be compared". Comparison with incomparables itself offends the doctrine of equality and is violative of Article 14 of the Constitution.

It is submitted that the Court ought to have applied the doctrine of equality as enshrined in Articles 14 and 15 of the Constitution in letter and spirit leaving other aspects to the Legislature. If stability of marriages is an ideal to be achieved, it required fidelity from both the parties and not partial fidelity at the costs and consequences of the other spouse. If the Legislature enacts a provision which offends the basic principle of equality, it is expected, nay, it enjoins a competent court to exercise its power and discharge its duty under the Constitution without inhibition of consequences likely to ensure. It is for the Legislature to take corrective measures. Sometimes, it was stated that wife is a "victim" and not an author of the crime. It is submitted that this is not correct. In "adultery" the wife cannot be held "victim" inasmuch as she is a consenting partner in the act of cohabitation or sexual intercourse. Where there is no "consent" on her part, an act of sexual intercourse with her would amount to "rape" as defined in Section 375 of the Code, punishable under Section 376 IPC.

It may be stated that the Law Commission studied this provision care-fully. It also sought opinions from various quarters and by a majority, recommended removal of exemption of wife from punishment for an offence of adultery treating husband and wife at par with each other.

### **Adultery and rape: Difference**

Though both these offences, i.e. adultery and rape relate to cohabitation or sexual intercourse by a man with a woman, there are certain distinguishing features.

<b>Adultery [5.498]</b>	<b>Rape [5.375]</b>
1. Adultery is an offence against marriage.	Rape is an offence against person of a woman.
2. Adultery can be committed only with a married woman whose husband is alive.	Rape can be committed on any woman, married or unmarried, or whose husband is alive or dead or on a divorced women.
3. In adultery, a woman is a willing party and a consenting partner.	In rape, sexual intercourse is committed by a man against the will of the woman or without her consent.
4. No adultery can be committed by a husband with his wife.	Rape can be committed by husband on his wife in certain circumstances.
5. In adultery, aggrieved party is husband.	In rape, aggrieved party is the victim with whom sexual intercourse has been committed by a man.
6. Adultery is less serious offence.	Rape is more serious offence.
7. In adultery no minimum sentence is prescribed.	In rape, minimum sentence is prescribed by the Code.

## **Punishment**

An offence of adultery is punishable with imprisonment up to two years or with fine or with both.

## **CRIMINAL ELOPEMENT**

Section 498 punishes a person who takes or entices a married woman from her husband with intent that she may have illicit intercourse with any person.

### **Object**

Section 498 seeks to preserve the rights of the husband. It penalises any other person by protecting the husband from unlawful interference in his married life. The gist of offence is deprivation of husband of custody and control over his wife with the object of having illicit intercourse with her.

### **Ingredients**

The section requires fulfilment of four conditions:

1. the woman must be wife of another person;
2. the accused must be aware (or he must have reason to believe) that she is the wife of another person;
3. the accused must have enticed or taken away the woman from her husband; and
4. such taking, enticing, etc. must be with the intent that she may have illicit intercourse with any person.

### **Policy of law**

In *Alamgir v. State of Bihar*, the Supreme Court stated that the principle underlying Section 498 may sound inconsistent with the modern notions of the status of women and of the mutual rights and obligations under marriage. That, however, is a question of policy with which courts are not concerned.

### ***Who may file complaint?***

A complaint under Section 498 IPC can be filed by the husband of the woman or in his absence by a person who is in care of such woman.

### ***Who can commit offence?***

An offence under Section 498 can be committed by a man as also by a woman. No doubt, an essential element of the offence is that such woman may have illicit intercourse with any man. But the act of enticing or taking away woman can be done by a woman also. In that case, she can be punished under this section.

Consent of wife is irrelevant and is no defence to a charge under this section. A wife cannot be punished as an abettor.

### **Kidnapping, abduction, etc. and elopement: Difference**

Offences under Sections 366 and 498 relate to kidnapping, enticing or taking away women and are punishable under the Code. They are, however, different in certain aspects.

Section 366 applies to cases where the woman kidnapped or abducted is an unwilling party and does not respond to criminal intent of the accused. Section 498 applies to cases of consent.

Section 366 is intended to protect the woman who is sought to be kidnapped or abducted whereas Section 498 seeks to protect the rights of the husband over his wife.

Under Section 366, consent of the woman who is major is a relevant consideration. In case of elopement under Section 498, Consent of wife is immaterial and irrelevant.

An offence under Section 366 is a major offence while an offence under Section 498 is comparatively a minor offence.

### **Punishment**

A person committing an offence under Section 498 is punishable for imprisonment up to two years. Normally, an appellate court should not interfere with an order of sentence passed by the trial court.

### **CRUELTY**

Chapter XXA [S. 498-A] has been inserted in IPC in 1983. It shows the anxiety of Parliament to extend protection to weaker class, i.e. women community in matrimonial life.

### **Statutory provision**

Section 498-A deals with special type of cases relating to cruelty to a woman by her husband and her in-laws. The section reads thus:

**498-A.** Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

*Explanation-* For the purposes of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

### **Object**

In Statement of Object and Reasons, the object behind this provision has been set out. It was observed:

The increasing number of dowry deaths is a matter of serious concern. The extent of the evil has been commented upon by the Joint Committee of the Houses to examine the working of the Dowry Prohibition Act, 1961. Cases of cruelty by the husband and relatives of the husband which culminate in suicide by, or murder of, the hapless woman concerned, constitute only a small fraction of the cases involving such cruelty. It is, therefore, proposed to amend the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act suitably to deal effectively not only with cases of dowry deaths but also cases of cruelty to married women by their in laws.

In *Brij Lal v. Prey Chand*, dealing with the provisions of Sections 498-A, 304-B IPC and Sections 113-A and 113-B, Evidence Act, 187z, the Supreme Court stated:

The degradation of society due to the pernicious system of dowry and the unconscionable demands made by greedy and unscrupulous husbands and their parents and relatives resulting in an alarming number of suicidal and dowry deaths by woman has shocked the legislative conscience to such an extent that the legislature has deemed it necessary to provide additional provisions of law, procedural as well as substantive, to combat the evil and has consequently introduced Sections 113-A and 113-B in the Indian Evidence Act and Section 498-A and 304-B in the Indian Penal Code.

## **Constitutional validity**

Section 498-A is not unconstitutional. Possibility of abuse of provision of law does not make such provision arbitrary or unreasonable and cannot be declared ultra vires if it is otherwise intra vires. Again, the term "cruelty" cannot be held to be vague or ambiguous. Explanation to Section 498-A clearly defines the expression and carries within it conduct and behaviour which can be said to come within the meaning of the said expression. It also does not confer arbitrary power on police or on courts to harass husband and his relatives at the instance of wife. Courts will interpret the provision reasonably keeping in view the paramount object of the legislation to strike at the roots of dowry menace.

## **Ingredients**

The following are the ingredients of Section 498-A:

1. the woman must be married;
2. she must be subjected to cruelty; and
3. such cruelty must have been shown by her husband or his relatives.

## **Cruelty: Meaning**

Explanation to Section 498-A defines the term "cruelty". It includes physical as well as mental torture or harassment. It is a course of conduct or behaviour which adversely affects matrimonial duties and obligations. The concept of cruelty and its effect varies from individual to individual. It also depends on social and economic status to which such person belongs. Cruelty postulates a treatment which causes reasonable apprehension in the mind of the wife that her living with husband and in-laws will be harmful, injurious or painful.

In deciding the question of cruelty, several factors, such as, matrimonial relationship between husband and wife, their education, social status, occupation, temperament, state of health, their interaction in daily life, conduct and behaviour of husband and in-laws towards the woman, sensitivity of the victim, degree of courage or endurance to withstand such cruelty, etc. are all relevant and have to be considered by the court.

Whether the husband or his relatives have treated the victim with cruelty or not is essentially question of fact and must be decided keeping in view all the circumstances brought before the court. Cruelty is a continuing offence.

## **Presumption**

Section 113-A, Evidence Act, 1872 enables a court to presume that commission of suicide by a woman has been abetted by her husband or his relatives if the following two conditions are satisfied:

1. the woman has committed suicide within seven years from her marriage; and
2. the husband or his relatives had subjected her to cruelty.

It has, however, been held that the said provision [S. 113-A, Evidence Act, 1872] does not alter the fundamental principle of criminal law which requires the prosecution to prove beyond reasonable doubt that it was the accused who had committed the offence.

## **Proof**

Initial burden of proof of cruelty shown to woman is on the prosecution. But inference can be drawn from the facts and circumstances of the case. The court may also invoke Section 113-A, Evidence Act, 1872. The test of proof should be of a reasonable man. Standard of proof must be of a prudent man.



## **Dying declaration**

**Dying declaration of the victim can be considered under Section 32, Evidence Act, 1872 if it is otherwise reliable and trustworthy. But a statement which is otherwise covered by hearsay rule and does not fall within any of the exceptions of Section 32, Evidence Act, 1872 cannot be relied upon for recording conviction of the accused.**

## **Sentence**

**Deterrent sentence is called for in cases of dowry death and cruelty to women at matrimonial home. The court must keep in view the fact that offences against women are increasing for unjustified and illegal demand of dowry. The sentence for such offences, therefore, should be an eye-opener for the offender. The offender must realise that he cannot get away merely by paying some amount of fine or by remaining in jail for few days.**

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# DEFAMATION

## Synopsis

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## Introduction

Chapter XXI [Ss. 499-502] deals with defamation. Section 499 defines "defamation". It also contains several exceptions. Section 500 prescribes penalty. Section 501 and 502 apply to special cases.

## Defamation : Meaning

To defame means "to attack the good name or reputation" of another person. "Defamation" thus is "the act of defaming". It is an act of causing harm or injury to the reputation of another.

*In Halsbury's Law of England*, it is stated:

A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.

Defamation tends to injure or harm reputation, diminishes the esteem, respect, goodwill or confidence in the person. It excites adverse, derogatory or unpleasant feelings or opinions against such person. Defamation is a statement (written or spoken) which exposes a person to contempt, hatred or ridicule. Defamation thus tends to lower a person in the estimation of right thinking members of society generally or tends to make them shun or avoid him.

## Object

The primary object of this chapter is to preserve, protect and safeguard reputation. The right of reputation is inherent personal right of every individual. This right can be considered as a facet of right to life guaranteed under Article 21 of the Constitution. A man's reputation is his real property, which is more valuable than any other property. It is, therefore, the duty of every civilised society to protect this important right of its subjects. Defamation is an act which causes a harm or an injury to the reputation of a person. It is certainly a tort (civil wrong). But it is also a crime under the Penal Code, 1860 (IPC) for which punishment is Provided For Imprisonment As Also For Fine.

## **Statutory Provisions**

Section 499 defines defamation with the help of four explanations.

The section also contains ten exceptions whereunder a person will not be held guilty for the offence of defamation. They are based on truth, good faith, public interest, etc.

Thus, it can be said that Section 499 IPC, on the one hand, guarantees the fundamental right of Article 21 of the Constitution (Right to life), while, on the other hand, it protects and allows exercise of another equally important fundamental right (Right of speech and expression) guaranteed by Article 19(i)(a) of the Constitution. The section thus seeks to strike a balance between freedom of speech and expression and right to reputation.

Section 499 reads thus:

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

**Explanation 1-** 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 2-** It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

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

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

### **Illustrations**

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

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

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

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

**Third Exception-** Conduct of any person touching any public question- It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further.

### Illustration

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

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

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

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

### Illustrations

(a) A 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.

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

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

### Illustrations

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

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

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

### Illustration

A judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his 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.

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

#### **Illustration**

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.

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

#### **Illustrations**

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

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

### **Ingredients**

The offence of defamation as defined in Section 499 consists of the following ingredients:

1. making or publishing any imputation concerning a person;
2. such imputation must have been made:
  - a. by words (spoken or written); or
  - b. by signs; or
  - c. by visible representations; and
3. the imputation must have been made with the intention of harming, or with knowledge or having reason to believe that it will harm the reputation of such person.

### **Explanations**

The section contains four explanations.

*Explanation 1* applies to a dead person. It makes imputation to a dead person punishable, if such imputation would have hurt his reputation, had he been alive and is intended to be hurtful to the feelings of his family members.

*Explanation 2* applies to cases of defamation of an association, a company, or collection of persons.

*Explanation 3* covers cases of defamation by innuendo (indirect statement). Here, imputation is expressed ironically. [See, Illustration (a).]

*Explanation 4* gets attracted when an imputation is made on a person's character with a view to lower him in the estimation of others.

Thus, describing a woman that she has paramours wherever she goes is per se defamatory.

### **Exceptions**

As already observed above, Section 499 contains 10 exceptions. They declare that whenever a case falls in any one or more exceptions, there is no defamation.

Thus, in the following cases, there is no defamation:

1. imputation of truth for public good;
2. public conduct of public servants;
3. conduct of any person touching any public question;
4. publication of reports of proceedings of court;
5. merits of a case decided in court;
6. merits of public performance;
7. censure passed in a good faith by a person having lawful authority over another;
8. accusation made in good faith to an authorised person;
9. imputation made in good faith by a person for protection of his (or other's) interest; and
10. caution intended for public good.

The exceptions to Section 499 are exhaustive in nature and no grounds can be added to avoid liability under Section 500 IPC. The question of applicability of exceptions can only be considered at the time of trial and not at the stage of commencement of proceedings.

The burden of proof that the case is covered by any exception is on the accused, claiming the benefit of such exception.

### **Innuendo**

Innuendo is an oblique remark or indirect suggestion usually of a derogatory nature. In innuendo, words which are prima facie innocent or innocent on their face value are actionable if read and understood correctly. Innuendo is thus a statement by the plaintiff in an action for defamation of the construction which he puts upon the words himself and attempts to induce jury or court to adopt at the trial.

For instance, the innuendo of the statement "David burned down his house" can be shown by pleading that the statement should be understood to mean that David was defrauding the insurance company.

Similarly, a statement that "X is a good advertiser" is innocent. But is innuendo if it is used for a senior member of a Bar since the noble profession does not allow advertisement.

## **Sentence**

In considering quantum of sentence in a case of defamation, the court must take into account several factors; such as, the type of defamation, the manner in which defamation is made, nature of allegations, status or position of the accused as also of the complainant, intention, motive or object behind making such imputations, effect likely to be caused of such imputations on the complainant as also on society, etc. Thus, where the President of the Municipal Committee made allegation against a widow that she was unchaste, the Supreme Court held that the accused was a man of power and wealth who acted in a totally irresponsible and reckless manner not befitting to his position which required prudence, dignity and decorum. Hence, sentence of imprisonment for three months was proper and no reduction was called for.

## **Law Commission's View**

The Law Commission of India undertook the exercise of revision of IPC. Regarding this chapter, it opined that in the opinion of the Commission, it is necessary. The reason is that a suit for damages is not only expensive but in many cases useless since person guilty of defamation are men of no substance and nothing can be recovered from them.

The Law Commission made another important suggestion. When a defamatory statement is published in a newspaper and made known to a large number of persons, the fact of the offender's conviction must also be similarly published and the cost to be recovered from the convicted person. Nothing, however, has been done by Parliament in that direction.

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## CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

### Synopsis

- ▶ Introduction
- ▶ Criminal intimidation
- ▶ Intentional insult
- ▶ Inducing belief of divine displeasure
- ▶ Insulting modesty of woman
- ▶ Misconduct in public by a drunken

### Introduction

Chapter XXII [Ss. 503-510] deals with criminal intimidation, intentional insult, statements, conducing to public mischief, inducing belief of divine displeasure, insulting the modesty of a woman and misconduct in public by a drunken person.

### Criminal Intimidation

#### (a) Meaning

"To intimidate" means "to threaten", "to put in fear", "to deter from some action". "Intimidation" thus means "an act of threatening", "unlawful coercion" or "extortion". The act of intimidation includes any words or acts intended or calculated to put any person in fear of any injury or danger to himself or any other person.

#### (b) Definition

Section 503 defines "criminal intimidation", while Section 506 provides penalty. Section 507 is a special form of criminal intimidation. Criminal intimidation consists of an act of threatening with any injury to person, reputation or property.

#### (c) Ingredients

Criminal intimidation consists of the following ingredients:

1. threatening a person with injury:
  - a) to his person, reputation or property; or
  - b) to the person or reputation of any one in whom that person is interested; and
2. such threat must be with the intent:
  - a) to cause alarm to that person; or
  - b) to cause the person to do any act which he is not legally bound to do; or
  - c) to cause the person to omit to do any act which he is legally entitled to do.

(d) Criminal intimidation and extortion: Comparison



## **Criminal intimidation is closely analogous to extortion.**

In extortion, the immediate purpose is obtaining money (or money's worth), while in criminal intimidation, the immediate purpose is to induce the person threatened to do something which he is not bound to do, or to abstain him from doing something which he is entitled to do.

As rightly observed by the Supreme Court, very often a particular act in some of its aspects comes within the definition of one offence of Penal Code, 1860 (IPC), while in other aspects, it falls within the definition of another offence.

### **(e) Illustrative cases**

Let us understand the doctrine with illustrative cases:

1. 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.
2. A illegally demanded a sum of money from B threatening that if such payment is not made, A will publish indecent photographs of B's daughter, which may injure reputation of B and his daughter. A has committed the offence.

It has however, been held that the threat contemplated by the section should be there. Where there is no threat or material on record to show such threat causing alarm to the person, the section cannot be invoked. The question whether there was threat or not is a question of fact which has to be decided on the basis of evidence before the court.

### **(f) Sentence**

Section 506 provides penalty for an offence of criminal intimidation. It states that whoever commits offence of criminal intimidation shall be punished with imprisonment up to two years. If such threat is 1) to cause death; or 2) grievous hurt; or 3) destruction of property by fire; or 4) to cause an offence punishable with death or imprisonment for life or imprisonment for seven years; or 5) to impute unchastity to a woman, the punishment may be up to seven years.

## **Intentional Insult**

### **(a) Nature and scope**

Section 504 punishes a person who intentionally insults with intent to provoke breach of peace.

### **(b) Ingredients**

The following are essential ingredients of the offence:

1. intentional insult;
2. such insult should provoke the person insulted; and
3. it is likely to result in breach of public peace.

### **(c) Object**

This section has been enacted to deal with persons who are responsible for breach of public peace. Mere use of unparliamentary or abusive language unaccompanied by an intentional insult is, therefore, not sufficient. It is the intention of the person using such language which is material in deciding the question whether the utterances were likely to result in breach of public peace.

#### **(d) Sentence**

A person convicted for an offence of intentional insult may be ordered to undergo imprisonment up to two years or with fine or with both.

#### **(e) Mock funerals of living person**

The Law Commission took note of the fact that mock funerals of living persons are being frequently staged in public. Such demonstrations are calculated to result in breach of peace. Performing of such acts should be made punishable. The Commission, therefore, suggested to make a specific provision for it. But so far, nothing has been done by Parliament.

### **Inducing Belief Of Divine Displeasure**

#### **(a) Doctrine explained**

Section 508 IPC seeks to punish any act or omission which induces a person to believe that he will be rendered an object of divine displeasure if he does or omits to do something.

#### **(b) Object**

The section is intended to prevent practices known as dhurnas and tragas.

#### **(c) Illustrations**

Section 508 contains two 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.

#### **(d) Ingredients**

For invocation of this section, the following essentials must be present:

1. the accused must have voluntarily caused (or attempted to cause) any person to do a thing which a person is not legally bound to do, or omit to do something which he is entitled to do; and
2. the accused must have induced that person to believe that he (or any person interested in him) would become an object of divine displeasure if such thing is done or not done.

#### **(e) Sentence**

A person convicted for an offence under this section may be ordered to undergo imprisonment up to one year, or with fine, or with both.

### **INSULTING MODESTY OF WOMAN**

#### **(a) Nature and scope**

Section 509 deals with an offence of intentionally insulting the modesty of a woman.

#### **(b) Object**

The section intends to protect the modesty of a woman. The Legislature has intended that any sort of aggression into a woman's modesty should not be tolerated.

### **(c) Ingredients**

Section 509 is in two parts. Under the first part, modesty of a woman can be insulted in the following manner:

1. by uttering words, making sound or gesture or exhibiting object; and
2. with intention that such words or sound should be heard; or gesture or object should be seen by such woman.

Under the second part, modesty of a woman can be insulted by intruding upon the privacy of a woman.

### **(d) Illustrative cases**

Let us consider few illustrative cases to understand ambit and scope of Section 509:

Where a top police official slapped a senior lady officer on her posterior in presence of an elite gathering, it was held that such act would amount to outraging modesty of a lady officer.

Where a University Graduate addressed a letter to a nurse containing indecent overtures and suggesting certain action to show whether she accepted the terms, it was held that the accused had committed the offence.

Where the accused at midnight entered into a room occupied by four women and on alarm, escaped from the place, it was held that he was guilty of the offence under this section.

The words "exhibits", "gesture", etc. may ordinarily express an idea of actually showing a thing or object to a person. But such "exhibits" or "gesture" may also be in the form of a "closed envelope". The fact that the indecent act was not observed by all except the woman is no excuse to the offender. In fact the provision is intended to punish such acts.

The Supreme Court, taking note of sexual harassment of women at working place, has laid down several guidelines. It has, however, been held that in order to establish the offence under Section 509 IPC, it is necessary to show that modesty of a particular woman or readily identifiable group of women has been insulted. General grievance is not enough.

### **(e) Offence of moral turpitude**

Conviction of a person for an offence under Section 509 IPC involves moral turpitude. Such person hence, is liable to be dismissed from service.

### **(f) Sentence**

Section 509 provides punishment to an offender to suffer simple imprisonment up to one year, or with fine, or with both.

### **(g) Law Commission's view**

The Law Commission considered the seriousness of the crime and recommended Parliament to make the offence "cognizable".

## **Misconduct in Public by a Drunken Person**

### **(a) Nature and scope**

Section 510 IPC punishes a person who in a state of intoxication appears at a public place or at any other place while committing a trespass and causes annoyance to any person.

**(b) Ingredients**

The section requires the following ingredients:

1. the accused must have appeared at a public place (or at other place by committing a trespass);
2. he must be drunk; and
3. he must have conducted himself in such a manner as to cause annoyance to some person.

**(c) Sentence**

A person convicted under this section may be ordered to undergo simple imprisonment up to 24 hours, or with fine, or with both.

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# ATTEMPT

## Synopsis

- ▶ Introduction
- ▶ Stages of crime
- ▶ Object
- ▶ Attempt: Meaning
- ▶ Ingredients
- ▶ Illustrative cases
- ▶ Preparation and attempt: Distinction
- ▶ Evidence
- ▶ Procedure
- ▶ Sentence

## Introduction

Chapter XXIII [S. 511], Penal Code, 1860 (IPC) contains only one section providing punishment for an attempt to commit an offence punishable with imprisonment for life, or imprisonment, or with fine and for which no express provision has been made in the Code. It is thus a general provision and seeks to punish offences which are not punishable by specific provisions in IPC.

## Stages of Crime

As already noted in the beginning, there are four stages of a crime:

1. intention;
2. preparation;
3. attempt; and
4. crime or act.

Attempt is thus third stage of a crime. Where such attempt is successful, it results in the act, accomplishment or crime.

## Object

Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment, or with fine, or with both, but not punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, creates alarm, which by itself is an injury and the moral guilt of the offender is established. Since the injury is not as great as if the act had been committed, the law provides only half the punishment.

## Attempt : Meaning

The term "attempt" has not been defined in the Code. "Attempt" also defies precise and exact definition. Broadly speaking, an attempt to commit an offence is an act, or series of acts, which leads inevitably to the

commission of an offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent the act. An attempt thus may be described as an act done in part-execution of a criminal design, amounting to more than intention and preparation but falling short of actual consummation, and possesses, except for failure to consummate all the elements of a substantive crime or offence. An attempt thus consists in the intention, preparation and an act to commit a crime, falling short of actual commission, consummation or completion.

Normally, all crimes are preceded by three acts: 1) intention; 2) preparation; and 3) attempt. Attempt is thus the third stage of a crime. It is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step need not be penultimate act towards the commission of the crime. It is sufficient if such act is deliberately done and is proximate to the intended result. The measure of opportunity is not in relation to time and action but in relation to intention of the culprit.

An attempt to commit an offence begins when the preparations are complete and the culprit commences to do something with the intention of committing the crime which is a step forward for commission of offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the crime.

### **Ingredients**

An offence of attempt under Section 511 requires the following ingredients:

1. there must be an attempt to commit an offence;
2. such offence must be punishable under IPC;
3. the offence must be punishable with imprisonment, or with fine, or with both;
4. there should not be an express provision of punishment of such offence; and
5. the accused must have committed an act towards the commission of the crime.

### **Illustrative Cases**

Let us consider few illustrative cases to understand the principle underlying Section 511 IPC:

1. A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
2. 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.

### **Preparation and Attempt: Distinction**

In the commission of an offence, there are different stages, such as, intention, preparation, attempt, and act. Mere intention to commit a crime is not punishable. Barring few cases, even preparation is not an offence under IPC. An attempt, however, is an offence. It is a crime punishable either under the special provisions in the Code or under Section 511.

The difficulty, however, is: What is the distinction between preparation and attempt? Where preparation ends and attempt begins? What is the test or criterion to distinguish mere preparation which is non-punishable from attempt which is punishable?

Thus, preparation consists in devising or arranging the means or measures necessary for the commission of the offence. An attempt to commit an offence is a direct movement towards the commission after preparations

are over. In order that a person may be convicted of attempt to commit a crime, he must be shown 1) to have committed intention to commit the offence; and 2) to have done an act which constitutes the actus reus of a criminal attempt.

The difference between preparation and an attempt may be explained by an illustration:

If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but, if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it.

The question whether a particular act is merely one of preparation or an attempt towards commission of crime is a question of fact and must be decided on the basis of evidence and material before the court. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the reply is in the affirmative, it is an attempt punishable under IPC. But if the reply is in the negative, the doer of the act cannot be convicted.

### **Evidence**

It is for the prosecution to prove that the accused attempted to commit some offence punishable with imprisonment, or with fine, or with both. It must also prove that he had committed some act towards the commission of the crime and, hence, he is covered by Section 511 of the Code. When the doer's design is manifested by a positive act, the offence of attempt can be said to have been proved irrespective of its failure to result in the intended offence.

### **Procedure**

Regarding cognizability, compoundability and bailability of the offence attempted, the procedure applicable to the main offence is required to be followed.

### **Sentence**

A person committing an offence under Section 511 IPC can be awarded half the punishment awardable for the main offence. Thus, if the punishment for the main offence is imprisonment for 10 years, the person convicted for an attempt to commit such offence can be ordered to undergo imprisonment which may extend to five years.

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## THUG

### Synopsis:

- ▶ Statutory Provisions
- ▶ Essentials

### Statutory Provisions

Section 310 of the Indian Penal Code states that whoever, at any time after the passing of this Act (IPC, 1860), shall have been habitually associated with any other or others for the purpose of committing robbery or child stealing by means of or accompanied with murder, is a thug.

According to Section 311 of the Code, whoever is a thug shall be punished with imprisonment for life, and shall also be liable to fine. Sections 310 and 311 provide for a species of crime which has now become extinct. Thuggee was one rampant in the country and the thug regarded himself as an object of protection by the Goddess Kali or Devi, whose protegee he claimed to be, and to whom he offered up the blood of his victim. Thugs are organized bands of roving marauders, who work in gangs. They used to appear in various disguises in bazars, fairs and public ways and often worked as domestic servants, cartmen, spicers or merchants, but in each case their object was to reconnoitre their surroundings or inveigle travellers to rob and murder them.

### Essentials

In order to be a thug, a person must :

- (i) habitually,
- (ii) associate with,
- (iii) other or others,
- (iv) for the purpose of committing robbery or child-stealing by means of on accompanied with murder.

A single individual, planning robbery by means of murder cannot be proceeded against as a thug. The thug must have associated with another habitually, and for common purpose during some definite period. In order to be a habitual associate of another, there must be evidence of their companionship. Sections 310 and 311 make the habitual association with thugs an offence. The actual commission of an offence by him is not necessary.

Thugs must be distinguished from robbers and dacoits. Thugs are organized gangs, whose object is to rob or kidnap accompanied by murder. Thus, the committing of murder itself is one of the set purposes of thugs. They first kill and then rob their victims. At present there are no thugs and the Sections 310 and 311 have become more or less redundant. In Ancient India, many such gangs were operative which needed a special legislation called the Thuggee Act, 1836 to eradicate this evil from society. These provisions are obsolete now. The Law Commission, therefore, suggested deleting them from the Code.

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# MODEL QUESTION PAPER (WITH KEY)

## LAW OF CRIMES

**Time:** 2 1/2

**Maximum: 70 marks**

### **PART A (2 x 12 = 24 marks)**

**Answer TWO of the following in about 500 words each:**

**1. Define Crime? What are the different stages of crime?**

#### **Synopsis:**

- Introduction
- Meaning and Definition of Crime
- Main elements of Crime
- Stages of Crime
  - ◆ Intention
  - ◆ Preparation
  - ◆ Attempt
  - ◆ Commission.
- Illustrations and case study

**2. State the meaning and scope of 'Jurisdiction' under the provisions of the Indian Penal Code?**

#### **Synopsis:**

- Introduction
- Jurisdiction: Meaning
- Section 2, 3 and 4.
- Jurisdiction of Criminal Courts
  - ◆ Personal Jurisdiction
  - ◆ Territorial Jurisdiction
    - ▶ Intra-Territorial Jurisdiction
    - ▶ Extra-Territorial Jurisdiction
  - ◆ Admiralty Jurisdiction
- Illustrations and case study

3. Define 'Culpable Homicide'? State the circumstances when Culpable Homicide not amounting to murder?

**Synopsis:**

- Introduction
- Kinds of Homicides
- Section 299, Section 300
- Culpable Homicide not amounting to murder
  - ◆ Grave and sudden provocation
  - ◆ Right to private defence
  - ◆ Public servant discharging the duty
  - ◆ Sudden fight
  - ◆ Consent
- Illustrations and case study

**PART B (2 x 7 = 14 marks)**

**Answer TWO of the following in about 300 words each:**

4. Define the offence of 'Abduction'? Distinguish Kidnapping from Abduction?

**Synopsis:**

- Introduction
- Abduction
  - ◆ Abduction: Meaning
  - ◆ Statutory provision
- Kidnapping and abduction: Distinction
- Aggravated forms of abduction

5. What is Defamation? Is imputation against a dead person amounts to defamation?

**Synopsis**

- Introduction
- Defamation: Meaning
- Object
- Statutory provisions
- Ingredients
- Explanations
- Exceptions
- Sentence

6. Define offence of Conspiracy and discuss its nature and scope under the provisions of IPC.

**Synopsis:**

- Introduction
- Object
- Criminal Conspiracy: Definition [S. 120-A]
- Ingredients
- Two or more persons
- Agreement
- Illegal act or legal act by illegal means
- Mens Rea (Guilty Mind)
- Punishment [S. 120-B]

**PART C (5 x 4 = 20 marks)**

**Write short notes on FIVE of the following:**

7.

- a) Thug
- b) Attempt to commit suicide
- c) Grievous hurt
- d) Insanity
- e) Elements of Crime
- f) Reformatory Theory
- g) Common Intention
- h) Causing Disappearance of Evidence

**PART D (2 x 6 = 12 marks)**

**Answer TWO of the following by referring to the relevant provisions of law and decide cases. Give cogent reasons.**

8. A, a child below 7 years of age attacks B by a sword. Before A could cause death or grievous hurt to B, B opened fire by a gun on the child A (below 7 years of age), A is killed. B is prosecuted under section 302 I.P.C for murder of A. B takes the defence that he killed the child in exercise of 'right of private defence' whereas the arguments of prosecution was that B had no 'right of private defence' because A was under 7 years of age and his act was not an offence and the right of private defence is exercised only against an act which is an offence and not against such an act which does not constitute an offence. Decide, who will succeed, whether prosecution or defence. Give reasons and also refer to the relevant provision on the point.

**Ans.:** Defence (accused B) will succeed- section 98, I.P.C.

**Reasons:** According to section 98, on which this problem is based, right of private defence is available even against a person, who in law not capable of committing an offence, for example - a child below 7 years of age or a man of unsound mind.

In the present case, A is a child below 7 years of age. Thus, if he had killed B or caused grievous hurt to B, it would have not been an offence in view of provision made in section 82. However, in view of the provision

made in section 98, B has same 'right of private defence' which a person enjoys against a person above 7 years of age or a major (above 18 years of age). According to section 100, a person has a right to kill another if he has reasonable apprehension of death or grievous hurt.

In the given case, B has committed no offence even if he caused death of A (child below 7 years of age) in view of section 98 read with section 100, I.P.C. In other words, it can be said that a person has right of private defence against another even if such a other person, in law, is not capable of committing offence. Thus, in the given case, accused B (defence) will succeed and the prosecution will not succeed.

9. The accused was beating a person with fists. The wife of the man being beaten intervened with her baby in arms with a view to rescue her husband. The accused gave a fist blow to her also, which struck the baby, as a result of which it died. On It being prosecuted, the accused pleads accident. Decide.

Ans.: The plea of accident is not sustainable at law and the accused will not succeed in view of Jageshwar's case, 1923 (24) Cr 14 789 and Chatur Nath's case, 1919 (21) Bom LR 1101.

Reasons: Section 80 of I.P.C., on which this case is based, states that in order to take the defence of section 80 (accidental act), it is necessary that the act of the accused must have been lawful, and must have been done in lawful manner and by lawful means. In the given case, the act of beating a man with fists is not lawful. The facts of the given case are based on Chatura Nath's case, referred above. In this case, the Bombay High Court held that although the child was hit by the accused by accident, yet the accused was not entitled to take the benefit of section 80, I.P.C. in as much as the act of accused i.e., 'beating', was not lawful. The view expressed by Bombay High Court in Chatur Nath's case was also taken in Jageshwar's case referred above. Thus, on the basis of above discussion, it can be said that in the given case, the accused cannot plead accident.

10. A, a snake charmer exhibited in public a venomous snake whose fangs he knew, had not been extracted, and for showing his own skill and dexterity, however, without intention to cause harm to any one, placed the snake on the head of one of the spectators. The spectator while trying to push off the snake was bitten by the snake and consequently died. What offence, if any, was committed by A. Give reasons and also refer to the case law, if any, on the point.

Ans : A has committed the offence of 'culpable homicide not amounting to murder' - Ganesh Duley's case, 1879 5 Cal 351.

Reasons: The facts of the given case are based on Ganesh Duley's case, referred above. In this case the Calcutta High Court held that the snake charmer committed the offence of 'culpable homicide not amounting to murder' under 3rd clause of section 299. It reads as follows: "whoever causes death by doing an act with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".

Thus, it can be easily said that in the present case, A is guilty of 'culpable homicide not amounting to murder', because his act of showing the skill and dexterity in public by a poisonous (venomous) snake, being fully acquainted with the fact that the poisonous tooth (fangs) of the snake had not been extracted, was such, as he must have knowledge of the fact that his act is likely to cause the death of another, though he had no intention to cause the death or kill to any of the spectators or any onlooker present there.

NOTE: It is notable in this case, that the intention of A is immaterial, as in order to constitute the offence of culpable homicide, intention is not an essential element in all cases. That is why 3rd clause of section 299 (culpable homicide) does not speak of intention. It is also notable that if it is a case of intention, the case is covered by 1st clause of section 299 and by 1st clause of section 300 (murder). Hence, the offender becomes liable for murder defined under section 300, if the act of causing death by offender is intentional. But in the given problem, as the offender had no intention to cause death, section 300 cannot be invoked.

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