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STUDY MATERIAL

for

LAW OF CRIMES I

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UNIT I

CRIME AND ITS MEANING:

SYNOPSIS :

- Meaning
- Elements of crime – Actus Reus and Mens Rea
- Stages of Crime
- Parties to crime

Meaning

Crime may be defined as an act or omission, which the society has of thought fit to punish or otherwise deal with under its laws for the time being in force. The different acts and or omissions so punishable under the law are known as crimes.

Blackstone defined crime as “an act committed or omitted in violation of public law forbidding or commanding it”. According to Glanville Williams “a crime is a legal wrong that can be followed by criminal proceedings which may result in punishment”. Professor Kenny defined crimes in the following terms: “Crime is a harmful human conduct that sovereign desires to prevent.” Salmond defines crime as “an act deemed by law to be harmful to society in general even though its immediate victim is an individual”. John Austin defines crime “a wrong which is pursued by the sovereign or his subordinates is a crime.”

Essential Elements of Crime:

The cardinal principle of criminal law is contained in the maxim **‘actus non facit reum, nisi mens sit rea’**. It means an act does not make a person guilty of a crime unless the mind is also guilty.

The general rule of English law states that a person will be criminally liable if he has committed a prohibited act, which is by a certain state of mind. Clearly, there is a difference between an accident which cause injury and a deliberate act which injures another. The difference may not be in the act, but in the state mind of the actor. However, certain crimes do not require any particular state of mind. These crimes are classified as strict liability offences. They are an exception to the requirement of mens rea.

Often, in criminal law, a crime is committed when there is a combination of actus reus and mens rea. The actus reus for each crime must be established. It is not enough that mens rea for the crime was present, if actus reus was not committed as well. The main reason for this is that criminal law insists on some expression of someone’s criminal thoughts through their actions before it will intervene to punish them. Moreover, there is no criminal liability for possessing a particular state of mind. Mens Rea and deliberate conduct by the accused is essential to constitute offence.

Actus Reus:

It is the deed of commission, a result of active conduct of the offender. The word Actus denotes a deed, a material result of human conduct. When the criminal policy regards such a deed as sufficiently harmful, it prohibits it and seeks to prevent its occurrence by imposing a penalty for its commission. Thus, Actus Reus may be defined as such result of human conduct as the law seeks to prevent. It is important to note that the actus reus, which is the result of conduct and therefore an event, must be distinguished from the conduct which produced the result. For example, in a case of murder, the death of the victim is brought by stabbing. Here the actus reus is homicide which is brought by the conduct of the offender i.e. stabbing.

There may be situations where the law commands or permits the harm to be inflicted. In such cases the act done does not amount to offence. For example: a duly appointed executioner who puts to death a condemned criminal. No criminal liability arises in such cases.

Causation

There may be several causes of an event. It is however reasonable to say that an event may be caused by one of these factors if it would not have happened without that factor. From this it would follow that a man can be said to have caused the actus reus of a crime if that actus would not have occurred without his participation in what was done. The ancient rule of strict liability required no more than this test. However, with modern day conception of mens rea no hardship could result from the investigation of causes since the more remote the cause, the greater the difficulty of proving that the accused person intended or realized what the effect of it would be.

The physical element in criminal liability can be assessed under the following heads:

(i) **When there is no physical participation**: A man can be held fully liable even though there is no physical participation in the act. Thus, law from very early times attached to one who procures or advises another to commit a crime at least an equal responsibility with that of the actual perpetrator of the deed. The law dealing with such situations is dealt under the heads of incitement and conspiracy.

(ii) **Where the participation is indirect**: The actus reus is fully attributed to anyone who has done things which have led or allowed some wholly innocent person to act under mistake so as to cause harm in question. An example would be: A puts poison into a drink which he knows or expects that B will offer to C.

(iii) **Where another person has intervened:** In certain cases, it would seem that the harm could not have occurred but for an act or omission on the part of the offender, but in which he has been excused on the ground that some other person intervened and s appeared to have more immediate and direct cause of harm. In *R v. Hilton*, on an indictment of manslaughter, it appeared that the prisoner who was in charge of a steam engine had stopped the engine and gone away. During his absence some unauthorized person had set the engine in motion after the prisoner had gone away. The judge held that the death was the consequence, not of the act of the prisoner but of the because of the because of the person who had set the engine in motion after the driver had gone away.

(iv) **Where victim's own conduct has affected the result**: Although there is no definite test laid down by any authority it would seem that so long as it is reasonably certain that the result charged against the offender in the indictment (a) would have occurred even if nothing was done subsequently by the victim (b) did occur although it might have been averted if the victim had taken some remedial action, then the prisoner offender be convicted. In cases where the victim's conduct has affected the result, the benefit of it must go the offender. In *R v. Martin* the prisoner was charged with the manslaughter of his 4-year-old son by giving it gin. It appeared that he had held out a glass to a little boy who snatched the glass and drank nearly the whole of the liquor which brought about its death shortly. The prisoner was acquitted on the grounds that the death followed because of the act of the child.

(v) **Contributory negligence of the victim:** that the victim of an offence has contributed to the harm by his own negligence affords no such defence to the accused in criminal proceedings as it may do in a civil action. In R v. Swindall and Oshborne, it appeared that the prisoners were driving a horse and cart on the public road and encouraging each other to drive at a dangerous pace. In the course of this, they ran over and killed a pedestrian. It was held that it is immaterial whether the deceased was drunk or negligent, or in part contributed to his own death.

Mens Rea

Mens rea means the evil intent or guilty state of the mind. It refers to psychological state or desire of the offender to bring about a contemplated result. Two tests have evolved to determine the mens rea in a particular case:

i. Whether the act in question is a voluntary act of the accused? (Section 39 of IPC defines voluntarily)
ii. Whether the accused had foresight of the consequences of the conduct?

There are different degrees of mens rea.

Intention: To intend is mind is to have a fixed purpose to reach a desired objective. The word intention is used to denote the state of mind of a man who not only foresees but also wills the possible consequences of his conduct. For example: If a man chops off the head of another, it is clear that he not only foresees his death but also wills to cause the death. There cannot be intention without the foreseeability of the consequences and willingness to turn foreseeability into reality.

Knowledge: Knowledge is the awareness on the part of the person concerned, indicating that his mind is aware of the possible consequences of his conduct. In *Basdev v. State of Pepsu,* it was observed that knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things.

Recklessness: A man may foresee the possible or even probable consequence of his conduct, not desire them to happen and despite this knowingly runs the risk of bringing about unwished results. A man who is reckless may prefer that the contemplated event shall not happen and does not desire for it to happen and does not act with the purpose that it shall happen. But despite this the person knowingly runs the risk.

Negligence: When a man is negligent, he may not have foreseen the probable or possible consequences of his actions. There is no foreseeability of possible consequences in negligence. The word negligence denotes such blame worthy inadvertence and the man who through his negligence has brought harm upon the other is under an obligation to make reparations to the

victim. Under IPC, negligence has been incorporated very specifically to fasten liability in cases of death caused by negligence (Section 304A). Negligence is essentially a principle of tort law.

Motive :

Motive is the psychological phenomena which compels a person to do a particular act. For example: ambition, jealously, fear etc. Motive is something which leads or tempts the mind to indulge in an act or which compels the mind to do an act. According to Austin, motive is like a spring. It pushes the intention further. In contrast, intention is the aim of the act. Motive is something which triggers mens rea. Motive can be good or bad. For instance, a person may commit theft to feed poor people. His motive is good, i.e., helping the poor. However, his intention is to commit a crime to achieve that motive. Motive may be relevant to find out the guilt if the accused but is not an ingredient of crime.

Stages of Crime:

1. **Intention**- Intention is the first stage in the commission of an offence. But the law does not take notice of an intention, mere intention to commit an offence not followed by any act, cannot constitute an offence. The obvious reason for not prosecuting the accused at this stage is that it is very difficult for the prosecution to prove the guilty mind of a person.

2. **Preparation**- Preparation is the second stage in the commission of a crime. It means to arrange the necessary measures for the commission of the intended criminal act. Intention alone or the intention followed by a preparation is not enough to constitute the crime. Preparation has not been made punishable because in most of the cases the prosecution has failed to prove that the preparations in the question were made for the commission of the particular crime. However, there are exceptions to this rule. For certain offences, even the preparation is made punishable.

3. **Attempt**- Attempt is the direct movement towards the commission of a crime after the preparation is made. A person may be guilty of an attempt to commit an offence if he

does an act which is more than merely preparatory to the commission of the offence; and a person will be guilty of attempting to commit an offence even though the facts are such that the commission of the offence is impossible. There are three essentials of an attempt:

- Guilty intention to commit an offence;
- Some act done towards the commission of the offence;
- The act must fall short of the completed offence

4. **Accomplishment or Completion**- The last stage in the commission of an offence is its accomplishment or completion. If the accused succeeds in his attempt to commit the crime, he will be guilty of the complete offence and if his attempt is unsuccessful, he will be guilty of an attempt only. For example, A fires at B with the intention to kill him, if B dies, A will be guilty for committing the offence of murder and if B is only injured, it will be a case of attempt to murder.

Parties to crime :

The four parties to crime at early common law were principals in the first degree, principals in the second degree, accessories before the fact, and accessories after the fact. These designations signified the following:

- Principals in the first degree committed the crime.
- Principals in the second degree were present at the crime scene and assisted in the crime's commission.
- Accessories before the fact were not present at the crime scene, but assisted in preparing for the crime's commission.
- Accessories after the fact helped a party to the crime avoid detection and escape prosecution or conviction.

In modern times, the parties to crime are principals and their accomplices, and accessories. The criminal act element required for accomplice liability is aiding, abetting, or assisting in

the commission of a crime. In many jurisdictions, words are enough to constitute the accomplice criminal act element, while mere presence at the scene without a legal duty to act is not enough. The criminal intent element required for accomplice liability is either specific intent or purposely or general intent or knowingly.

UNIT II

SYNOPSIS :

DEFENCES :

- Mistake of law and facts
- Accidents
- Necessity
- Infancy
- Insanity
- Intoxication
- Private Defence

OFFENCES AGAINST THE STATE :

- Waging war against the government of India and related provisions
- Sedition

A person is presumed to know the nature and consequences of his act and is therefore, responsible for it in law. However, there are some exceptions to this. Such provisions are dealt with in chapter IV of the Indian Penal Code from section 76 to 106. The general exceptions can be classified into two broad classes. First is excusable and the second is justifiable. Excusable defences are those acts which are excused for want of necessity of mens rea. In such cases the act is not criminal because the guilty intention is absent. In the case of justifiable defences the acts are not excused but justified. Here we are discussing about

- Mistake of law and facts
- Accidents
- Necessity
- Infancy
- Insanity
- Intoxication
- Private Defence

Mistake of law and mistake of facts (Sections 76 and 79)

The term mistake literally means commission or omission of an act ignorantly or unintentionally causing injury. It is an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract or a belief. Mistake is one of the defences available to the accused to get exemption from criminal liability. A court has to determine his guilt on the basis of the believed facts and not on the real facts. Mistake negates the existence of a particular intent or foresight which penal law requires to make a person liable rather than actus reus. Mistake as an absolving factor allows a court to look into the mental statues of the wrong doer. In order to exclude the criminal from the liability on the ground of mistake three conditions are to be fulfilled,

a. *The state of things believed to exist would, if true,*
b. *have justified the act done; the mistake must be reasonable; and*
c. *the mistake must relate to fact and not to law*

Section 76 and 79 of Indian Penal Code deals with Mistake of law and Mistake of fact respectively. Both these mistakes are based on the maxim "ignorantia *facti excusat, ignorantia juris non- excusat"* means ignorance of fact excuses and ignorance of law does not excuse".

Section 76 excuses a person from criminal liability who is bound by law to do something and has done it or who in good faith, owing to a mistake of fact, believes that he is bound by law to do something and does it whereas section 79 absolves a person, who believes, by reason of mistake of fact and not by reason of mistake of law, in good faith, that his act would be justified by law. The similarities between both the sections is that the act must done based must be done due to mistake of fact and the accused must have acted in good faith. The difference between two sections, is shown in the words "bound *by law" and* "justified *by law*". These two sections, though identical and accord the same immunity, are distinct from each other.

Under section, 76 a person believes himself bound by law to do a thing and

thereby he thinks he is under legal compulsion to do a thing, whereas section 79 he acts because he thinks that he is justified in doing so and thereby believes that there is a legal justification for his action. The purpose of these sections is to provide protection from conviction to persons, who are bound by law or justified by law in doing a particular act, but due to mistake of fact, in good faith, committed an offence.

A plain reading of the wordings in section76 & 79 "who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes" reveals that the protection of the sections applies only to mistake of fact and not to mistake of law. If mistake of law is admitted as an exonerating factor, it is argued, every accused will take the plea of mistake of law as a defence and it will be difficult for prosecution to refute it and to show affirmatively that the accused knew the law in question. Allowing mistake of law will also lead to the encouragement of ignorance of law.

However, mistake of law, in limited circumstances, can serve as a defence to criminal charges. The circumstances in which a mistake of law can serve as a defence include:

i. When the law is not published

ii. When you relied upon a statute that was later overturned or held to be unconstitutional

iii. When you relied upon a judicial decision

iv. When you relied upon an interpretation by an appropriate official

In R v Tolson, The appellant married in Sept 1880. In Dec 1881 her husband went missing. She was told that he had been on a ship that was lost at sea. Seven years later, believing her husband to be dead, she married another. Sometime after her marriage, her first husband turned up. She was charged with the offence of bigamy. She was held not guilty since she was afforded the defence of mistake as it was reasonable in the circumstances to believe that her husband was dead.

However in *R. v. Prince*, prince took a girl below the age of 16 years without the

consent of the parents under the belief that she was above 16 years, which is an offence in England under Offences against persons Act, 1861. In this case he didn't act in good faith because he failed to make enquiries to find out the actual age of the girl. He was convicted, even though; there is no mens rea, for the offence of kidnapping.

In *R v. Bailey* the accused was away from the cost of Africa, when a statute was passed by the British parliament, and he could not have known by any means about the passing of the statute under which he was charged. The court held him guilty, disallowing his plea of want of knowledge of the law. *R v. Wheat & Stock*, the accused was an illiterate and he was miscommunicated that he had been granted divorce. Subsequently he remarried. His first wife charged him for bigamy. The court held him guilty of bigamy and convicted him. *Tolsons case* and *wheats case* are quite distinct from each other. In the first case accused was excused due to mistake of fact and the latter case, there was a mistake of law, which is not excusable, and hence the accused was convicted.

One of the essential ingredients required for an accused to get protection of section 76 and 79 is that his action must be done in good faith. Section 57 says about good faith where essential ingredient is due care and attention. Even if a person is honest in his intentions, he is expected to act with due care and caution. The definition of good faith under the General Clauses Act is not applicable to an offence under the IPC. Due care denotes the degree of reasonableness in the care sought to be exercised. In *State of West Bengal v. Shew Mangal Singh*, a subordinate officer opened fire in pursuance of the orders of the Commissioner of Police causing the death of some persons. Here the police personnel fired on a mob by the order of superior officer, in conformity with the commands of the law as well as in good faith. The supreme Court held if the order of the superior officer was justified and lawful there was no requirement of any further enquiry regarding the applicability of section Due care and caution principle requires three factors, firstly, the nature of the act committed by the accused; secondly , its magnitude and importance, and thirdly , the facility a person has for the exercise of the care and attention.

Accident (Section 80)

Section 80 exempts a person from criminal liability if, *the act must have been done without any criminal intention or knowledge; the act alleged to have been done against the accused must be lawful; the act must have been done in a lawful manner by lawful means and with proper care and caution.* To bring an act within the meaning of the term accident used in section 80, an essential requirement is that the happening of the incident cannot be attributed to human fault. It is something happens out of ordinary course of things. The word misfortune means the same thing as accident plus that it was as unwelcome as it was unexpected. It was only an accident with attendant evil consequences. Both these words "accident" and "misfortune" are used in the sense of implying the injury to another. In order to invoke this section, it must be proved that the act is done without any "criminal intent or knowledge". It is mandatory to prove that the act is done without mens rea or guilty mind. Thus, injuries caused due to accidents in sports and games are covered this section.

In *Tunda v. Rex*, two friends fond of wrestling participated in a wrestling match and one of them suffered injury which resulted in death of the other. The other person was charged under s 304 A IPC. The High Court held that when both agreed to wrestle with each other, there was an implied consent on the part of each to suffer accidental injuries. In the absence of any proof of foul play, it was held that the act was accidental and unintentional.

The section specifically mentions that a lawful act in a lawful manner by lawful means. If an act is lawful but done it through unlawful manner the section doesn't have any application. Further the section emphasis act must be done with proper care and caution. What is expected is not utmost care, but sufficient care that a prudent and reasonable man would consider adequate, in the circumstances of cases

In *Jagesher v. Emperor*, the accused was beating a person with his fist. The latter's wife intervened with two month old baby on her shoulder. The accused hit the

women also the blow struck the child on the head and it died from the effects of the blow. The accused was held liable, even though the child was hit by accident. The reason is that the accused was not doing a lawful act in a lawful manner by lawful means.

In *Bhupendra singh v. State of Gujarat*, the accused constable, along with the head constable, was on patrol duty at a dam site, which was in danger on account of heavy rain fall. The accused took the plea that he saw a fire and hence fired. The accused close at shot range without knowing the identity of his target. The Supreme Court held that the act was done without any care and caution. His conviction for murder was upheld and he was sentenced to life imprisonment.

Doctrine of Necessity (section 81)

To invoke section 81 two ingredients must be satisfied such as, the act must have been done under good faith; there must not be mens rea (absence of mens rea). It embodies the principle that where the accused chooses lesser evil, in order to avert the bigger, then he is immune. The genesis of this principle emanates from two maxims: *quod necessitas non habet legum*- necessity knows no law *and necessitas vincit legum*- necessity overcomes the law. This doctrine of necessity recognises that the law has to be broken to achieve a greater good. The illustration of the section explains lucidly how the doctrine of necessity works. It is pertinent to note that although section 81 does not specifically refer to greater evil or lesser evil, it in effect deals with the case of lesser evil.

Section 80 and 81 are analogous provisions, the former dealing with accidents and the latter with inevitable accidents. Section 80 stipulates the absence of criminal intention as well as criminal knowledge. But section 81 stipulates the absence of criminal intention alone. In fact, section 81 clearly contemplates a situation where the accused has knowledge that he is likely to cause harm, but is specifically stipulated that such knowledge shall not be held against him. The relevant leading case on this point is *R v. Dudly and Stephens* three seamen and a cabin boy were the crew of an English

vessel. Due to ship wreck, the three seamen and the boy escaped and were put into open boat. On 20th day, when they had no food for eight days and no water for five days, the accused killed the boy and fed on the flesh and blood for four days to survive. On the fourth day, they were picked up by a passing vessel and subsequently they were prosecuted for the offence of murder of the boy. The accused pleaded the defence of necessity to get exemption from the criminal liability. The Privy Council held they are guilty for murder and convicted them on the ground of, self preservation is not an absolute necessity, no man has a right to take another's life to preserve his own; and there is no necessity that justifies homicide.

Killing a person in self defence may appear to be an example of necessity. While self defence may overlap necessity, the two are not the same. Private defence operates only against aggressors. Generally, the aggressors are wrongdoers, while the person against whom action is taken by necessity, may not be an aggressor or wrongdoer. Unlike necessity, private defence involves no balancing of values.

In *United States v. Holmes* the accused was a member of the crew of a boat after a shipwreck. Fearing that the boat would sink, he under the order of the mate threw 16 male passengers overboard. The accused though not convicted for murder, was convicted for manslaughter and sentenced to six months imprisonment with hard labour.

In *Gopal Naidu v. Emperor*, a drunken man was carrying a revolver in his hand was disarmed and put under restraint by the police officers, though the offence of public nuisance under section 290 was a non cognizable offence without a warrant. Though the police officer were prima facie guilty of the offence of wrongful confinement, it was held that they could plead justifications under this section. Further added, the person or property to be protected may be the person or property of the accused himself or of others.

Infancy (section – 82 and 83)

These sections confer immunity from criminal liability on child offenders. It is

presumed that a child below the age of seven years is *doli incapax*. It means that such a child is incapable of doing a criminal act and cannot form the necessary mens rea to commit a crime. This presumption is conclusive and it emanates from the recognition of the fact that he lacks the adequate mental ability to understand the nature and consequences of his act and thereby an ability to form the required mens rea. Even though there may be the clearest evidence that the child causes an actus reus with mens rea, he cannot be held guilty once it appears that he, at the time he committed the act, was below the seven years.

Section 83 presumes that a child above seven but below 12 years of age is *doli capax*, capable to commit crime depending upon the maturity of understanding. But this presumption is not conclusive. The burden is upon the prosecution to prove beyond reasonable doubt that the child caused an actus reus with mens rea and that he knew that his conduct was not merely mischievous but wrong. However, once the court comes to a conclusion that the concerned child has not attained sufficient maturity of understanding, then the immunity conferred by section 83 is as absolute as that conferred by section 82.

The principle of innocence is based on the principle of immaturity of intellect. The proof of attainment of sufficient maturity can be derived at by a court on the consideration of all the circumstances of the case. It can be inferred from the nature of the act and his subsequent conduct and other allied factors such as his demeanour and appearance in the court. It need not be proved by the prosecution by positive evidence. Beyond the age of 12, there is no immunity from criminal liability, even if the offender is a person of undeveloped and incapable of understanding the nature and consequences of his act. All these juvenile in conflict with law is now governed by Juvenile Justice Act, 2000.The perusal of JJ act makes clear that it is not giving any punishment for juveniles but at the same time it is not exonerating the juveniles from criminal liability. But it would appear that something akin to immunity is provided to delinquent juveniles under this Act.

In *Ulla Mahapatra v. The King*, a boy eleven and below twelve picked up his knife and advanced towards another. He threatened the other by saying that he would cut him into bits and did actually what he said. It was held that he was having sufficient

maturity of understanding, because he did what he intended.

In *Walters v. Lunt* the parents of the child aged 7 years were charged with receiving from their son a Childs tricycle knowing it to have been stolen by their child. It was held that the parents must be acquitted on the ground that, since the child could not steel the tricycle was not stolen property.

Insanity : (Section 84)

In India, **Section 84** of IPC describes the defences available to the person of an unsound mind. Persons of unsound minds are vulnerable in nature. There is a complete chance of their exploitation in a situation where they are not being sought protection. The law that protects an unsound minded person and provides defence from criminal liability to the unsound minded person is known as the Law of Insanity. Whenever an insane person commits a crime due to the effect of his insanity, he does not have a guilty mind to understand that what he is doing is something that is prohibited by law. The insanity law has proven to be of practical importance in understanding the situation and the mental position of an insane person and in certain reasonable circumstances granted them exemption from criminal liability.

According to the rule in the *M'Naghten's* case, it must be clearly demonstrated, in order to establish the defence of insanity, that the accused worked under a fault at the time of the act so much as to be unaware of the nature and quality of the act he was doing. This explanation cannot be taken as a full definition of proof, as it fails to explain various aspects of insanity.

It is therefore imperative to note that the term "insanity" has a particular meaning in criminal law. It is not necessarily used in its medical sense, but its legal significance must be understood. Therefore, insanity as a defence refers to legal insanity and not medical insanity. The concept of 'legal insanity' refers to certain requirements to be met by the accused according to the rules laid down in the law. Legal insanity is a narrower concept than medical insanity. Legal insanity is a concept narrower than medical insanity. For example, some mental illnesses such as schizophrenia, paranoia or lunacy may overlap with the legal and medical conceptions of insanity and may also be protected against insanity or insanity of mind when the other conditions are fulfilled in order to satisfy legal insanity criteria.

Indian Law on the Defence of Insanity:

Insanity is provided in accordance with Section 84 of the Indian Penal Code as a defence under Indian Law. However, the term "insanity" is not used under this provision. The Indian Penal Code uses the sentence "mental soundness." In accordance with the code, the defence of insanity, or that can also be called defence of mental insanity, comes from M'Naghten's rule.

In Section 84 of the Indian Penal Code, a person of an unsound mind shall act- Nothing is an offence committed by someone who is currently unable to know the nature of the act or does what is wrong or contrary to legislation due to a lack of a sound mind.

Nevertheless, it should be noted that the framers of the IPC preferred to use the expression "insanity of mind" instead of the term "insanity." Insanity's scope is very limited, while the mind's insanity covers a large area.

For this defence, the following elements are to be established-

- The accused was in a state of unsoundness of mind at the time of the act.
- He was unable to know the nature of the act or do what was either wrong or contrary to the law.

The term 'wrong' is different from the term 'contrary to the law.' If anything is 'wrong', it is not necessary that it would also be 'contrary to the law.' The legal conception of insanity differs significantly from medical conception. Not every form of insanity or madness is recognized as a sufficient excuse by law.

Distinction between Legal and Medical Insanity :

Section 84 of the Indian Penal Code sets out the legal responsibility test as distinguished from the medical test. It can be observed that the absence of will arises not only from the absence of understanding maturity but also from a morbid state of mind. This morbid mind condition, which provides an exemption from criminal responsibility, differs from the medical and legal point of view. According to the medical point of view, it is probably correct to say that every person, when committing a criminal act, is insane and therefore needs an exemption from criminal responsibility; while it is a legal point of view, a person must be held to be the same as long as he is able to distinguish between right and

wrong; as long as he knows that the act carried out is contrary to the law.

It has been ruled by the Supreme Court that "mentally ill" people and psychopaths are unable to seek immunity from a criminal case, as it is their responsibility to demonstrate insanity at the time the crime was committed. So in practice, not every person who is mentally ill is exempt from criminal liability. There has to be a distinction between legal insanity and medical insanity. "Arijit Pasayat and the Bench of Justices, DK Jain, stated while upholding the life conviction of a man who cut off his wife's head. The mere abnormality of mind, partial delusion, irresistible impulse or compulsive behavior of a psychopath does not provide protection from criminal prosecution as provided by the apex court held Section 84 of the Indian Penal Code (IPC). The Bench stated that Section 84 of the IPC, which provides immunity from criminal prosecution to persons of unsound mind, would not be available to an accused, as the burden of proving insanity would lie with them, as provided in Section 105 of the Indian Evidence.

In the case of Hari Singh Gond v. State of Madhya Pradesh, the Supreme Court observed that Section 84 sets out the legal test of responsibility in cases of alleged mental insanity. There is no definition of 'mind soundness' in IPC. However, the courts have mainly treated this expression as equivalent to insanity. But the term 'insanity' itself does not have a precise definition. It is a term used to describe various degrees of mental disorder. So, every mentally ill person is not ipso facto exempt from criminal responsibility. A distinction must be made between legal insanity and medical insanity. A court is concerned with legal insanity, not medical insanity.

In the case of Surendra Mishra v. State of Jharkhand, It was pointed out that 'every person suffering from mental illness is not ipso facto exempt from criminal liability.' Furthermore, in the case of Shrikant Anandrao Bhosale v. State of Maharashtra, the Supreme Court, in determining the offense under Section 84 of the IPC, held that' it is the totality of the circumstances seen in the light of the recorded evidence' that would prove that the offense was committed.' It was added: "The unsoundness of the mind before and after the incident is a relevant fact."

- *Unsoundness of mind must be at the time of the commission of the Act.*

The first thing a court to be considered when defending insanity is whether the accused has established that he was unsound at the time of committing the act. The word "insanity" is not used in Section 84 of the penal code.

In *Rattan Lal v. State of M.P,* it was well established by the court that the crucial point of time at which the unsound mind should be established is the time when the crime is actually committed and whether the accused was in such a state of mind as to be entitled to benefit from Section 84 can only be determined from the circumstances that preceded, attended and followed the crime. In other words, it is the behavior precedent, attendant and subsequent to the event that may be relevant in determining the mental condition of the accused at the time of the commission of the offense but not those remote in time.

In Kamala Bhuniya v. West Bengal State, the accused was tried for her husband's murder with an axis. A suit was filed against the accused, she alleged to be insane at the time of the incident, the investigating officer recorded at the initial stage about the accused's mental insanity. The prosecution's duty was to arrange for the accused's medical examination, it was held that there was no motive for murder. The accused made no attempt to flee, nor made any attempt to remove the incriminating weapon Failure on the part of the prosecution was to discharge his initial responsibility for the presence of mens-rea in the accused at the time of the commission of the offence. The accused was entitled to benefit from Section 84. And hence accused was proved insane at the time of the commission of the offence and was held guilty of Culpable Homicide and not of Murder.

- *Incapacity to know the nature of the act*

The word "incapacity to know the nature of the act" embodied in Section 84 of the Indian Penal Code refers to that state of mind when the accused was unable to appreciate the effects of his conduct. It would mean that the accused is insane in every possible sense of the word, and such insanity must sweep away his ability to appreciate the physical effects of his acts.

- *Incapacity to know right or wrong*

In order to use the defence of insanity under the latter part of Section 84, namely "or to do what is either wrong or contrary to the law," it is not necessary that the accused should be completely insane, his reason should not be completely insane, his reason should not be completely extinguished. What is required, is to establish that although the accused knew the physical effects of his act, he was unable to know that he was doing what was either "wrong" or "contrary to the law." This part of Section 84 has made a new contribution to criminal law by introducing the concept of partial insanity as a defence against criminal insanity. However, as a practical matter, there would probably be very few cases in which insanity is pleaded in defence of a crime in which the distinction between "moral" and "legal" error would be necessary. In any crime, insanity can undoubtedly be pleaded as a defence, yet it is rarely pleaded except in murder cases. Therefore, in a case, this fine distinction may not be very useful for the decision. The Indian penal code has advisably used either "wrong or contrary to the law" in Section 84, perhaps anticipating the controversy.

Intoxication

Intoxication is a state of mind in which a person loses self-control and his ability to judge. Intoxication is a defence available to criminal defendant on the basis that, because of the intoxication, the defendant did not understand the nature of his/her actions or know what he/she was doing. The defence of intoxication typically depends on whether the intoxication was voluntary or involuntary and what level of intent is required by the criminal charge. Under the Indian Penal Code the criminal liability under intoxication is mentioned under section 85 and 86.

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

Section 86: Offence requiring a particular intent or knowledge committed by one who is intoxicated.*—In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be*

dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him without his knowledge or against his will.

Section 85 deals with offences committed under the influence of drugs or alcohol which is caused by fraud or coercion. Section 86 deals with intoxication which is self-induced. ***Bablu alias Mubarik Hussain V. State of Rajasthan***, in this case SC examined Section 85 of IPC and held that evidence of drunkenness, the evidence which proves that the accused is incapable of forming the wrongful intent has also been considered along with the other facts, and then it should be proved of the accused person has the intention to commit crime. These sections do not protect someone who voluntarily consumed intoxicants as the person loses his mental ability because of his consensual act i.e. by self-induced intoxication.

The Right to Private Defence (Sections 96-106)

If a person does an act while exercising his right of private defence, his act would be no offence (Section 96). Right of private defence is based upon the instinct of self-preservation. This instinct is vested in every human being and has been recognised by the law in all the civilized countries. The need for self-preservation is rooted in the doctrine of necessity.

Common law has always recognised the right of a person to protect himself from attack and to act in defence of others. In this process, he can inflict violence on another, if necessary. The person who is about to be attacked does not have to wait for the assailant to attack first.

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

i. Every member of the society can claim this right
ii. That the state takes responsibility for the maintenance of law and order

- *This right of private defence is preventive and not punitive.*

Supreme Court said that the right of private defence is a defensive right surrounded by the law and is available only when the person is able to justify his circumstances. This right is available against an offence and therefore, where an act is done in exercise of the right of private defence, such an act cannot go in favour of the aggressor. In the case of Darshan Singh v. State of Punjab, the Supreme Court gave the following principles to govern the 'right to private defence':

"All the civilized countries recognise the right of private defence but of-course with reasonable limits. Self-preservation is duly recognized by the criminal jurisprudence of all civilized countries. The right of private defence is available only when the person is under necessity to tackle the danger and not of self-creation."

Only a reasonable apprehension is enough to exercise the right of self-defence. It is not necessary that there should be an actual commission of the offence to give rise to the right of private defence. It is enough if the accused apprehended that an offence is likely to be committed if the right of private defence is not exercised.

The right of private defence commences as soon as a reasonable apprehension arises and continues till the time such apprehension exists. We cannot expect a person under assault to use his defence in a step by step manner. In private defence, the force used by the accused must be reasonable and necessary for the protection of the person or property.

If the accused does not plead self-defense, the court can consider the chances of the existence of such defence depending upon the material on record. There is no need for the accused to prove beyond reasonable doubt that the right of private defence existed. Under the Indian Penal Code the right of private defence exists only against an offence.

If a person is in imminent and reasonable danger of losing his life or limb; he may exercise the right of self-defense to inflict any harm which can extend to death on his assailant.

Chapter IV of the IPC, which includes Section 76 to Section 106, explains general defences which can be pleaded as an exception for any offence. The right of private defence explains that if something is done in private defence then it is no offence. A right to defend does not include a right to launch an offence, particularly when there is no more a need to defend.

The right of private defence has to be exercised directly in proportion to the extent of aggression. There is no as such hardcore formula to test that the act of the person falls within the ambit of private defence or not. It depends upon the set of circumstances in which the person has acted. Whether in a particular circumstance, a person has legitimately acted to exercise his right of private defence is a question of fact.

In determining this question of fact, the court must consider the surrounding facts and circumstances. If the circumstances show that the right of private defence has been legitimately exercised, the court is open to consider the plea. Certain factors need to be kept in mind in considering the act of private defence:

- If there was sufficient time for recourse to public authorities or not
- If the harm caused was more than what was necessary to be caused or not
- If there was a necessity to take such action or not
- If the accused person was the aggressor or not
- If there was a reasonable apprehension of death, grievous hurt or hurt to the body or property.

Section 97 states that the right of private defence is available against the body and property only. Along with this, Section 99 states the exceptions to the rule of private defence. Both of these sections together lay down the principles of the right of private defence.

- The right of private defence against Body:

Under section 97, every person has a right to defend his body or of any other person or to defend against any offence which affects the human body. The person can also exercise the right against his property including both movable property such as a car or jewellery and immovable property such as land or house.

- The right of private defence against property

A person can also exercise the right against the property of other people along with his own property. The right of private defence against property can only be exercised against offences in

the category of theft, robbery, mischief or criminal trespass or against theft, mischief or house-trespass the person is under reasonable fear of probable death or grievous hurt.

Every person has a right to dispose of his property and to throw away any trespasser who enters into the property without permission. But if the trespasser has the possession of the property and the owner knows about it, the right of private defence is not available to the owner. For example, tenant.

The right of self-defence against a trespasser is available till the time the trespasser is actually on the land. If the trespasser tries to dispossess the owner from the property, the owner has the right to inflict such injuries over the trespasser to dispossess him from the property. The moment the trespasser is dispossessed, the owner's right of private defence is expired and he cannot take laws in his hands and injure the trespasser. There are cases where the private defence is available against the owner. If the person is in lawful possession of the property and the owner tries to dispossess him from the property, the possessor of the property has a right to exercise self-defence.

For exercising such right, following conditions needs to be fulfilled

1. The trespasser must be in actual physical possession of the property over a sufficiently long period.
2. The possession must be in knowledge of the owner, either expressed or without any concealment of fact.
3. The process of dispossession of the true owner by the trespasser must be complete and final.

In case of culturable land, if the possessor has grown any crop on the land then none including the true owner has a right to destroy those crops.

The right of private defence of property is available to prevent theft, robbery, mischief or criminal trespass or an attempt to commit any of these offences. Where the offence has been committed or the act constituting the offence has ceased, the right cannot be exercised.

In short, the law of private defence is summarised by a full bench of Orissa High court in the case of State of Orissa v. Rabindra Nath:

“It is the responsibility of the State to defend a person’s body and property. In the same way, it is the duty of every person to take shelter under the machinery of the state. But in case such aid is not available, he has the right of private defence.”

Whether or not a person was allowed to use his right of private defence without the recourse of public authorities depends upon the nature of threat of imminent danger. The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

After the actual danger has commenced, the question of applying for protection of the public authorities does not arise. The law does not expect a person to run away for protection under public authorities when someone attacks on a person in possession of the property. The moment reasonable apprehension of imminent danger to the property commences, the right of private defence is available to the individual. There is no duty on the accused to run for protection of public authorities.

When a person in possession is attacked by trespassers, he has the whole right to drive away the aggressors by application of force. When the person who is in physical possession of the property is dispossessed by the trespasser, he is entitled in exercise of the right of private defence to drive away such intruder provided that the trespasser has not obtained settled possession over the property.

If the accused although has the physical possession of the property but at the time of attack, if he is not present at the spot, is entitled to exercise his right to force aggressor to not to enter into the property or to turn away the aggressor when he comes to know that the trespasser is getting into possession of his property or is attempting to do so.

If there is an imminent danger to the property and the person in possession incurs sufficient injury, he is entitled to defend the act of aggressor without asking for the aid of the state.

When there is no serious loss to the property or no urgency for driving away from the trespasser, the person must recourse to state aid and not exercise any offence under the shelter of private defence. Where such person exercising the right is present on the property at the time trespass is attempted, he would ordinarily have the right of private defence as soon as his possession over the property is actually threatened. There can be an exception to the rule of seeking state aid in case where the aggressor tries to take advantage of the temporary absence of the person who has the settled possession of the property and attempts to trespass to the property.

Just because the location of police station was not away from the crime scene, it does not mean that a person cannot exercise his right of private defence. This can be taken into account if it is proved that could have been timely and effective. The effectiveness of the police help depends on the possibility that timely information to the police and obtaining timely assistance from the police was possible and effective.

In dealing with cases of private defence, a distinction must be made between enforcing a right and maintaining the right. If the aggressor was only preparing for the attack, this does not mean that the other person has no right of private defence. It must, however, be proved that there was no time to take recourse of public authorities.

- Can you exercise the right of private defence against a person of unsound mind? (Section 98)

We know that a person of unsound mind is immune from getting punished for any offence. But what can we do if that person attacks or tries to harm our body or property? It is said that the immunity given to the insane person will not affect your right of private defence in any manner. Although any offence committed by an insane person is no offence in the eyes of the law; this won't affect your right of private defence. An individual has the same right of private defence against an insane person as he has against a sane person. For example, a person under the influence of sleepwalking, tries to kill Mr. Gabbar. Mr. Gabbar in private defence hits that person with a stick causing hurt. Here, the person who is sleepwalking is guilty of no offence.

Mr. Gabbar, however, has a complete right of private defence. This right is applicable to other exceptional cases as well such as:

1. A child below 12 years
2. A person who lacks understanding
3. A person with unsound mind
4. An intoxicated person

Section 100

100 authorises a person to take away life in exercise of his right of private defence against body. The basic idea behind Section 100 was that no innocent person should be punished. If a person has committed an offence in order to protect his or someone else's person or property instead of running away from the spot; the law gives him the right to defend the concerned person or property

It is the duty of the court to check if the action of the accused is protected under the exceptions of Section 100 or not, even though the accused has not taken a plea. It is not necessary that the accused has obtained any injury or not. Mere reasonable apprehension would be sufficient for the exercise of right of private defence. The right of private defence can save a person from guilt even if he causes the death of another person in the following situations:

1. The deceased was the actual assailant,
2. There was a threat to life or of great bodily harm must be present,
3. The threat must be real and apparent as to create honest belief that necessity exists,
4. There must be no other reasonable or safe mode of escape,
5. There must be a necessity of taking life

If the offence which is committed by the deceased and which had occasioned the cause of the exercise of the right of private defence of body and property falls within any of the seven categories enumerated in Sections 100 of the penal code. This Section exercises a limit on the right of private defence to the extent of absolute necessity. It must not be more than what is necessary for defending aggression. There must be reasonable apprehension of danger that

comes from the aggressor. The question of private defence arises only when the prosecution has established that the act of the accused is an offence.

Fear of death: If there is an assault and a person has a reasonable fear that his death will cause if he will not kill that person.

Fear of grievous hurt: If there is an assault and a person has a reasonable fear that he will be grievously hurt if he will not kill that person.

To prove that the person was under fear of death or grievous hurt; the following conditions need to be fulfilled:

1. The accused must not have caused the fault i.e. he must not have started the encounter first. It needs to be the victim who should cause the fear of death or grievous hurt without fault of the accused.
2. There must be an approaching danger to life or of great bodily harm. This danger must be so evident and real that the other person felt the necessity to cause death.
3. There must not be any other safe or reasonable way to escape from that situation.
4. There must be a necessity to do so. The act of voluntarily causing death can be excused only when the person feels that it is necessary to act that way
5. Reasonable Apprehension of danger:

The right of private defence of the body extends to voluntarily causing of death to the assailant during the assault if the victim has reasonable apprehension that grievous hurt would otherwise be the consequence. It is this apprehension in the mind of the victim which gives him the right of private defence to voluntarily cause death of the assailant

In considering the plea of self-defence, it is not to be considered that how many injuries have been inflicted upon the accused. It does not matter if any injury has been inflicted or not. What is to be considered is whether the accused had any reasonable apprehension of grievous hurt or death to himself or not.

Real or apparent danger:

The apprehension of death or grievous hurt which was present in the mind of the accused to enable him to invoke the aid of private defence is to be ascertained objectively with reference to events and deeds at the time of the offence and the surrounding circumstances.

Intention of Rape: If a person feels that the other person is committing assault with an intention of rape; the death can be committed for self-defence. In the case of State of orissa v. Nirupama Panda , the victim entered into the house of accused and tried to rape her. There was a scuffle between them and the accused lady finally stabbed the man and he died. She was not held liable because she was acting in her right of private defence.

Intention of satisfying unnatural lust: If a person is committing assault with an intention of satisfying his unnatural lust; the other person can exercise his right of private defence to the extent of causing the death of that person. It has been held in the case of Indu Kumari Pathak v. S. K. Pathak that if a wife refuses to submit to her husband for cohabitation, the husband is not expected to use force to make the wife to sexual intercourse. The husband has no right to cause injury to his wife in enforcing sexual intercourse and wife has the right of private defence to retaliate the force used on her .

Intention of kidnapping or abduction: If a person feels that the other person is acting with an intention of kidnapping or abducting him or any other person, he may use his right to cause death of kidnapper.

Intention of wrongful confinement: If a person feels that the other person is intending to wrongfully confine him or any other person and if the person is confined, he will not be able to escape or take help of public authorities for his release. In this case, he can exercise his right of private defence to cause death of another person.

Act of throwing or attempt to throw acid: This provision was not present in the original provision but observing the increasing rates of acid attack, this condition was added after recommendations of Justice J. S. Verma Committee under which a person, in certain circumstances may exercise his right of private defence to voluntarily cause harm or death to the assailant.

If a person is in fear that other person is going to throw acid or is attempting to throw acid and this may cause grievously hurt; He /she can exercise his/her right of private defence to cause death of that person. The act of throwing or attempting to throw acid is an offence under Section 326A and 326B of the Indian Penal Code.

- The right of self-defence to cause death and the doctrine of necessity

The doctrine of necessity states that if an act is an offence, it will not be considered as one if the following conditions are satisfied :

a) The act was done to avoid other harm which could not be avoided otherwise. If that situation was not avoided, it would have inflicted upon him or another person's body or property, inevitable and irreparable evil.
b) The force inflicted was reasonable as per the necessity
c) The evil inflicted was proportionate to the evil avoided

As stated in KENNY on Outlines of Criminal, where the man has inflicted harm upon others person or property for the purpose of saving himself or others from greater harm, he is saved under this defence. One person, in private defence can kill any number of aggressors to protect himself alone. private defence overlaps the doctrine of necessity. Unlike necessity, the private defence does not.

What is the extent of private defence against body in a situation which is not mentioned in the seven categories of Section 100? If there is any situation which is not mentioned in Section 100, the person cannot exercise his right of private defence against the body to cause death of any person. He can only exercise the right to the extent of causing any other harm or injury except death. In the case of Mahinder Pal, when small mischief was committed in the factory by the workers, the owner was not justified in doing his act when he shot dead one of the workers.

- When does the right of private defence Commences, and ends?

Section 102 deals with the commencement and continuance of right of private defence with respect to body only. The person exercising the right must consider whether the threat to his person is real and immediate or not.

Commencement: A person can exercise the right of private defence as soon as he reasonably apprehends the danger to the body. This may be sensed when any person attempts to commit an offence or threatens that he will commit an offence. The person is not expected to wait till the offence is committed. Even if the person threatens to commit the offence, it is sufficient for the other person to exercise his right of private defence. The extent to which the right can be exercised does not depends upon the actual danger but on the reasonable apprehension of danger. The right to private defence gives right to defend one self from any reasonable apprehension of danger. The threat however must give rise to present and imminent danger and not remote or distant danger.

Continuance: As long as the fear of danger continues, the person is free to use his right of private defence.

It was held in the case of Sitaram v. Emperor, that a person exercising the right of private defence is entitled to secure his victory as long as the contest is continued. He is not obliged to retreat but may continue to defend till he finds himself out of danger.

End: When it can be reasonably seen that the danger no longer exists, the person's right of private defence ends. He has no such right after that. If in case he commits any hurt to other after the fear ends, he will not be immune and will be held liable for his act. For example, Mr. A threatened Mr. B that he will kill him and moved with a sword towards Mr. B. Meanwhile, Mr. X, father of Mr. A, came in between and stopped Mr. A. Mr. A followed his order and started going back to his home. Now, the apprehension of threat on Mr. B has ended. If Mr. B attacks Mr. A now, he will not be given shelter under private defence and will be held liable for his acts.

- When can a person exercise his right of private defence against Property to cause death?

Section 103 postulates that in certain cases, when you have threat to a property, be it yours or someone else's or movable or immovable property, you can exercise the right of private defence to cause death of a person. In the case of Jagan Ram v. State the court said that whenever any offence is committed on a property, it is immaterial that the accused is the owner of the property or not. However, they cannot exercise this right to defend the property of other person if that person has entered into a free fight. This act justifies the mentioned acts when they causes reasonable apprehension of death or grievous harm. If a person is not in possession of the property, he cannot claim any right of private defence regarding such property. Right to dispossess or throw out a trespasser is not available to the true owner if the trespasser is in the lawful possession of the property at that time. If a person is appointed to guard the property of his employer, he is protected under Section 103 if he commits homicide while defending the property from aggressors. Similarly, a person who is appointed to guard a public property enjoys the same right

If there is any other threat to the property which is not mentioned above, the person cannot exercise his right of private defence to cause death to any person. However, the person can exercise his right of private defence to cause any harm other than death to the person who is doing wrong to his property. (Section 104)

Also, in cases where theft, mischief or trespass if it does not cause reasonable apprehension of death then one cannot cause death of a person.

- When does the right of private defence Commences, continues and ends? (Section 105)

Under this section, what is important to be noticed is that was there a reasonable apprehension of danger to the property or not. Once there is such apprehension of danger, the right is available to the accused irrespective of the fact that the offence or the attempt for the offence has actually committed or not.

Commencement: A person can exercise the right of private defence as soon as he reasonably senses the danger to the property. For commencing the right of private defence, reasonable apprehension is important and not the fact that actual crime has been committed or not.

Continuance:

Theft: A person can exercise the private defence till: The offender has not withdrawn from the property, or

The police assistance is not obtained, or The property is not recovered

If the thief has withdrawn or the property has been recovered, the person has can no longer exercise the right of private defence.

Robbery: A person can exercise his right of private defence as long as: The offender causes or attempts to cause death, hurt or wrongful restraint to any person, or

The fear of death, hurt or wrongful restraint continuous

Criminal Trespass and Mischief: A person can exercise the right until the aggressors leave the field. If the trespassers use violence against the persons resisting the criminal trespass, any hurt made as an exercise of private defence over the trespassers is justified.

House Breaking by night: A person can exercise the right till the offence of housebreaking continues. Ends: As soon as the above conditions stops operating, a person's right of private defence cannot be exercised. But the right of private defence against property is not extended to intellectual property such as patents, copyrights etc.

What does the Supreme Court says on the right of private defence to cause death?

The Supreme Court reviewed the law relating to the right of self-defence extending to cause death and clearly enunciated these:-

1. It is not a right to take revenge. It is a right to defend.
2. It can be exercised only when the person is unable to get immediate aid from the State machinery
3. This right can be extended to protect the body and property of third party as well.
4. It should not be an act of self-creation but an act of necessity which causes an

impending danger and should not exceed than what is legitimate and necessary.

One may cause such injury as may be necessary to tackle with that danger or threat. Where the person is exercising the right of self-defence, it is not possible to calculate the amount of force which he needs to exercise. The person exercising the right does not need to prove the existence of a right of private defence beyond reasonable doubt. The right of private defence is recognized under the law but within certain reasonable limits. Even if the accused does not plead self-defence, it is open to the Court to consider that such circumstances might exist. The fight of self-defence commences as soon as reasonable apprehension arises, and continues till such apprehension lasts

There is nothing which lays down in absolute terms and in all situations that the injuries incurred by the accused have to be explained. Once the reasonable apprehension disappears, the right of self-defence is not available anymore. The plea of reasonable apprehension is a question of fact which the court finds out through certain facts and circumstances. It is unrealistic to expect a person under assault to step by step modulate his defence.

- Right of private defence against reasonable fear of death in case where there is a risk of harm to innocent person (Section 106)

Where a person can reasonably foresee that there is fear to his life but if he exercises the right of private defence, any innocent person may get hurt; he has the right to exercise such right. In case he hurts an innocent person while exercising his right of private defence; he will not be held liable for this act.

Section 106 contemplates an assault which reasonably causes apprehension of death and therefore contemplates exercise of the right at the risk of harm to innocent person.

- What are the Exceptions to the rule of private defence? (Section 99) :

Act of a public servant or under the direction of a public servant:

A person cannot exercise his right of private defence if the following conditions are satisfied:

1. There was no fear of death or grievous hurt
2. The act was done or attempted to be done by a public servant or under the direction of public servant

3. The public servant was acting in good faith
4. The public servant was under colour of his office
5. It does not matter if the act or direction was justified by law or not.

Section 99 specifically says that there is no right of private defence against an act which does not cause reasonable apprehension of death or grievous hurt, if done or attempted to be done on the direction of a public servant acting under good faith under the colour of his office. The protection extents to acts which are not even justified by law .

However, there is a difference between acts which are not strictly justified by law and acts which are wholly illegal. If a public servant acts without jurisdiction, it cannot be said that he acted in good faith and his act should be protected even if it is not justified by law. The law does not protect illegal acts and the acts committed by officers without jurisdiction. 'Act not justified by law does not cover an act which is wholly illegal and totally without jurisdiction. Section 99 applies to acts where jurisdiction is wrongly applied but not in cases where jurisdiction is absent.

When a person has time to recourse:

If a person has reasonable time to have recourse to the protection of the public authorities; he has no right to use its private defence. For example, if a person is threatened that he will be killed after three days, he has sufficient time to inform the police. If in case he waits for the person who threatened him and shot him dead. He cannot say that he was using his right of private defence.

A per the Supreme Court of India, when a person has time to get recourse and there is no need to take law in hands, right of private defence cannot be exercised.

This does not mean that a person must run away to have recourse of the public authorities when he is attacked instead of defending himself .

In the case of Jai Dev v. state of Punjab, the Supreme court said that "In a civilized society, the state is assumed to take care of person and properties of Individual. This, however, does not mean that if a person suddenly faces an assault, he must run away and protect himself. He is entitled to resist the attack and defend himself."

The law of private defence itself states that there is no right of private defence available unless the situation was so urgent that there was no time to have recourse to the protection of public authorities. The urgency of the situation must naturally depend upon several facts and circumstances. These circumstances may include:

1. Immediate danger to person or property that if it is not immediately protected, would be lost by the time the protection from public servants is obtained.
2. Reasonable apprehension of the danger to person or property arises out of committed, attempted or threatened crime. The act was going to affect person and property and justifies the particular injury inflicted.
3. When the act of private defence extends to inflicting of more harm than it is necessary to inflict for the purpose of defence:
4. The right of private defence is restricted to not inflicting more harm than necessary for the purpose of defence. To determine the amount of force which was necessary to be inflicted, the facts and circumstances are needed to be considered. There is no protection available in case the harm is inflicted unnecessarily and is much extended than what was reasonable.

For instance, if a person is going to slap you, you cannot shoot the person with a gun in self-defence.

There have been instances where the force inflicted was more than necessary. Some of them are:

1. A person killed old woman found stealing at night.
2. A person caught a thief at night and deliberately killed him with a pick-axe.
3. A thief was caught committing housebreaking and was subjected to gross maltreatment
4. The right of private defence arises when an aggressor has struck or a reasonable apprehension of a grievous hurt arises depending upon the facts of each case. But such a right in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence

Exception to the exception of right of private defence :

If the person who uses his right of private defence over a public servant did not know or had no reason to believe that he is a public servant; he can exercise his right. For example, Mr. X saw Mr. A was followed by an unknown person with a gun. Mr. X hit that unknown person in order to save Mr. A. Later, it is revealed that the unknown person was Mr. Z, a police officer. Since Mr. Z was not in his uniform, Mr. X did not know and has no reason to believe that he is a public servant. Therefore, Mr. X's right of private defence was justified.

If the person who uses his right of private defence against a person who was acting under the direction of public servant; his right of private defence cannot be taken if: He did not know that the person is acting under the direction of a public servant He has no reason to believe that the person is acting under the direction of a public servant. The person does not state that he is working under such authority. If the person has the authority in writing and he did not produce such authority, if demanded

1. Bonafide Act: Even if the act of a public servant is not justified by law, the right of private defence cannot be exercised if he acts bonafide and under the colour of his office. But in case the officer is acting unlawfully, he cannot be said to be acting in discharge of his duties.

2. Knowledge of identity of public officer and his authority: In order to establish this condition, it is necessary that the accused must be sure that the person is a public officer.

In case of Emperor v. Abdul Hamim, policemen raided to the house of accused at night. The accused was sleeping and was awakened by some noise and rushed out of the room. The policemen fired at him and he fired back not knowing who they were. It was held that the accused was under a mistake of fact with regards to the identity of the officers. This gave him the right to private defence to save his body and property from trespassers.

OFFENCES AGAINST THE STATE

WAGING WAR AGAINST THE GOVRERNMENT OF INDIA

Waging war is provided under Sections 121 to 123 and Section 125of Indian Penal Code. It is one of the rare offences which is punishable at all stages viz, preparation, attempt, conspiracy and commission.

Section 121 of the Indian Penal Code, 1860 deals with the offence of waging, or attempting to wage war or abetting waging of war, against the Government of India. It 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 be fined".

Meaning of war:

War can be defined as a state of armed conflict between different countries or different groups within a country. It may include all acts of terrorism, armed aggression, civil war or rebellion and coups.

Acts of terrorism have been held to come under the ambit of offence of waging war or attempting to wage war or abetting waging of war under Section 121 IPC. This was held by the Delhi High Court in the case State (NCT) of Delhi v. Mohd. Afzal and Ors. This judgment of the Delhi High court was confirmed by the Supreme Court on appeal. Mohd. Afzal also known as Afzal Guru was convicted by the Supreme court under this section. He was one of the conspirators of the terrorist attack on the Indian Parliament in December 2001. There has been some confusion however whether the word "whoever" in this section includes foreign nationals. In Mohd. Afzal's case it was held that section 121 IPC applies to foreign nationals as well. The position of the Delhi High Court in this regard was reaffirmed by the Supreme Court when it held that-"We find no good reason why the foreign nationals stealthily entering into the Indian territory with a view to subverting the functioning of the Government and destabilizing the society should not be held guilty of waging war within the meaning of Section 121. The section on its plain terms, need not be confined only to those who owe allegiance to the established

Government." The same view was taken by the Special Court set up for the 2008 Mumbai terror attack trial. The special judge agreed with the prosecution that the attacks amounted to waging war against India, and accepted the contention raised by the prosecution that Section 121 of the Indian Penal Code, 1860 was applicable to Ajmal Kasab, the sole attacker captured alive and went on to hold that "An offence under Section 121 of the Indian Penal Code,1860 can be committed by both Indian nationals and foreign nationals. Therefore the position whether Section 121 of the Indian Penal Code,1860 applies to foreign nationals has been now confirmed by the courts.

Sedition (Sec. 124A)

Section 124 A, IPC provides as follows:

Sedition.—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government estab-lished by law in India shall be punished with [im-prisonment for life], to which fine may be added, or with impris-onment 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 meas-ures 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 admin-istrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

DEFINING ‘DISAFFETION’ UNDER THE COLONIAL REGIME

The law of sedition that was introduced in India, despite being partly deduced from the provisions of the Treason Felony Act, was less severe and yet more precise. Sir James Stephen, while introducing the amendment, justified its inclusion in the Act by asserting that it was “free from a great amount of vagueness and obscurity with which the Law of England was hampered.” However, when this provision came to be interpreted by the Indian courts, there was great uncertainty as to the precise definition of the term ‘disaffection’. This was sought to be resolved in various cases, which will be discussed in this part of the paper.

The first recorded state trial for sedition is that of *Queen empress* v. *Jogendra Chunder Bose* (‘Jogendra Bose’). The Court, in its much debated judgment, laid down the distinction between ‘disaffection’ and ‘disapprobation’. Disaffection was defined as the use of spoken or written words to create a disposition in the minds of those to whom the words were addressed, not to obey the lawful authority of the government, or to resist that authority. It was also observed that:

“It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government, and to hold it up to the hatred and contempt of the people, and that they were used with an intention to create such feeling.”

Another significant case which had a direct bearing on the 1898 amendment was that of *Queen empress* v. *Bal Gangadhar Tilak* (‘Tilak’). Allegations of sedition against Bal Gangadhar Tilak were first forwarded when the magazine *Kesari* published detailed reports of the proceedings that had taken place at the Shivaji Coronation Festival, during the celebration of which several patriotic lectures and speeches were delivered. It was alleged that these speeches made references to Shivaji’s call for *Swarajya* (independence) and al- luded to the trials of the people under the British rule. Although the Coronation Ceremony in itself was peaceful, the weeks following the publication of the re- port on June 15, 1897, saw the murder of two eminent British officials.

In perhaps one of the most comprehensive expositions of the law in colonial India, the Court, transcending the arguments from both sides, interpreted S. 124A mainly as

exciting 'feelings of disaffection' towards the government, which covered within its ambit sentiments such as hatred, enmity, dislike, hostility, contempt, and all forms of ill-will. It expanded the scope of the offence by holding that it was not the gravity of the action or the intensity of disaffection, but the presence of *feelings* that was paramount and mere attempt to excite such feelings was sufficient to constitute an offence.

The meaning of 'disaffection' and 'disapprobation' was further clarified by the court in *Queen empress* v. *Ramchandra Narayan* in which accusations against the editor and proprietor of the *Pratod* newspaper for publishing an article entitled "Preparation for Becoming Independent". The Court did not agree with the notion that 'disaffection' was necessarily the opposite of affection, but it advocated that an attempt to excite disaffection amongst the masses was to be construed as an attempt to "excite political discontent and alienation from their allegiance to a foreign sovereign." In *Queen empress*v. *Amba Prasad*, the Court, however, held that even in cases of 'disapprobation' of the measures of the government, if it can be deduced from a "fair and impartial consideration of what was spoken or written", that the intention of the accused was to excite feelings of disaffection towards the government and therefore it could be considered a seditious act. Thus 'disaffection' would include the "absence" or "negation" of affection as well as a "positive feeling of aversion" towards the government.

A conflict arose when the Federal Court of India, the highest judicial body of the country till the establishment of the Supreme Court, overturned the conviction of Majumdar in *Niharendu Dutt Majumdar* v. *King emperor* ('Niharendu Majumdar'). Charges of sedition had first been pressed against Majumdar on account of him allegedly delivering violent and provocative speeches in the Bengal legislative assembly highlighting the inefficiency of the State Government to maintain law and order in the aftermath of the Dacca riots.52 Sir Maurice Gwyer, Chief Justice of the Federal Court at the time, held that the mere presence of violent words does not make a speech or publication seditious. Instead, he was of the belief that in order to be brought under the ambit of sedition, "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."

Subsequently, the soundness of the decision given by the Federal Court in Niharendu Majumdar came to be discussed in great detail in *King emperor* v. *Sadashiv Narayan Bhalerao* ('Sadashiv Bhalerao'). This case, pertaining to the publication and distribution of leaflets containing prejudicial reports, was heard before the Privy Council. The Judicial Committee of the Privy Council opined that Niharendu Majumdar was decided on the basis of a wrongful construction of S. 124A. In acknowledgement of the model of literal interpretation followed by Strachey, J., in Tilak case, it asserted that the view proposing the imposition of the offence of sedition only on the basis of suggesting rebellion or forcible resistance to the government was inadmissible.

DEVELOPMENTS IN THE LAW POST- INDEPENDENCE

After India attained independence in 1947, the offence of sedition continued to remain in operation under S.124A of the IPC. Even though sedi- tion was expressly excluded by the Constituent Assembly as a ground for the limitation of the right to freedom of speech and expression, this right was still being curbed under the guise of this provision of the IPC. On three significant occasions, the constitutionality of this provision was challenged in the courts. These cases shaped the subsequent discourse in the law of sedition.

Following the decision in Niharendu Majumdar, S. 124A was struck down as unconstitutional in *Romesh Thappar* v. *State of Madras*, *Ram Nandan* v. *State*, and *Tara Singh* v. *State* ('Tara Singh'). In Tara Singh, the East Punjab High Court relied on the principle that a restriction on a fundamental right shall fail *in toto* if the language restricting such a right is wide enough to cover instances falling both within and outside the limits of constitutionally permissible legislative action affecting such a right.

During the debates surrounding the first amendment to the Constitution, the then Prime Minister Jawaharlal Nehru was subjected to severe criticism by members of the opposition for the rampant curbs that were being placed on the freedom of speech and expression under his regime. This criticism, accompanied by the rulings of the courts in the aforementioned judgments holding S.124A to be unconstitutional, compelled Nehru to suggest an amendment to the Constitution.

Thus, through the first amendment to the Constitution, the additional grounds of 'public order' and 'relations with friendly states' were added to the Article 19(2) list of permissible restrictions on the freedom of speech and expression guaranteed under Article 19(1)(a). Further, the word 'reasonable' was added before 'restrictions' to limit the possibility of misuse by the government. In the parliamentary debates, Nehru stated that the intent behind the amendment was not the validation of laws like sedition. He described S.124A as 'objectionable and obnoxious' and opined that it did not deserve a place in the scheme of the IPC.

The decision of the Supreme Court in Kedar Nath v. State of Buhar, laid down the interpretation of the law of sedition as it is understood today. In this decision, five appeals to the Apex Court were clubbed together to decide the issue of the constitutionality of S.124A of the IPC in light of Article 19(1)(a) of the Constitution. In the Court's interpretation the incitement to violence was considered an essential ingredient of the offence of sedition. Here, the court followed the interpretation given by the Federal Court in Niharendu Majumdar. Thus, the crime of sedition was established as a crime against public tranquility as opposed to a political crime affecting the very basis of the State.

The Court looked at the pre-legislative history and the opposition in the Constituent Assembly debates around Article 19 of the Constitution. Here, it noted that sedition had specifically been excluded as a valid ground to limit the freedom of speech and expression even though it was included in the draft Constitution. This was indicative of a legislative intent that sedition not be considered a valid exception to this freedom. As a consequence, sedition could only fall within the purview of constitutional validity if it could be read into any of the six grounds listed in Article 19(2) of the Constitution. Out of the six grounds in Article 19(2), the Court considered the 'security of the state' as a possible ground to support the constitutionality of S.124A of the IPC. The Court made use of the principle that when more than one interpretation may be given to a legal provision, it must uphold that interpretation which makes the provision constitutional. Any interpretation that makes a provision *ultra vires* the Constitution must be rejected. Thus, even though a plain reading of the section does not suggest such a requirement, it was held

to be mandatory that any seditious act must be ac- companied by an attempt to incite violence and disorder.

However, the fact that the aforementioned Irish formula of "undemining the public order or the authority of the State" that been rejected by the members of the Constituent Assembly was ignored by the Court. This was despite making a reference to this fact earlier in the judgment. The reasoning of the Court was that since sedition laws would be used to maintain public order, and the maintenance of public order would in turn be in the interests of the security of the state, these laws could be justified in the interests of the latter.

- Distinction between Government and People engaged in Administration.

While defining the contours of the crime of sedition, the court in Kedar Nath also sought to distinguish between 'the Government established by law' as used in S.124A of the IPC from people engaged in the administration for the time being. The former was said to be represented by the visible symbol of the State. Any attempt to subvert the government established by law would jeopardise the very existence of the State. However, any *bona fide* criticism of government officials with a view to improve the functioning of the government will not be illegal under this section. This exception was introduced to protect journalists criticising any government measures.

It is submitted, however, that on closer scrutiny, this distinction is murky and is difficult to practically implement. Any persons involved in the daily administration of the government or acting as a representative of the people in the government would also necessarily constitute a visible symbol of the state. As a result of this tenuous distinction, a conflicting situation is created. While calling all the bureaucrats of a government "thugs and profiteers" does not qualify as a seditious act, attributing the same qualities to the government as a whole would bring the speech within the ambit of sedition.

It must be noted that the Court was still driven by the notion of sedition as a crime that affected the very basis of the State. It had thus been included under the section related to 'Offences against the State' in the IPC. The rationale for the criminalization of such acts is generally that it fosters "an environment and psychological climate conducive to criminal activity" even though it may not incite a specific offence.

Given that sedition is a crime against the state, one must take into consideration the changing nature of the State with time. At the time when sedition was introduced in the IPC, India was still a part of the British Empire and was ruled by the British monarchs. Since all authority emanated from the Crown and the subject owed personal allegiance to the Crown, it was considered impermissible to attempt to overthrow the monarchs through any means. Subsequent to the attainment of independence, however, all authority is derived from the Constitution of India, rather than an abstract 'ruling state'. The 'State' now consists of the representatives of the people that are elected by them through democratic elections. Thus, a crime that is premised on preventing any attempt to alter the government loses its significance. It is possible for governments to come and go without the very foundations of the State being affected.

In fact, in Tara Singh, while striking down S.124A as being *ultra vires* Article 19(1)(a) of the Constitution, the Court drew a distinction between a democratically elected government and a government that was established under foreign rule. In the former, a government may come in power and be made to abdicate that power, without adversely affecting the foundations of the state. This change in the form of government has made a law of the nature of sedition obsolete and unnecessary.

Lastly, it has also been emphasized that the courts must take into consideration the growing awareness and maturity of its citizenry while deter- mining which speech would be sufficient to incite them to attempt to overthrow the government through the use of violence. Words and acts that would endanger society differ from time to time depending on how stable that society is. Thus, meetings and processions that would have been considered seditious 150 years ago would not qualify as sedition today. This is because times have changed and society is stronger than before.

This consideration becomes crucial in determining the threshold of incitement required to justify a restriction on speech. Thus, the audience must be kept in mind in making such a determination. In *S. Rangarajan* v. *P. Jagjivan Ram* the Court held that "the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who

present danger in every hostile point of view.

It gives an indication of what sort of acts might be considered seditious, when it observes that the film in question did not threaten to overthrow the government by unlawful or unconstitutional means, secession or attempts to impair the integrity of the country.

UNIT III

OFFENCES AGAINST HUMAN BODY (SEC. 299 – 374)

SYNOPSIS :

- Culpable Homicide and Murder
- Causing death by negligence
- Dowry death
- Criminal force and assault
- Attempt and abetment to suicide
- Wrongful Restraint and Confinement

CULPABLE HOMICIDE AND MURDER (SEC. 299 & 300)

The word homicide has been derived from the Latin word 'homo' which means a man and 'caedere' which means to cut or kill. Thus, homicide means the killing of a human being. All cases of homicide are not culpable (punishable). Law distinguishes between lawful and unlawful homicide. For instances, killing in self-defense in pursuance of a lawful authority or by reason of mistake of fact is not culpable. Likewise, if death is caused by accident or misfortune or while doing an act in good faith and without any criminal intention for the benefit of the person killed, the man is excused from criminal responsibility for homicide. Culpable Homicide is defined under section 299 of the Indian Penal Code, 1860. It consists of both physical and mental elements. Where an act is done with the intention of causing death or with such knowledge that the act which he/she is going to undertake will result in death of the person or would cause such bodily or physical injury that would lead to his death would satisfy both the physical and mental requirement.

Illustrations:

1. Y is diagnosed with terminal illness and needs certain drugs to live from day to day. A confines him in a room and denies him his medication. As a result, Y dies. A is guilty of culpable homicide.
2. G mows over a pedestrian deliberately. The pedestrian bleeds on the road and no one helps him and he dies as a result of G's actions. G cannot take the defence that if the pedestrian had taken medical treatment at the right time, he would have lived.
3. M knows S to be behind a bush. H does not know it. M, intending to cause, or knowing it to be likely to cause S's death, induces H to fire at the bush. H fires and kills S. Here, H may be guilty of no offence but M has committed the offence of culpable homicide.
4. X 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. A believing the ground to be firm, trends on it falls in and is killed. H has committed the offences of culpable homicide.

Ingredients of Culpable Homicide

Acts:

The act should be of such a nature that it would put to peril someone's life or damage someone's life to such an extent that the person would die. In most cases the act would involve a high degree of violence against the person. For instance, stabbing a person in vital organs, shooting someone at point blank range, or administering poison include instances which would constitute culpable homicide. The section says causing death by doing an act, so given the special circumstances certain acts which may not involve extreme degree of violence but may be sufficient to cause someone's death. For example: starving someone may not require violence in the normal usage of the term, but may cause a person's death.

Intention:

The act committed with the Intention of causing death. Thus where you push someone for a joke and the person falls on his head has a brain injury and dies, there was no intention of causing death but when you pushed the person deliberately with the idea that the person falls and dies, in that case the act is with the intention of causing death.

To prove intention in acts where there is bodily injury is likely to cause death. The act has to be can be of two types:

- Firstly, where bodily injury itself is done in a fashion which cause death. For example bludgeoning someone on the head repeatedly with a blunt instrument.
- Secondly, in situation where there are injuries and there are investigating events between the injuries and the death provided the delay is not so blatant, one needs to prove that injuries were administered with the intention of causing death.

Knowledge:

Knowledge is different from intention to the extent that where a person may not have the intention to commit an act which kills, he knows that the act which he commits will take someone's life or is likely to take someone's life will be considered having the knowledge that he is likely by such act to cause death.

Illustrations:

A doctor uses an infected syringe knowingly on a patient thereby infecting him with a terminal disease. The act by itself will not cause death, but the doctor has knowledge that his actions will lead to someone's death.

Culpable Homicide amounting to Murder:

Section 300 deals with Culpable Homicide amounting to murder. In others words the section states that culpable homicide is murder in certain situations. This makes us come to two conclusions namely,

1. For an act to be classified as murder it must first meet all the conditions of culpable homicide.
2. All acts of murder are culpable homicide, but all acts of culpable homicides are not murder.

Illustration: Akash shoots Priya with the intention of killing him. Priya dies in consequences. Akash commits Murder.

Culpable homicide is murder in four situations:

- When an act is done with the intention of causing death:

The degree of intention required is very high for murder. There must be intention present and the intention must be to cause the death of the person, not only harm or grievous hurt without the intention to cause death. Instances would include:-

- Shooting someone at point blank range
- Stabbing someone in the hurt
- Hanging someone by the neck till he dies
- Strapping a bomb on someone
- Administering poison to someone

- Inflicting of bodily injury which the offender knows is likely to cause death:

The second situation covers instances where the offender has special knowledge about the victim's condition and causes harm in such a manner which causes death of the person. It states that the offender knows likely to be the cause of death.

- Bodily injury which causes death in the ordinary course of nature:

These situations cover such acts where there is bodily injury which in ordinary sequence of

events leads to the death of the person. The section actually has two conditions:

1. The bodily injury inflicted is inflicted with the intention of causing death of the person on whom it is inflicted

2.The bodily injury caused in the ordinary course of events leads to death of someone.

- Commission of an imminently dangerous act without any legitimate reason which would cause death or bodily injury which would cause death

This head covers the commission of those acts which are so imminently dangerous which when committed would cause death or bodily injury which would result in death of a person and that such an act is done without any lawful excuse.

1. Commission of an inherently dangerous act

2. The knowledge that the act in all probability will cause death or bodily injury which will cause death and

3. The act is done without any excuse

Culpable Homicide not amounting to Murder:

As stated above an act must first become culpable homicide before it becomes murder.

- Acts under grave and sudden provocation:

When a person losses self-control on account of certain situation and causes the death of some person. The provocation must be grave, it must be sudden that is there must be no scope for pre meditation and thirdly, it must not be self-invited so as to use it as an excuse to deprive a person of his/ her life.

Illustration : A returns from the office and sees his wife, B, in a compromising position with Z in his bedroom. A turn out of the room and kills Z next day. It is case of Murder and not Culpable because A had sufficient time to cool down his anger.

- When private Defense is exceeded in good faith

In exercising private defense either with respect to property or person, if person accidently exceeds his or her right in good faith or in wrong judgment and the act causes the death of a person, the act is culpable homicide and not murder.

Illustration : Z attempts to horsewhip A, not in such a manner as to cause a grievous hurt to A. A

draw 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.

- Exceeding the Ambit of discharging public duties

When an officer or public servant exceeds his or her mandate of duties or authority given to him or an officer or public servant assisting him exceeds the same, it is considered culpable homicide not amounting to murder.

- When death is caused in sudden fight or heat of passion upon a sudden quarrel

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.

- When death is caused of a person above eighteen years of age who voluntarily took the risk of death.

When death is caused in a situation where a person has by his own consent put himself to risk the same would be culpable homicide and not murder.

Illustration : A, by instigation, voluntarily causes Z, a person under eighteen years of age of commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder.

Difference between Culpable Homicide and Murder

The true difference between culpable homicide and murder is only the difference in degrees of intention and knowledge. A greater the degree of intention and knowledge, the case would fall under murder. A lesser degree of intention or knowledge, the case would fall under culpable homicide. However, it is difficult to arrive at any categorical demarcations or strait jacket difference between culpable homicide and murder.

- Requirement of Intention:

Culpable Homicide requires that the offender should have the intention of causing such bodily injury as is likely to result in death. This means that so long as the person inflicting the injuries is

doing so intentionally she/he has the requisite mental element. it is a question for the court to decide if the injuries inflicted on the victim were such that they were likely to result in death. The section does not specify a requirement that the person should that these injuries are such they will result in the death of the person on whom they are inflicted.

Culpable Homicide is murder if a person intentionally causes some bodily injury to a person, and the bodily injury such that it is sufficient in the ordinary course of nature to cause death.

- Requirement of knowledge

Culpable Homicide requires that the offender have the knowledge that the act committed by her/ him is such that it is likely to result in death. On the other hand, Murder requires that the person committing the act have the knowledge that the act committed is so imminently dangerous that it must in all probability cause death.

The position of law related to Culpable Homicide and murder and punishment for the same in other countries like USA, Canada, Australia, China, Australian, Singapore, and South Africa.

*In Kesar Singh v. State of Haryana t*he Court held that the distinction between knowledge and intention. Knowledge in the context of Section 299 would, inter alia, mean consciousness or realisation or understanding. The distinction between the terms "knowledge" and "intention" again is a difference of degrees. An inference of knowledge that it is likely to cause death must be arrived at keeping in view the fact situation obtaining in each case. The accused must be aware of the consequences of his act.

Knowledge denotes a bare state of conscious awareness of certain facts in which the human mind might itself remain supine or inactive whereas intention connotes a conscious state in which mental faculties are roused into activity and summed up into action for the deliberate purpose of being directed towards a particular and specific end which the human mind conceives and perceives before itself.

In *Rampal Singh v. State of U.P* the Court held that Sections 299 and 300 of the Code deal with the definition of "culpable homicide" and "murder", respectively. In terms of Section 299, "culpable homicide" is described as an act of causing death: (i) with the intention of causing death, or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii)

with the knowledge that such an act is likely to cause death.

As is clear from a reading of this provision, the former part of it, emphasizes on the expression “intention” while the latter upon “knowledge”. Both these are positive mental attitudes, however, of different degrees. The mental element in “culpable homicide”, that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted above, it would be “culpable homicide”. Section 300, however, deals with “murder” although there is no clear definition of “murder” in Section 300 of the Code. As has been repeatedly held by this Court, “culpable homicide” is the genus and “murder” is its species and all “murders” are “culpable homicides” but all “culpable homicides” are not “murders”.

The difference between both these concepts can be broadly specified as follows:

1. The aspect of degree of probability of death or it can be said as the seriousness of act of the crime. If the act done by the offender is either a heinous crime or it be a very dangerous act that causes only death to a person, without any other result it would aptly fall under the concept if Murder and not Culpable homicide.
2. If such an act by the offender leaves the victim to be alive with some grievous hurt with chance of escaping death, then it is said to be a Culpable homicide which does not amount to murder
3. Every murder is committed after committing a culpable homicide but every culpable homicide does not amount to Murder. Murder is said to be an aggravated form of a Culpable homicide.
4. The existence of one of the ingredient of Section 300 of IPC turns the crime into a murder where the exceptions to murder turns the crime into a Culpable homicide which does not amount to Murder.
5. In both the concepts there is intention which is mens rea involved, to kill a person. But whereas in Certain case the offender will not be certain in death of the victim, in that case the offence done by the offender is a culpable homicide but when the offender has certainty in his act will surely cause death of the victim and this will fit into the definition of murder. Because the degree of probability of death is high in murder whereas in Culpable homicide the degree of death is low.

Causing Death by Negligence

S. 304A - "Whoever causes the death of any person by doing any rash or negligent act notamounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Section 304-A was added to the IPC by the Amendment Act, of 1870. This supplies an omission providing for the offence of manslaughter by negligence which was originally included in Draft Code, but omitted from the Code when it was finally enacted in 1860. To impose criminal liability under Section 304-A, it is necessary that the death should have been the direct result of a rash and negligent act of the accused and that the act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causacausans* (immediate or operating cause); it is not enough that it may have been the causa sine qua non (a necessary or inevitable cause). That is to say, there must be a direct nexus between the death of a person and rash or negligent act of the accused.

The provisions of Section 304-A apply to cases where there is no intention to cause death, and no knowledge that the act done in all probability would cause death. Section 304-A deals with homicide by negligence. It does not apply to a case in which there has been the voluntary commission of an offence against the person. The doing of a rash or negligent act, which causes death, is the essence of Section 304-A. There is distinction between a rash act and a negligent act. 'Rashness' means an act done with the consciousness of a risk that evil consequences will follow. (It is an act done with the knowledge that evil consequence will follow but with the hope that it will not).

A rash act implies an act done by a person with recklessness or indifference as to its consequences. The term 'negligence' means 'breach of a legal duty to take care, which results in injury/damage undesired by the wrong doer. The term 'negligence' as used in Section 304-A does not mean mere carelessness.

A negligent act refers to an act done by a person without taking sufficient precaution or reasonable precautions to avoid its probable mischievous or illegal consequences. It implies an omission to do something, which a reasonable man, in the given circumstances, would not do. Rashness is a higher degree of negligence.

The rashness or negligence must be of such nature so as to be termed as a criminal act of negligence or rashness. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused.

The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, t was the imperative duty of the accused person to have adopted.

Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening.

The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumstances. A rash act primarily is an overhasty act. Negligence is a breach of a duty caused by omission to do something which a reasonable man, guided by the those considerations which ordinarily regulate the conduct of human affairs would do.

The expression ‘not amounting to culpable homicide’ in Section 304-A indicates the offences outside the range of Sections 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge enters. It indicates that intentionally on knowingly inflicted violence, directly and willfully caused, is excluded from the implication of Section 304-A.

Section 304-A specifically deals with the rash or negligent acts which cause death but fall short of culpable homicide of either description. Where A takes up a gun not knowing it is loaded, points in sport at B and pulls the trigger, B is shot dead. A would be liable for causing the death negligently under Section 304-A.

Contributory negligence is no defence to a criminal charge i.e., where the death of a person is caused partly by the negligence of the accused and partly by his own negligence. If the

accused is charged with contributing to the death of the deceased by his negligence it matters not whether the deceased was deaf, or drunk, or negligent, or in part contributed to his own death. In order to impose criminal liability under Section 304-A, it is essential to establish that death is the direct result of the rash or negligent act of the accused.

Generally, Section 304-A is taken into consideration in the cases of road accidents, accidents in factories, etc. It is the duty of the driver to drive the vehicle in a cautious way. Where a driver drives the vehicle in an abnormal manner and cause the death of persons, he is liable under Section 304-A. Where a factory owner neglects the maintenance of the machine, and causes the death of a person, he shall be held liable under Section 304-A.

However, Section 80 of the IPC provides, "nothing is an offence which is done by accident or misfortune and without any criminal knowledge or intention in the doing of a lawful act in a lawful manner by a lawful means and with proper care and caution'. It is absence of such proper care and caution, which is required of a reasonable man in doing an act, which is made punishable under Section 304-A.

To render a person liable for neglect of duty it must be such a degree of culpability as to amount to gross negligence on his part. It is not every little slip or mistake that will make a man so liable. In Shivder Singh v. State a passenger was standing on the foot-board of a bus to the knowledge of the driver and even so the driver negotiated a sharp turn without slowing down. The passenger fell off to his death. The driver was held to be guilty under Section 304-A.

In Akbar AH v. R, the accused, a motor driver, ran over and killed a woman, but there was no rashness or negligence on the part of the driver so far as his use of the road or manner of driving was concerned, it was held that the accused could not be convicted under Section 304-A on the ground that the brakes of the lorry were not in perfect order and that the lorry carried no horn.

The 'rash or negligent act' referred to in Section 304-A means the act which is the immediate cause of death and not any act or omission which can at most be said to be a remote cause of death.

In Tapti Prasad v. Emperor the accused was the Assistant Station Master on duty. There was a collision of passenger train and goods train caused by the signalling of the accused. The collision claimed many lives and the accused were convicted under Section 304-A and Section 101 of Railway Act.

In Ramava v. R, the accused administered to her husband a deadly poison (arsenious oxide) believing it to be a love potion in order to stimulate his affection for her but the husband died. She was convicted under Section 304-A considering the act of the accused was rash and negligent.

In Batdevji v. State of Gujarat, the accused had run over the deceased while the deceased was trying to cross over the road. The accused did not attempt to save the deceased by swerving to the other side, when there was sufficient space. This was a result of his rash and negligent driving. His conviction under Section 304-A was upheld.

In medical field, a doctor is not criminally liable for a patient's death, unless his negligence or incompetence passes beyond a mere matter of competence and shows such a disregard for life and safety, as to amount to a crime against the State.

In Juggan Khan v. State of Madhya Pradesh, the accused was a registered homeopath who had administered to a patient suffering from guinea worm, 24 drops of stramonium and a leaf of dathura without properly studying its effect. The patient died as a result of the medicine given the accused. The accused was convicted under Section 304-A as he has given poisonous medicine without being aware of its effects by his rash and negligent act.

In Jacob Mathew v. State of Punjab, the Supreme Court formulated the following guidelines, which should govern the prosecution of doctors for offences of criminal rashness or criminal negligence:

i) Negligence becomes actionable on accident of injury resulting from the act or omission amounting to negligence attributable to that person sued.

ii) A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment is also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed;

iii) When the charge of negligence arises out of failure to use some particular equivalent, the charge would fail it the equipment were not generally available at the time (that is at the time of the incident) at which it is suggested it should have been used;

iv) A professional may be held liable for negligence on one of the two findings, viz., either he was

not possessed of the requisite skill which he professes to have possessed, or he did not exercise, with reasonable competence in the given case, which he did possess;

v) The standard to be applied for judging, whether the person charged had been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices;

vi) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mensrea must be shown to exist. The degree of negligence must be much higher, i.e., gross on of a very high degree in criminal negligence. Negligence, which is neither, gross nor of a very high degree may provide a ground for action in civil law but cannot be the basis for prosecution

vii) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury that resulted was most imminent;

viii) A private complaint may not be entertained against a doctor unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor;

ix) A doctor accused of rashness or negligence may not be arrested in a routine manner (simply because a charge has been levelled against him), unless the arrest is necessary for furthering the investigation or for collecting evidence;

x) Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur (i.e., the thing speaks for itself).

The punishment for causing death by negligence under Section 304-A is imprisonment of either description for a term, which may extend to two years, or with fine, or with both. Sentence depends on the degree of carelessness seen in the conduct of the accused.

This offence is cognizable and warrant should ordinarily issue in the first instance. It is bailable,

but not compoundable, and is triable by a Magistrate of the First Class.

Dowry Death

The problem of Dowry has always been persistent in India and is also rising at a rapid rate and so are the offences related to dowry demand. Dowry demands can go on for years together. The birth of children and a number of customary and religious ceremonies often tend to become the occasions for dowry demands. The inability of the bride's family to comply with these demands often leads to the daughter-in-law being treated as a pariah and subject to abuse. In the worst cases, wives are simply killed to make way for a new financial transaction—that is, another marriage. The Section 304-B, IPC has been inserted by the Dowry Prohibition Amendment Act, 1986 with a view of combating increased menace of dowry deaths.

304B. - Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called" dowry death", and such husband or relative shall be deemed to have caused her death.
To invoke **Section 304B** of the Indian Penal Code the following ingredients are essential:

- The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances.
- Such a death should have occurred within seven years of her marriage.
- She must have been subjected to cruelty or harassment by her husband or any relative of her husband.
- Such cruelty or harassment should be for or in connection with the demand of dowry.
- Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

One of the important ingredients to attract the provision of dowry death is that the death of the

bride must relate to the cruelty or harassment on account of demand for dowry. It is true that Section 304-B does not define cruelty. However, under explanation of Section 113-B of the Evidence Act, by which presumption of dowry can be drawn, it has been provided that 'cruelty' shall have the same meaning as in section 498-A of the Indian Penal Code. As per requirement of clause (b) appended to section 498-A I.P.C. there should be a nexus between harassment and any unlawful demand for dowry.

If these conditions are fulfilled then a presumption acts under the Indian Evidence Act and the burden of proof shifts on the accused to prove that he is innocent. The section states:
In dowry death cases direct evidence may not be available. Such cases may be proved by circumstantial evidence. Section 304-B IPC read with 113-B of the Evidence Act indicates the rule of presumption of dowry death. If an unnatural death of a married woman occurs within 7 years of marriage in suspicious circumstances, like due to burns or any other bodily injury and there is cruelty or harassment by her husband or relatives for or in connection with any demand for dowry soon before her death then it shall be dowry death.

113B. of Indian Evidence Act- Presumption as to Dowry Death

When the question is whether a person has committed the dowry death of a women and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.

In the case of State of Punjab v. Iqbal Singh, the Supreme Court clarified the position as to why the necessity to introduce Section 113-B in the Indian Evidence Act was felt –
The legislative intent is clear to curb the menace of dowry deaths, etc. with a firm hand. It must be remembered that since crimes are generally committed in privacy of residential houses and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Section 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundation facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such

person to cruelty and/or harassment for, or in connection with, any demand for dowry. Section 113-B, Evidence Act provides that the court shall presume that such person had caused the dowry death.

A conjoint reading of Section 113-B of the Act and 304-B I.P.C. shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. 'Soon before' is a relative term and it would depend upon circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period soon before the occurrence. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death.

Attempt and abetment to suicide

Suicide has not been defined anywhere in the IPC. However briefly defined, 'suicide' is the human act of self-inflicted, self-intentioned cessation. It has been defined by various sociologists and psychologists in different ways. Some of the definitions are 'suicide is the initiation of an act leading to one's own death'. "It is synonymous with destruction of the self by the self or the intentional destruction of one's self." Thus, suicide is killing oneself intentionally so as to extinguish one's life and to leave this world. The Oxford Companion to Law, explains it as 'self killing or taking one's own life.

Suicide as such is no crime under the code. It is only attempt to commit suicide that is punishable under this section, i.e., code is attracted only when a person is unsuccessful in committing the suicide. If the person succeeds, there is no offender who could be brought within the purview of law. The section is based on the principle that the lives of men are not only valuable to them but also to the state which protects them

Attempt to suicide is an offence punishable under section 309 of the Indian Penal Code.

Section 309 reads thus:

Attempt to commit suicide. "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."

Article 21 of the Constitution of India enjoins that no person shall be deprived of his life or personal liberty except according to procedure established by law.

A Division Bench of the Supreme Court in P. Rathinam v. Union of India [11]held that the right to live of which Article 21 speaks of can be said to bring in its trail the right not to live a forced life, and therefore, section 309 violates Article 21.

This decision was, however, subsequently overruled in GianKaur v. State of Punjab [12]by a Constitution Bench of the Supreme Court, holding that Article 21 cannot be construed to include within it the 'right to die' as a part of the fundamental right guaranteed therein, and therefore, it cannot be said that section 309 is violative of Article 21.

- **Right to live**: Ambit and scope – It is settled law that life does not mean 'animal existence'. Before more than 100 years, it was recognized by the U.S. Supreme Court in the leading case of Munn v. Illinois. This principle is recognized by our Supreme Court in Kharak Singh, Sunil Batra v. Delhi Administration and in various other cases. After Maneka Gandhi v. Union of India, various rights have been held to be covered by Article 21; such as right to go abroad, right to privacy, right against solitary confinement, right to speedy trial, right to shelter, right to breathe in unpolluted environment, right to medical aid, right to education, etc. Thus, life does not mean mere living, but a glowing vitality – the feeling of wholeness with a capacity for continuous intellectual and spiritual growth.
- **Right to die**- As a normal rule, every human being has to live and continue to enjoy the fruits of life till nature intervenes to end it.
- **Death is certain**. It is a fact of life. Suicide is not a feature of normal life. It is an abnormal situation. But if a person has right to enjoy his life, he cannot also be forced to live that life to his detriment, disadvantage or disliking. If a person is living a miserable life or is seriously sick or having incurable disease, it is improper as well as immoral to ask him to live a painful life and to suffer agony. It is an insult to humanity. Right to live means right to live peacefully as ordinary human being. One can appreciate the theory that an individual may not be permitted to die with a view to avoiding his social obligations. He should perform all duties towards fellow citizens. At the same time, however, if he is unable to take normal care of his body or has lost all the senses and if his real desire is to quit the world, he cannot be compelled to continue with torture and painful life. In such cases, it will indeed be cruel not to permit him to die. …
- **Reduction of suffering** - Right to live would, however, mean right to live with human dignity up to the end of natural life. Thus, right to live would include right to die with dignity at the end of life and it should not be equated with right to die an unnatural death curtailing natural span of life.

Hence, a dying man who is terminally ill or in a persistent vegetative state can be permitted to terminate it by premature extinction of his life. In fact, these are not cases of extinguishing life but only of accelerating process of natural death which has already commenced. In such cases, causing of death would result in end of his suffering.

But even such change, though desirable, is considered to be the function of the legislature which may enact a suitable law providing adequate safeguards to prevent any possible abuse."

Abetment to suicide

Abetment of suicide is an offence under section 306 & 107 of the Indian penal code, 1860. A woman may be driven to commit suicide due to excessive demands for dowry. However, it may be difficult to prove that the death was a dowry death. In such cases, these provisions can be used to punish the offender.

A person is guilty of abetment when a. He instigates someone to commit suicide (or) b. He is part of a conspiracy to make a person commit suicide.(or) c. He intentionally helps the victim to commit suicide by doing an act or by not doing something that he was bound to do. The charge of abetment of suicide is usually accompanied by a charge under section 498A, IPC if the woman was treated cruelly by her husband or his relatives. Where a woman has committed suicide within 7 years of her marriage because of violence by her husband or relatives and the prosecution proves the above, the court presumes that the husband or his relatives abetted the suicide. Where the woman committed suicide after 7 years of her marriage, no presumption will be made. The prosecution has to prove beyond reasonable doubt that the cruelty was of such a nature that it drove the woman to commit suicide.

Hurt and Grievous Hurt

In normal sense, hurt means to cause bodily injury and/or pain to another person. IPC defines Hurt as follows -

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

Based on this, the essential ingredients of Hurt are -

i. Bodily pain, disease or infirmity must be caused - Bodily pain, except such slight harm for which nobody would complain, is hurt. For example, pricking a person with pointed object like a needle or punching somebody in the face, or pulling a woman's hair. The duration of the pain is immaterial. Infirmity means when any body organ is not able to function normally. It can be temporary or permanent. It also includes state of mind such as hysteria or terror.

ii. It should be caused due to a voluntary act of the accused.

The expression 'bodily pain' means that the pain must be physical as opposed to any mental pain. So mentally or emotionally hurting somebody will not be 'hurt' within the meaning of Section 319. However, in order to come within this section, it is not necessary that any visible injury should be caused on the victim.

All that the section contemplates is the causing of bodily pain. The degree or severity of the pain is not a material factor to decide whether Section 319 will apply or not. The duration of pain is immaterial. Pulling a woman by the hair would amount to hurt.

'Causing disease' means communicating a disease to another person. However, the communication of the disease must be done by contact.

Causing of nervous shock or mental derangement by some voluntary act of the offender is covered by Section 319. The duration of the state of mental infirmity is immaterial.

'Infirmity' means inability of an organ to perform its normal function which may either be temporary or permanent. It denotes an unsound or unhealthy state of the body or mind, such as a state of temporary impairment or hysteria or terror. 'Infirmity' denotes an unsound or unhealthy state of the body. This infirmity may be a result of a disease or as a result of consumption of

some poisonous, deleterious drug or alcohol.

As per Section 319, the hurt must be caused to ‘any person’. This means ‘any person’ other than the person causing the hurt.

The causing of bodily pain must be caused by direct application of force to the body is clearly erroneous as there is nothing in Section 319 to suggest that the hurt should be caused by direct physical contact between the accused and his victim. Where the direct result of an act is the causing of bodily pain, it is hurt whatever be the means employed to cause it.

Where there is no intention to cause death or bodily injury as is likely to cause death or there is no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of hurt only if the injury caused was not serious.

In Marana Goundan v. R the accused demanded money from the deceased which the latter owed him. The deceased promised to pay later. Thereafter the accused kicked him on the abdomen and the deceased collapsed and died. The accused was held guilty of causing hurt as it could not be said that he intended or knew that kicking on the abdomen was likely to endanger life.

In Naga Shevepo v. R [(1883) SJLB 179] the accused struck a man one blow on the head with a bamboo yoke and the injured man died afterwards in a hospital. He was guilty of an offence of causing hurt under Section 319 because there was no intention to cause death and the blow in itself was not of such a nature as was likely to cause death itself was not of such a nature as was

In Arjuna Sahu v. State it was observed that a push on the neck is likely to cause some bodily pain within the meaning of Section 319 though in some cases it may be so slight.

Self-inflicted hurt does not come within the purview of Section 319. Section 321 elaborates on what amounts to voluntarily causing hurt

When there is no intention of causing death or bodily injury as is likely to cause death, and there is no knowledge that inflicting such injury would cause death, the accused would be guilty of hurt if the injury is not serious. In Nga Shwe Po's case (1883), the accused struck a man one blow on the head with a bamboo yoke and the injured man died, primarily due to excessive opium administered by his friends to alleviate pain. He was held guilty under this section.

A physical contact is not necessary. Thus, a when an accused gave food mixed with dhatura and caused poisoning, he was held guilty of Hurt.

The term ‘Simple hurt’ is used nowhere in the IPC. However, to differentiate ordinary hurt covered by Sections 319, 321 & 323, from that of grievous hurt, the expression ‘simple hurt’ has come into popular use.

Grievous Hurt

Section 320 lays down the following kinds of hurt only which are designated as "grievous":

(1) Emasculation i.e., depriving a person of masculine vigour;

(2) Permanent privation of the sight of either eye;

(3) Permanent privation of hearing of either ear;

(4) Privation of any member of joint

(5) Destruction or permanent impairing of the powers of any member or joint:

(6) Permanent disfiguration of the head or face

(7) Fracture or dislocation of bone or tooth; and

(8) 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—(seven years, and fine).

It could not be said that the accused intended or knew that the kicking on the abdomen was likely to endanger life and consequently the accused was guilty of causing hurt only. It was held in similar circumstances in Shahe Rai (3 Cal. 623) that the accused had committed hurt on the infant under the circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt. The offence committed is neither of grievous hurt, not of culpable homicide, but of simple hurt.

Criminal force and assault

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

Illustrations

(a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and hedoes this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has there-fore intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence, or in-tending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here Z 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.

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

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

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

frighten or annoy Z, he has used criminal force to Z.

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

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

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

The ingredients of Section 350 of the Code are:

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

Section 350- Assault.—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.

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

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.

The essential ingredients of an assault are:

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 affect the purpose.

According to Section 351 of the Code, the mere gesture or preparation with the intention of 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 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 caused 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.

Wrongful Restraint and Wrongful confinement Wrongful Restraint

Section 339. Wrongful restraint

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

Wrongful restraint means preventing a person from going to a place where he has a right to go. In wrongful confinement, a person is kept within certain limits out of which he wishes to go and has a right to go. In wrongful restraint, a person is prevented from proceeding in some particular direction though free to go elsewhere. In wrongful confinement, there is restraint from

proceeding in all directions beyond a certain area. One may even be wrongfully confined in one's own country where by a threat issued to a person prevents him from leaving the shores of his land.

Object - The object of this section is to protect the freedom of a person to utilize his right to pass in his. The slightest unlawful obstruction is deemed as wrongful restraint. Physical obstruction is not necessary always. Even by mere words constitute offence under this section. The main ingredient of this section is that when a person obstructs another by causing it to appear to that other that it is impossible difficult or dangerous to proceeds as well as by causing it actually to be impossible, difficult or dangerous for that to proceeds.

Ingredients:

1. An obstruction.

2. Obstruction prevented complainant from proceeding in any direction. Obstruction:-

Obstruction mans physical obstruction, though it may cause by physical force or by the use of menaces or threats. When such obstruction is wrongful it becomes the wrongful restraint. For a wrongful restraint it is necessary that one person must obstruct another voluntarily.

In simple word it means keeping a person out of the place where his wishes to, and has a right to be.

This offence is completed if one's freedom of movement is suspended by an act of another done voluntarily.

Restraint necessarily implies abridgment of the liberty of a person against his will.

What is required under this section is obstruction to free movement of a person, the method used for such obstruction is immaterial. Use of physical force for causing such obstruction is not necessary. Normally a verbal prohibition or remonstrance does not amount to obstruction, but in certain circumstances it may be caused by threat or by mere words. Effect of such word upon the mind of the person obstructed is more important than the method.

Obstruction of personal liberty: Personal liberty of a person must be obstructed. A person means a human being, here the question arises whether a child of a tender age who cannot walk of his own legs could also be the subject of restraint was raised in Mahendra Nath Chakravarty v.

Emperor. It was held that the section is not confined to only such person who can walk on his own legs or can move by physical means within his own power. It was further said that if only those who can move by physical means within their own power are to be treated as person who wishes to proceed then the position would become absurd in case of paralytic or sick who on account of his sickness cannot move.

Another points that needs our attention here is whether obstruction to vehicle seated with passengers would amount to wrongful restraint or not.

An interesting judgment of our Bombay High Court in Emperor v. Ramlala : "Where, therefore a driver of a bus makes his bus stand across a road in such a manner, as to prevent another bus coming from behind to proceed further, he is guilty of an offence under Sec. 341 of the Penal Code of wrongfully restraining the driver and passengers of another bus".

"It is absurd to say that because the driver and the passengers of the other bus could have got down from that bus and walked away in different directions, or even gone in that bus to different destinations, in reverse directions, there was therefore no wrongful restraint" is the judgment of our High Court which is applicable to our busmen who suddenly park the buses across the roads showing their protest on some issues.

Illustrations-

I. A was on the roof of a house. B removes the ladder and thereby detains A on the roof.

II. A and B were co-ower of a well. A prevented B from taking out water from the well .

Wrongful confinement

Section 340. Wrongful confinement.

Whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Object - The object of this section is to protect the freedom of a person where his personal liberty has totally suspended or abolish, by voluntarily act done by another.

Wrongful confinement is aggravated form of wrongful restraint. In wrongful restraint, the person

restrained is obstructed to proceed in a direction in which he has right to proceed. However alternative ways are always opened in wrongful restraint. But in wrongful confinement, the person restrained is confined in some circumscribed limits. In wrongful confinement, restrained person is not allowed to move anywhere. He has no alternative to move in any other way.

Ingredients:

A. The person must be wrongfully restrained.

B. The restrained person must be such as to prevent the person to proceed beyond some circumscribing limits.

The person must be wrongfully restrained: Before satisfying other conditions it is necessary that the conditions for a wrongful restrained must be satisfied. (All the ingredients of wrongful restrain can also be mentioned here).

The restrained person must be such as to prevent the person to proceed beyond some circumscribing limits: It is necessary that the person confined must not have any option to proceed in any direction. Circumscribing limits means some type of boundary or some type of ambit in which a person has been locked with a view to obstruct him to proceed in any way.

Restraint may be physical or otherwise: It is not necessary that the physical restraint must be there or any force is not necessary to use to obstruct the person. A person can also be restraint or confined by use of moral force as well as direction.

For e.g. when any person is directed to stand at a particular place and warned not to move anywhere, then this may be said to be confinement.

Wrongful confinement is a kind of wrongful restraint, in which a person kept within the limits out which he wishes to go, and has right to go. There must be total restraint of a personal liberty, and not merely a partial restraint to constitute confinement. For wrongful confinement proof of actual physical obstruction is not essential. Circumscribing Limits

Wrongful confinement means the notion of restraint within some limits defined by a will or power exterior to our own.

Degree of Offense : Wrongful restraint is not a serious offence, and the degree of this

offense is comparatively lees then confinement. Wrongful confinement is a serious offence, and the degree of this offense is comparatively intensive then restraint.

Principle element : Voluntarily wrongful obstruction of a person personal liberty, where he wishes to, and he have a right to. Voluntarily wrongfully restraint a person where he wishes to, and he has a right to, within a circumscribing limits.

Personal liberty : It is a partial restraint of the personal liberty of a person. A person is restraint is free to move anywhere other than to proceed in a partial direction. It is a absolute or total restraint or obstruction of a personal liberty.

Nature : Confinement implies wrongful restraint. Wrongful confinement not implies vice-versa. No limits or boundaries are required.

UNIT IV

KIDNAPPING AND ABDUCTION

Synopsis

- Section 361 Kidnapping from Lawful Guardianship
- Object of the Section
- Ingredients of Kidnapping
- Section 363 Punishment for Kidnapping
- Section 362 of IPC Abduction
- Ingredients of Abduction
- Role of Consent
- Case Laws
- Difference between Kidnapping and Abduction

Section 361 Kidnapping from Lawful Guardianship

As per Section 361 Kidnapping from Lawful Guardianship means, "Whoever takes or entices any minor under (sixteen) years of age if a male, or under-(eighteen) years of age of a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

Explanation:

"Lawful Guardian" includes any person who is lawfully entrusted with care and custody of such minor or other person.

Exception

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

Object of the Section

The purpose of this section is to protect minors and persons of unsound mind from being exploited and protect the rights of guardians who have the lawful charge or custody of their wards. Thus, absence of consent of the parent or guardian is the main ingredient of this section.

Ingredients

The following are the ingredients of Section 361:

- **Taking away or enticing of a minor or a person of unsound mind**

Enticing is inducing hope or desire in the mind of a person to make him do things which he wouldn't do otherwise. Persuasion by the accused person which creates willingness on the part

of the minor to be taken out of the keeping of lawful guardian would be sufficient to attract the section.

The expression used in Section 361, I.P.C. is "whoever takes or entices any minor". The word "takes" does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, "to cause to go," "to escort" or "to get into possession".

- Such minor must be under 16 years of age if a male and under 18 years of age if a female
- The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind**.**

The act of taking is not a continuous act and as such when once the boy or girl has been actually taken out of the keeping, the act is complete.

The Court in Vardargan V. State of Madras 1965 AIR 942, 1965 SCR (1) 243 highlighted the dichotomy between 'taking' and 'allowing a minor to accompany a person'. Stating that the two are not synonymous held that where the minor having capacity to understand the consequences of her actions voluntarily joins the accused on her free will, the accused cannot be held liable for taking her away from the keeping of lawful guardian.
The taking or enticing must also be without the consent of the guardian.

The consent of the minor is immaterial for this section and its only the consent of the guardian that will take the case out of the purview of this section.

The Supreme Court in Pradeep Kumar v. State of Bihar and Anr *AIR 2007 SC 3059* held that the consent obtained by lying to the father of the girl regarding the purpose of taking his minor daughter away cannot be termed as consent under the purview of this section and such taking away would amount to kidnapping.

Section 363 Punishment for Kidnapping

As per Section 363, “Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

The punishment for the offence of kidnapping provides for both fine and imprisonment. Abduction means forcibly taking away of a person and moving him or her from one place to another against their will. Use of force is a necessary ingredient of abduction. Abduction is the criminal act of taking by force or strong persuasion of a wife, husband, child or other person.[1] It has also been defined as the illegal act of taking away a person by persuasion, fraud or by open force or violence. The offence of Abduction is mentioned under Section 362 of the Indian Penal Code.

Section 362 of IPC

Abduction

“Whoever by force compels or by deceitful means induces, any person to go from any place, is said to abduct that person.”

The Section only gives a definition to the offence of Abduction which is not punishable per se. It is only punishable if it is accompanied with a criminal intent which is included in the subsequent sections of the Penal Code.

Ingredients of Abduction

Forcefully Compelling or inducement of a person by deceitful means

The provision makes it amply clear that taking away of a person should be accompanied by either forceful compelling or by deceitful means, merely threatening to use force would not result in abduction of a person. The element of compelling by force of inducement by fraudulent or deceitful means is a necessary ingredient to amount the taking of person to abduction. Force

has been defined under Section 349 of the Indian Penal Code and has the same meaning under this section. Inducement means "0to lead into" something and thus deceitful inducement would be misleading a person to do something which he or she wouldn't ordinarily do.

To go from any place/ Going of a person from any place

To constitute abduction, the person so abducted, must have gone from one place to another by compulsion of force or by inducement by deceitful means.

Role of Consent

Consent of the person who is moved or taken away is of vital importance in abduction. Unlike kidnapping where consent of the person who is taken away is immaterial, in abduction consent given by the person moved will not amount to an act of abduction.

Illustrations

1. A is a minor daughter of B. A voluntarily goes away with C and indulges in sexual relations with him. C cannot be held liable for abduction because A wilfully consented to go with him, there was no use of force or inducement.

2. Y is a minor daughter of R. X forcibly takes away Y without the knowledge of R. Y runs away with Z while she is custody of R who is X's relative. In this case, X is liable for abduction, however Z will be liable if he had some criminal intent to take away Y.

Abduction is not a substantive offence. It is however an auxiliary act or a subsidiary act which is only punishable when coupled with a criminal intent. Abduction is not a crystallised offence but a continuing one. It does not confine to the first time a person is taken away or moved from one place. It extends to every other person who is involved in the moving of the person by use of force or deceitful means.

Case Laws

Bhanukan's Case

Chief Justice Wanchoo observed that there was no abduction because he was satisfied that the girl was not compelled by force or induced by any deceitful means to go with the accused. The girl being a minor had gone out with the accused to have sexual intercourse, the court held that she wasn't abducted as no undue influence or force was used upon her.

Vinod Chaturvedi v. State of Madhya Pradesh

In the present case, the appellant was alleged to have abducted the deceased Brindaban. The process of investigation pointed out that Brindaban on being persuaded by the accused persons and Vinod in particular went inside his house, came out properly dressed to accompany the group to village Ramapura. Such conduct made it clear that Brindaban was not abducted the accused persons.

State of Assam vs. Goljer Ali and Nine Ors.

Abduction, as defined under Section 362 IPC contemplates both user of force or inducement by deceitful means. The deceased in the present case was offered a puff of Bidi and was therefore induced to go to the house of the accused where he has beaten to death.

Difference between Kidnapping and Abduction

Basis	Kidnapping	Abduction
Provision	Kidnapping is classified in Section 359 into two categories and is defined in Section 360 and 361 which relates to Kidnapping from India and Kidnapping from Lawful Guardianship**.**	Definition to the offence of Abduction is given under Section 362 of the Indian Penal Code.
Age	The offence of kidnapping relates to taking away of minors and people of unsound mind**.**	The offence of Abduction is in respect of all persons.
Means Employed	Kidnapping is an offence which involves taking away or enticing of a person.	Abduction involves taking away of a person by fraud or by force.
Intention	Intention of the person is of no significance. Once it is established that that taking away either outside India or outside the lawful guardianship is present, it amounts to kidnapping.	Intention plays a major role in the offence of abduction. A person is punishable only if abduction is done with an ill intent or criminal intent.
Nature of Offence	Kidnapping is a substantial offence and is punishable under Section 363 of the Indian Penal Code.	Abduction is merely an auxiliary act and is not punishable unless it is done with a criminal intent.
Consent	Consent of the person who is taken outside the custody of lawful guardian is immaterial.	Consent given by the person who is taken, takes the act out of the purview of abduction.

Completion of the Offence	Once a person is taken out of the country or outside the custody of lawful guardian, the offence of kidnapping is complete.	The offence of abduction involves forcibly or fraudulently taking of a person from one place to another, hence it is a continuing offence.

RAPE

Synopsis

- Meaning
- Amendments (Vide Act 13 of 2013)
- Definition of rape (After amendment of Sec 375)
- *Analysis of the definition*
- Essential Ingredients of Rape
- *Rape or Consensual Sex*
- Exception to Section 375
- Punishment of rape

- *Section 376-A of the IPC – Punishment for causing death or resulting in persistent vegetative state of victim*
- *Section 376-B of the IPC – Sexual intercourse by husband upon his wife during separation*
- *Section 376-C of the IPC– Sexual intercourse by a person in authority*
- *Section 376-D of the IPC– Gang rape*
- *Section 376-E of the IPC– Punishment for repeat offenders*
- Case laws

Meaning

The word rape is derived from the Latin term *rapio,* which mean 'to seize'. Thus, rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will." In other words, rape is violation with violence of the private person of a woman.

In the Indian Penal Code, **Section 375** defines rape.

Amendments (Vide Act 13 of 2013)

After the Nirbhaya Delhi Gang Rape case, 'The Criminal Law Amendment Act, 2013' came in to force w.e.f 3rd of Feb, 2013. Now this case was recorded as 'Rarest of Rare case' in the history of Indian Judiciary case laws. By this amendment act, our legislators introduced some new sections and make some amendments in Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and Protection of children from sexual offences act.

Some of the important changes brought about by the Act 43 of 1983 and Act 13 of the 2013 and other provisions are listed below:-

- Consent of woman of unsound mind or under intoxication is not to be considered valid defence.
- **Burden of Proof of innocence on accused** – Section 114A was inserted in The Indian Evidence Act, 1872 vide Criminal Law (Amendment) Act 43 of 1983.
- **Prohibition of disclosure of the identity of the victim**– Section 228A IPC added vide Criminal Law (Amendment) Act 43 of 1983.
- **Persistent Vegetative State**– A new section 376 A has been added vide Criminal Law (Amendment) Act 13 of 2013. When an injury caused to the victim results in death of the women or causes women to be in a persistent vegetative state, then the accused shall be liable for imprisonment for a term which cannot be less than 20 years or may extend to imprisonment of life or remainder of that persons natural life or till death.
- **Trial in Camera**– Section 327 CrPC,1973 has been amended vide Criminal Law (Amendment) Act 13 of 2013, to the effect that the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera.
- **Custodial Rape**– Section 376C, IPC comprise a group of sections that create a new category of offence, known as custodial rape which does not amount to rape because in such cases the consent of the victim is obtained under compelling circumstances. (Substituted by Criminal Law (Amendment) Act 13 of 2013)
- **Intercourse with wife during judicial separation**– Section 376 B IPC inserted vide Criminal Law (Amendment) Act 13 of 2013 makes sexual intercourse with one's own wife without her consent under a decree of separation punishable, with a minimum of 2 years that extend to 7 years.
- **Minimum punishment for Rape**– This provision has been made more stringent vide Criminal Law (Amendment) Act 13 of 2013.
- **Character assassination of prosecutrix prohibited**– A 'Proviso clause' to section 146 of the Indian Evidence Act, 1872 inserted vide Criminal Law (Amendment) Act

13 of 2013 has disallowed to put questions about prosecutrix character in cross-examination.

Definition of rape (After amendment of Sec 375)

A man is said to commit "rape" if he –

1. 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

2. 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

3. 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

4. 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 the seven descriptions.[3]

Analysis of the definition

The 2013 Act expands the definition of rape to include oral sex as well as the insertion of an object or any other body part into a woman's vagina, urethra or anus.

A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under clauses firstly to seventhly under section 375.

Essential Ingredients of Rape

The crux of the offence of rape under section 375, IPC is sexual intercourse by a man with a woman against her will and without her consent under any one of the seven circumstances mentioned below.

- Against her will.
- Without her consent.
- With consent obtained by putting her or any other person in whom she is interested in fear of death or of hurt,
- With consent but given under the misconception of fact that the man was her husband,
- Consent given by reason of unsoundness of mind, or under influence of intoxication or any stupefying or unwholesome substance,
- Women under eighteen with or without consent.
- When women is unable to communicate consent.

In order to bring home the charge of rape against a man, it is necessary to establish that the 'sexual intercourse' complained of was either against the will or without her consent. Where the consent is obtained under the circumstances enumerated under clauses firstly to seventhly, the same would also amount to rape.

Rape or Consensual Sex

Intercourse under promise to marry constitutes rape only from initial stage accused had no intention to keep the promise. An accused can be convicted for rape only if the court reaches the conclusion that the intention of the accused was malafide, and that he had clandestine motives. Deepak Gulati vs State of Haryana *AIR 2013 SC 2071.*

Exception to Section 375

'Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.'

Since child marriage in India is not yet void and is only voidable, such a check was necessary to restrain men from taking advantage of their marital rights prematurely. No man can be guilty of rape on his own wife when she is over 15 years of age on account of the matrimonial consent that she has given.

In Bishnudayal vs. State of Bihar *2003 Cri LJ 1539 SC*, where the prosecutrix, a girl of 13 or 14, who was sent by her father to accompany the relatives of his elder daughter's husband to look after her elder sister for some time, was forcibly 'married' to the appellant and had sexual intercourse with her, the accused was held liable for rape under section 376.

However, under section 376 B, IPC sexual intercourse with one's own wife without her consent under a decree of judicial separation is punishable by 2 to 7 years imprisonment.

Punishment of rape

It states that if the rape is committed by persons listed below, they shall be punished with rigorous punishment of not less than 10 years, but can 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.

- Police officer within the limits of the police station.
- A police officer in the premises of any station house.
- A police officer on a woman in the police officer's custody.
- Public servant on a woman's in his custody.
- Member of the armed forces.
- Any person in the management of the jail, remand home etc. on inmate of such place.
- Staff/management of a hospital on a woman in that hospital.
- By a person who is in a position trust or authority or control or dominance towards a woman on such woman.
- During communal or sectarian violence.
- On a pregnant woman
- On a woman less than 16 years of age
- On a woman incapable of giving consent
- On a mentally or physically disabled woman
- Who causes grievous bodily harms or endangers the life of a woman.
- Who commits rape repeatedly on the same woman

If any other person commits rape on any woman, he 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.

Section 376-A of the IPC – Punishment for causing death or resulting in persistent vegetative state of victim

It says if a person commits an offence which is punishable under section 376 which causes the death of the women or causes the women to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than 20 years, but may extend to imprisonment for life or with death.

Section 376-B of the IPC – Sexual intercourse by husband upon his wife during separation

Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.

Section 376-C of the IPC– Sexual intercourse by a person in authority

Whoever, being—

1. in a position of authority or in a fiduciary relationship; or

2. a public servant; or

3. superintendent or manager of a jail, remand home or other places of custody established by or under any law for the time being in force, or a women's or children's institution; or

4. on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Section 376-D of the IPC– Gang rape

It prescribes punishment for gang rape and says where a woman is raped by a group of persons, then they shall be punishable with rigorous punishment of not less than 20 years, but may extend to life imprisonment, and with fine.

Note: Such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Also, any fine imposed under this section shall be paid to the victim.

Section 376-E of the IPC– Punishment for repeat offenders

Whoever has been previously convicted of an offence punishable under Section 376 or Section 376-A or Section 376-D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.'

Case Laws

The Nirbhaya Case (2012)

This case hardly requires any facts to be stated as it is still fresh in the consciousness of the nation. A paramedical student was tortured by six men to such an extent that an iron rod was shoved into her vagina and her intestines, abdomen, and genitals were damaged severely. They threw her out of the bus in the wintery night. One of the accused was juvenile and was sent to a

reform facility for three years. One of the accused committed suicide in the jail and rest were given the death penalty.

The court observed that "Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases… protection of society and deterring the criminal is the avowed object of law…while determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large."

Rameshbhai Chandubhai Rathod vs State Of Gujarat

In the instant case, the victim who had not seen even ten summers in her life is the victim of sexual assault and animal lust of the accused appellant. She was not only raped but was murdered by the accused appellant.

Imposition of the sentence without considering its effect on the social order in many cases may be in reality a futile exercise. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded.

State vs Deepak Dogra

The boy established the sexual relations with the victim on the false pretext that he will marry her later. He performed an invalid marriage when the girl complained of him to the police when he refused to marry her and she was pregnant with his child. Keeping in view the ghastly and inhuman act of the convict, a substantive and stern sentence is required to be imposed upon the convict so that it is not only in commensuration with the gravity of the crime but also serves as

an example for the others who might also venture on the same forbidden path.. The convict does not deserve any leniency.

State of Maharashtra vs Chandraprakash Kewal Chand Jain

A girl who was newly married was raped by one policeman twice while his husband was kept separate from her. He not only raped her but also threatened her that if she opens her mouth, then he will burn her and her husband alive. Trial court-sentenced the respondent to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1,000 in default to suffer rigorous imprisonment for 6 months.

The court held that when a person in uniform commits such a serious crime of rape on a young girl in her late teens, there is no room for sympathy or pity. The punishment must in such cases be exemplary.

THEFT

Synopsis

- Introduction
- Section-378
- Prerequisites of Theft
- Punishment for Theft
- Section 379- Punishment for theft
- Kinds of Aggravated Theft:
    - *Section 380- Theft in Dwelling house*
    - *Section 381- Theft by a clerk or servant in possession of master's property*
    - *Section 382- Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft*

Introduction

Chapter XVII (378- 382) of Indian Penal Code,1860 deals with the Offences Against Property. Theft, in layman terms means the taking of a person's property without the consent of the owner and Section 378 of the Indian Penal Code, 1860 (IPC) has provided a proper legal definition of theft.

Section-378

Under this Section, Theft has been defined as the act of taking any immovable property with a dishonest intent and without the consent of the owner of such property. The Section further provides in the explanations given that any object attached to the earth would be considered as an immovable property hence it could not be a subject of theft but once it is removed from the earth it would become a movable property and could be stolen. The consent that must be attained for a property to be taken without it being considered theft may either be express or implied.

Prerequisites of Theft

Dishonest Intention

Section 24 of IPC provides that dishonesty means the intention of wrongful gain or wrongful loss. Section 23 of the IPC provides the definition of both wrongful gain and wrongful loss. Wrongful gain means gaining any property unlawfully, the person who is losing the property is the legal owner of such property. Wrongful loss means the loss brought about by unlawful

means.

In the case of M/s. Shriram Transport Finance Co. Ltd. v. R. Khaishiullah Khan, payment for a hire-purchase agreement defaulted and the property was seized and the court held that it would not constitute theft as the financer was entitled to seize such property. Further, there were no dishonest intentions.

Movable Property

Section 22 of IPC has provided the definition of movable property; means that any corporeal property except land and things permanently attached to the earth. Only movable property can be stolen as it is impossible to take immovable property away. Immovable property can be converted into movable property and once it has been converted such property can be stolen.

Electricity

Electricity has been ruled to be immovable property according to the case of Avtar Singh v. State of Punjab 1965 SCR (1) 103 but stealing of electricity has been made a punishable offence. The punishment for theft is provided under section 35 of Electricity Act, 2003 as up to three years of imprisonment with or without a fine.

Data

Theft of personal data has become one of the biggest issues of the current age. Data is intangible since it is only information thus it is incorporeal and does not come under the definition of theft given in Section 378 of IPC. If data is stored on some tangible object like a hard drive, then theft of such an object would be covered under this Section.

Crops

Growing crops are attached to the earth and hence cannot be considered movable property but once they are converted into movable property by removing them from the earth, it can be considered as theft.

Human Body

The human body cannot be considered to be movable property and hence Section 378 cannot be applied in case of theft of human body. But in case of instances where the body has been preserved or the skeleton has been kept, then such property is covered by Section 378 and falls under the definition of movable property.

Property in possession

In order for theft to have occurred, the property being stolen must be taken from the possession from the owner of such a property. If the property does not have an owner then such property cannot be said to have been stolen if a person acquires such property. For example; if A finds a gold nugget in a stream and he takes the gold home, it cannot be considered theft as the gold nugget has no owner.

No Consent

The property that is in question must have been taken without the consent of the owner of such a property. The consent can either be implied or express. The consent given must also be free meaning that such consent must not be acquired through means of coercion or fear of injury or misrepresentation of facts.

Consent given during state of drunkenness or intoxication as well as consent given by a person of unsound mind cannot be considered to be a valid consent.

In Pyarelal Bhargava v. State, , a govt. employee took a file from the government office and presented it to B, and brought it back to the office after two days. Held that permanent taking of the property isn't required, even a temporary movement of the property with dishonest intention

is enough and thus this was theft.

Punishment for Theft

Punishment for theft is provided under Sections 379-382. Different punishments have been provided for different circumstances of theft are mentioned as below:

Section 379- Punishment for theft

A person committing the crime of theft may be imprisoned for a period of time that may extend up to 3 years or a fine or both.

Classification of Offence

The offence under this section is cognizable, non-bailable, compoundable by the owner of the property stolen with the permission of the Court , and triable by any magistrate.

Kinds of Aggravated Theft

Section 380- Theft in Dwelling house

A person committing theft in the dwelling-house of any human whether it be a tent, house or vessel may be imprisoned for a period of time up to 7 years along with a fine.

Explanation : Dwelling house means a building, tent or vessel in which a person lives or remains whether permanently or temporarily. A railway waiting room is a building which is being used for human dwelling. Theft of articles from the roof of a house fall under this section**.** Satho Tanti vs. State of Bihar AIR 1973 Cr.LJ 76 Motive is to give greater security only to property deposited in a house and not to the in immovable property of the person or the party from whom it is stolen.

Section 381- Theft by a clerk or servant in possession of master's property

If any person who is a servant or clerk commits theft of any property owned by his master, such person shall be punished with imprisonment of 7 years as well as a fine.

Section 382- Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft

Any person who commits theft having made preparation for death, hurt or restraint or fear of the death, hurt or restraint for the purposes of such theft or for escape or retaining such property shall be punished with imprisonment for a period of time up to 10 years along with a fine.

For example, A commits theft on property in Z's possession and while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

CRIMINAL MISAPPROPRIATION

Synopsis

- Introduction
- Section 403
- Introduction
- Difference from theft
- Section 404

Introduction

Chapter XVII of the Indian Penal Code deals with the offences against property. Sections 403 and 404 under the said Chapter of the Code are relating to the offences of Criminal Misappropriation of Property. Section 403 specifically deals with dishonest misappropriation of property and section 404 provides for dishonest misappropriation of property possessed by deceased person at the time of his death.

Section 403

Section 403 provides that an offence of criminal misappropriation of property is said to be constituted if any person dishonestly misappropriates or converts the movable property of another for his own use. Therefore, the essentials of criminal misappropriation of property according to section 403 are-

1. Dishonest misappropriations or conversion of property of another for his own use by the accused

2. The property so misappropriated or converted shall be movable in nature.

The provision mandates that there shall be misappropriation or conversion of property by the accused, if the accused has merely retained the property in his possession, then it shall not constitute to be an offence under section 403.

The Court held that, if a person picked up a purse in a temple in the crowded gathering and put it in his pocket, but he was immediately arrested. Then such an offence of picking up the purse and not misappropriating the property for his own use shall not amount to offence under section 403 of the IPC.

In the case of ***Ramaswami Nadar v. State of Madras AIR 1957***, the Supreme Court held that the words used in section 403 such as ‘converts to his own use’ necessarily connotes that the accused has used or dealt with the property in derogation of the rights of the owner of the property.

Difference from Theft

Criminal Misappropriation of property is distinguished from the offence of theft. The offence of theft and criminal misappropriation of property have the aspect of dishonesty in common. But in case of theft mere moving of the property from the possession of owner is sufficient to constitute the offence, whereas, to prove the offence of criminal misappropriation of property the intention of the accused to convert or misappropriate the property so dishonestly taken into possession should also be established.

The provision under section 403 provides for two explanations to it. They are-

Explanation 1-

This explanation deals with the cases of 'dishonest misappropriation' only. The explanation clarifies the scope of the working of the section, as it includes both temporary and permanent misappropriation.

Explanation 2-

This explanation describes the rights of a founder of goods along with his liabilities in certain cases. The explanation clarifies that the property which is abandoned by the owner and the founder with all reasonable efforts was unable to find the true owner who has used the property for his own use. Then, the founder of the property cannot be held guilty of an offence under section 403. But the founder is held guilty if he had knowledge of the owner of the property or had all means to discover the owner and utilised none of the means to find the owner.

Further, section 403 imposes punishment on the persons who have committed the offence of criminal misappropriation of property. The punishment shall be imprisonment of a term which may extend to two years or fine or both.

Section 404-

Section 404 provides for criminal misappropriation of property is a specified case, that is in case of the property which was possessed by a deceased person at the time of his death. This section prescribes the following essentials-

1. Dishonest misappropriation or conversion of property

2. The property must have been in the possession of a deceased person at the time of his death

3. After the death of the person in possession of the property, the person who is legally entitled to take the possession of the property has not been given with the possession

Further, the section can be divided into two parts-

1. Cases where the offence under section 404 is committed by any person

2. Cases where the offence under section 404 is committed by a person who was employed as a clerk or a servant under the person deceased having the property in possession.

In the former cases, the punishment prescribed under the section is imprisonment of a term which may extend to 3 years and shall also be liable to fine. In latter cases, the punishment shall be imprisonment which may extend to the term of 7 years along with liability to pay fine.

In the case of ***State of Orissa v. Bishnu Charan Muduli 1985 Cr LJ 1573***, the Supreme Court held that, where the Head Constable who had forcefully taken the articles to his custody from a boatman, who had previously recovered those articles from a dead body of a drowned person, keeps those articles in his possession dishonestly. Then, the officer who was holding the articles of a deceased person dishonestly was held guilty of an offence under section 404.

Section 404 does not specify as to the nature of property whether it must be movable or immovable. The Courts have unanimously observed that the section shall apply only in cases of movable property while deciding many cases.

Keeping in view the above-mentioned provisions of IPC it can be concluded that the criminal misappropriation of property is an offence which requires dishonest misappropriation or conversion of a movable property by the accused.

CRIMINAL BREACH OF TRUST

SYNOPSIS

- **Introduction**
- **Essentials:**
- **Punishment:**
- **Classification of offence**

Section 407

Section 408

Section 409

INTRODUCTION

The Indian Penal Code of 1860 under Chapter XVII provides for offences against property. Criminal breach of trust is considered as an offence against property under this Chapter and Sections 405 to 409 deals with the specific provisions concerning the criminal breach of trust.

The definition of criminal breach of trust provided under Section 405 can be construed as any dishonest use or disposition of property by one person upon whom the other person has entrusted his property and owing to this dishonest use or disposition the latter should have suffered breach of trust as the act must have been committed in discharge of such trust.

Essentials:

The essential ingredients of the offence of criminal breach of trust are-

1. Entrustment of property

2. Dishonest intention of the accused

3. Misappropriation of property so entrusted or converted the property to own use of the accused to the detriment of the person who has entrusted it on the accused.

In the case of ***Ramaswamy Nadar v. State of Madras AIR 1957 SC,*** the Supreme Court held that the aspect of entrustment in the cases of criminal breach of trust is very important, unless there exists entrustment, there can be no offence under section 405 of IPC.

Punishment:

Section 406 prescribes punishment if the offence under section 405 is proved. Section 406 provides that any person who has committed an offence of criminal breach of trust shall be punished with either imprisonment of a term which may extend to 3 years or fine or both.

Classification of offence:

Criminal breach of trust is classified as a compoundable offence, but the offence is compoundable only by the owner of the property who has entrusted the property with the accused and the owner must take prior permission of the court. Further, the offence of criminal breach of trust is classified to be a cognizable and non- bailable offence which is triable by Magistrate of the first class.

In the case of ***Jaswantrai Manilal Akhaney v. State of Bombay 1956 SCR 483***, the Supreme Court considered the relationship between the owner of the property and the accused in cases of criminal breach of trust as the relationship between the transferor and transferee. Under the circumstances of a criminal breach of trust, the transferor remains to be the owner of the property and only the legal custody of the property will be entrusted with the accused for the benefit of the transferor. Therefore, transferee in these cases only acquires a special interest in the property which is entrusted with him and acquires no right to dispose of that property. Any act in contravention of the condition imposed by the transferor is considered as criminal breach of trust.

Sections 407 to 409

Sections 407 to 409 provides for criminal breach of trust by specified individuals, where-

- Section 407 provides for the criminal breach of trust committed by carrier, wharfinger or warehouse-keeper,
- Section 408 provides for the criminal breach of trust committed by clerk or servant, and
- Section 409 provides for the criminal breach of trust committed by a public servant, or by banker, merchant or agent.

Section 407

The offence of criminal breach of trust under Section 407 must be committed by either of the following individuals-

1. Carrier,

2. Wharfinger, or

3. Warehouse-keeper.

Further, the provision prescribes punishment in case of criminal breach of trust committed by the above-mentioned individuals. This provision imposes a higher level of liability on the offenders and prescribes more intensive punishment than the punishment prescribed for an offence under sections 405 and 406. The punishment under section 407 shall be imprisonment which may extend to a term of seven years and the convict shall also be liable to fine.

Illustration: Sam is a warehouse-keeper. *Ram* entrusts his office furniture with *Sam,* while he goes on a foreign tour for 2 months. The entrustment was made under a contract where *Ram* had agreed to pay a sum of Rs. 5000/- as stipulated by *Sam* towards warehouse room charges for 2 months. *Sam* dishonestly sells the furniture after 1 month. *Sam* has committed criminal breach of trust.

Section 408

Under section 408, criminal breach of trust shall be committed by the following individuals-

1. Clerk or

2. Servant

The offence of criminal breach of trust by the above-mentioned persons maybe committed in respect of the entrustment with any property or with dominion over the property.

Further, section 408 imposes similar punishment as imposed in the cases under section 407. Hence, the punishment under section 408 shall be imprisonment which may extend to a term of seven years and the person who commits the offence shall also be liable to fine.

Section 409

Section 409 states that an offence of criminal breach of trust under this provision shall be committed by the following persons-

1. Public servant

2. Banker

3. Merchant

4. Factor

5. Broker

6. Attorney or

7. Agent

Criminal breach of trust must be in respect of entrustment with any property or with any dominion over property.

The section further provides for punishment in case of criminal breach of trust by the specified individuals. The punishment shall be imprisonment for a term which may extend to 10 years and shall also be liable to fine.

In the case of ***Sadhupati Nageswara Rao v. State of Andhra Pradesh AIR 2012 SC,*** the Supreme Court observed that in cases under Section 409, the prosecution should prove that the accused was entrusted with the property of which he is duly bound to account for and that he committed criminal breach of trust.

In the light of all the afore-mentioned provisions of IPC, it is clarified that the most important requirement in case of criminal breach of trust is entrustment with any property by the owner to the accused. Without the existence of such entrustment, the offence of criminal breach of trust cannot be proved.

UNIT V

Attempt

Synopsis

1. Definition and meaning
2. Ingredients
3. Case laws
4. Conclusion

Definition

The word 'attempt' is not defined in the Indian Penal Code. According to Oxford Dictionary 'attempt' means 'earnest and conscientious activity intended to do' or 'accomplish something'.

Every commission of a crime has three stages:

1. Intention to commit it;
2. Preparation for its commission; and
3. A successful attempt.

If the attempt to commit a crime is successful, then the crime itself is committed; but where the attempt is not followed by the intended consequences, Section 511 of the Indian Penal Code (in short IPC) applies which is read as follows:

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

Ingredients of Section 511

The ingredients of Section 511 are:

1. Offence punishable with imprisonment for life or imprisonment;
2. Does any act towards the commission of the offence;
3. No express provision is made by the Code for the punishment of such attempt.

Attempt is the direct movement towards the commission after the preparations are made. Mere intention to commit a crime, not followed by any act, does not constitute an offence. Only such attempts are punishable under Section 511 for which no express provision is made by the Code. The same has been mentioned under the Section with the help of two illustrations a & b as follows;

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

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

Both of these illustrations are an example of an attempt to commit the offence as mentioned under the section. However in the first illustration, if A prepares himself with a hammer to break the box in order to steal the jewel, but does nothing to break the box, then he cannot be held liable for an attempt to commit the offence of stealing.

Section 511 of the Indian Penal Code is a general section that makes punishable all attempts to commit offences punishable with imprisonment for life or imprisonment excepting those punishable with death or with fine only. Section 511, IPC provides for punishment for an attempt to commit an offence under the Penal Code. The very policy underlying in Section 511, IPC seems to be for providing it as a residuary provision. It does not apply to offence under special or local laws.

In **Satvir Singh vs. State of Punjab AIR 2001 SC 2828**, it was observed that Section 511 of the Indian Penal Code makes attempt to commit an offence punishable. The offence attempted

should be one punishable by the Code with imprisonment. The conditions stipulated in the provision for completion of the said offence are- (i) the offender should have done some act towards commission of the main offence; (ii) such attempt is not expressly covered as a penal provision elsewhere in the Code. Thus attempt on the part of the accused is *sine qua non* for the offence under Section 511, IPC. If the act of the accused asking his wife/victim to go and commit suicide had driven her to proceed to the railway track for ending her life then it is expressly made punishable under Section 498A of the IPC. Section 498A, IPC makes cruelty as a punishable offence. One of the categories included in the Explanation to the said Section (by which the word cruelty is defined) is thus: (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; when it is so expressly made punishable the act involved therein stands lifted out of the purview of Section 511, IPC.

In **Abhayanand Mishra vs. State of Bihar AIR 1961 SC 1698**, the appellant applied to the Patna University for permission to appear at the 1954 M.A. Examination in the English as a private candidate representing that he was a graduate having obtained his B.A. degree in 1951 and that he had been teaching in a certain school. He attached bogus certificates in this regard. The University gave the permission and issued admit-card. In the meantime, however, the University came to know about the forged application of the applicant.
The issue before the Court was whether appellant was guilty of an 'attempt to cheat' the University, under Section 415, IPC, in as much as he, by making false representation, deceived the University and induced the authorities to issue admit-card. The arguments on behalf of the appellant was that what he did was just a preparation and not an attempt to cheat; further, admit-card was not property and had no pecuniary value in itself.
The Apex Court observed that a person commits the offence of 'attempt to commit a particular offence' when (i) he, intends to commit that particular offence; and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.
The Court held that appellant did deceive the University, as a dishonest concealment of facts is a deception and thus cheating under Section 415, IPC. Admit-card is a 'property' as it has immense

value to a candidate. It is not true that appellant did not go beyond the stage of preparation. The preparation was complete when he had prepared the application for the purpose of submission to the University. The moment he dispatched it, he entered the realm of attempting to commit the offence of cheating. He did succeed in deceiving the University and inducing it to issue the admit-card. He just failed to get it and sit for the examination because something beyond his control took place inasmuch as the University was informed about his being neither a graduate nor a teacher.

An act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case and accordingly set the test for distinguishing attempt from preparation.

Adultery

Synopsis

1. Introduction and meaning

2. Ingredients

3. Case law

4. Conclusion

Introduction and meaning

Adultery is a voluntary sexual intercourse between a married person and someone other than the lawful spouse. The term originates from the Latin word ad-ulterare meaning on the other side of the bond of marriage. Adultery is defined under law as a consensual physical correlation between two individuals who are not married to each other and either or both are married to someone else. The actual definition of adultery may vary in different jurisdictions but the basic theme is sexual relations outside marriage. Adultery, also known as infidelity or extra-marital affair is certainly a moral crime and is thought-out a sin by almost all religions. Adultery is a "voluntary sexual intercourse between a married person and someone other than the lawful spouse." The term originates from the Latin word ad-ulterare (a combination of ad, "at", and ulter, "above", "beyond", "opposite", meaning "on the other side of the bond of marriage"Adultery is a

"voluntary sexual intercourse between a married person and someone other than the lawful spouse." The term originates from the Latin word ad-ulterare (a combination of ad, "at", and ulter, "above", "beyond", "opposite", meaning "on the other side of the bond of marriage")

Section 497 of the IPC reads as follows:

497. Adultery.—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.

Ingredients:

In order to constitute the offence of adultery, the following must be established:–

(*i*) Sexual intercourse between a married woman and a man who is not her husband;

(*ii*) The man who has sexual intercourse with the married woman must know or has reason to believe that she is the wife of another man;

(*iii*) Such sexual intercourse must take place with her consent, i.e., it must not amount to rape;

(*iv*) Sexual intercourse with the married woman must take place without the consent or connivance of her husband.

After stating the ingredients as mentioned above, the Supreme Court in Joseph Shine goes on to discuss the vice of unconstitutionality inherent in the offence of adultery, as may be seen presently.

Who may file a complaint

Only husband of the woman with whom adultery is committed is treated as an aggrieved person and only he can file a complaint. However, in his absence, some other person who had care of the woman on his behalf at the time when such offence was committed may file a complaint on husband's behalf if the court allows. [Section 198(2) CrPC]

In Joseph Shine, this was held to be arbitrary and violative of constitutional guarantees as is discussed below.

Woman has no right to file a complaint

A wife is disabled from prosecuting her husband for being involved in an adulterous relationship. The law does not make it an offence for a married man to engage in an act of sexual intercourse with a single woman, *Joseph Shine* v. *Union of India*, 2018.

Who can be prosecuted

It is only the adulterous man who can be prosecuted for committing adultery, and not the adulterous woman, even though the relationship is consensual. The adulterous woman is not even considered to be an abettor to the offence. Woman is exempted from criminal liability.

Presence of an adequate determining principle for such classification was doubted in *Joseph Shine*.

Woman treated as property of man

Historically, since adultery interfered with the "husband's exclusive entitlements", it was considered to be the "highest possible invasion of property", similar to theft.

On a reading of Section 497, it is demonstrable that women are treated as subordinate to men inasmuch as it lays down that when there is connivance or consent of the man, there is no offence. This treats the woman as a chattel. It treats her as the property of man and totally subservient to the will of the master. It is a reflection of the social dominance that was prevalent when the penal provision was drafted, *Joseph Shine* v. *Union of India*, 2018.

Section 497 violates Articles 14 [Equality before law]

Section 497 treats men and women unequally, as women are not subject to prosecution for adultery, and women cannot prosecute their husbands for adultery. Additionally, if there is "consent or connivance" of the husband of a woman who has committed adultery, no offence can be established. The section lacks an adequately determining principle to criminalise consensual sexual activity and is manifestly arbitrary and therefore violative of Article 14, *Joseph Shine* v. *Union of India,2018.*

Section 198(2) CrPC also violates Article 14 [Equality before law]

Section 198(2) CrPC does not consider the wife of the adulterer as an aggrieved person. The rationale of the provision suffers from the absence of logicality of approach and therefore it suffers from the vice of Article 14 of the Constitution being manifestly arbitrary, *Joseph Shine* v. *Union of India,* 2018.

Violation of Article 15(1) [Prohibition of discrimination]

Article 15(1) prohibits the State from discriminating on grounds only of sex. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, the offence of adultery discriminates between a married man and a married woman to her detriment on the ground of sex only. The provision is discriminatory and therefore, violative of Article 15(1), *Joseph Shine* v. *Union of India,* 2018.

Violation of dignity of woman and Article 21 [Right to life]

Dignity of the individual is a facet of Article 21. Section 497 effectually curtails the essential dignity which a woman is entitled to have by creating invidious distinctions based on gender stereotypes which creates a dent in the individual dignity of women.

Besides, the emphasis on the element of connivance or consent of the husband tantamount to the subordination of women. Therefore, the same offends Article 21, *Joseph Shine* v. *Union of India*, 2018.

Violation of right to privacy and right to choose

This Court has recognised sexual privacy as a natural right, protected under the Constitution. Sharing of physical intimacies is a reflection of choice. To shackle the sexual freedom of a woman and allow the criminalisation of consensual relationships is a denial of this right, *Joseph Shine* v. *Union of India*, 2018.

Married woman's sexual agency rendered wholly dependent on consent or connivance of husband

A man who has sexual intercourse with a married woman without the consent or connivance of her husband, is liable to be prosecuted for adultery even if the relationship is based on consent of the woman. Though granted immunity from prosecution, a woman is forced to consider the prospect of the penal action that will attach upon the individual with whom she engages in a sexual act. To ensure the fidelity of his spouse, the man is given the power to invoke the criminal sanction of the State. In effect, her spouse is empowered to curtail her sexual agency, *Joseph Shine* v. *Union of India*, 2018.

Section 497 denudes woman's sexual autonomy

Section 497 denudes a woman of her sexual autonomy in making its free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to a limited autonomy on entering marriage. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality, *Joseph Shine* v. *Union of India*, 2018.

Opposed to "constitutional morality"

It is not the common morality of the State at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires enforcement of the constitutional guarantees of equality before the law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of Section 497, *Joseph Shine* v. *Union of India*, 2018.

Premised on sexual stereotypes

Section 497 is premised upon sexual stereotypes that view women as being passive and devoid of sexual agency. The notion that women are 'victims' of adultery and therefore require the beneficial exemption has been deeply criticized by feminist scholars, who argue that such an understanding of the position of women is demeaning and fails to recognize them as equally autonomous individuals in society, *Joseph Shine* v. *Union of India,* 2018.

Breakdown of marriage

In many cases, a sexual relationship by one of the spouses outside of the marriage may lead to the breakdown of marriage. But often, such a relationship may not be the cause but the consequence of a pre-existing disruption of the marital tie, *Joseph Shine* v. *Union of India*, 2018.

Case of pending divorce proceedings

Manifest arbitrariness is writ large even in case of a married woman whose marriage has broken down, as a result of which she no longer cohabits with her husband, and may, in fact, have obtained a decree for judicial separation against her husband, preparatory to a divorce being granted. If during this period, she has sex with another man, the other man is immediately guilty of the offence, *Joseph Shine* v. *Union of India*, 2018.

Whether adultery should be treated as a criminal offence?

Adultery is basically associated with the institution of marriage. Treating adultery an offence would tantamount to the State entering into a real private realm. Adultery does not fit into the concept of a crime. It is better to be left as a ground for divorce, *Joseph Shine* v. *Union of India*, 2018.

Adultery continues to be a ground for divorce

There can be no shadow of doubt that adultery can be a ground for any kind of civil wrong including dissolution of marriage, *Joseph Shine* v. *Union of India*, 2018.

The judgment has put forward a good initiative as it struck down Sec 497 IPC and Sec 198(2) of CrPC as both the sections are based on discriminative classification against women. The provision is being discriminative in two ways, firstly it does not give woman the right to prosecute an adulterous husband and secondly it does not punish a woman in adultery not even as an 'abettor'.

Moreover this judgment has also put into practice the idea of transformative justice. However the judgment has lead to some kind of anomaly in the realm of adultery law as it makes the practice of adultery non punishable. It is criticized that the judgment takes away remedies available to any spouse when his or her partner indulges in adultery. And the judgment is also silent as to its effect on the social institutions like marriage and also with regard to children born out of such relationship or involved in any other manner in similar situations.

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