

Documents (94)

1. [\[s 76\] Act done by a person bound, or by mistake of fact believing himself bound, by law.—](#)
Client/Matter: -None-
2. [\[s 77\] Act of Judge when acting judicially.—](#)
Client/Matter: -None-
3. [\[s 78\] Act done pursuant to the judgment or order of Court.—](#)
Client/Matter: -None-
4. [\[s 79\] Act done by a person justified, or by mistake of fact believing himself justified, by law.—](#)
Client/Matter: -None-
5. [\[s 80\] Accident in doing a lawful act.—](#)
Client/Matter: -None-
6. [\[s 81\] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—](#)
Client/Matter: -None-
7. [\[s 82\] Act of a child under seven years of age.—](#)
Client/Matter: -None-
8. [\[s 83\] Act of a child above seven and under twelve of immature understanding.—](#)
Client/Matter: -None-
9. [\[s 84\] Act of a person of unsound mind.—](#)
Client/Matter: -None-
10. [\[s 85\] Act of a person incapable of judgment by reason of intoxication caused against his will.—](#)
Client/Matter: -None-
11. [\[s 86\] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—](#)
Client/Matter: -None-
12. [\[s 87\] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—](#)
Client/Matter: -None-
13. [\[s 88\] Act not intended to cause death, done by consent in good faith for person's benefit.—](#)
Client/Matter: -None-
14. [\[s 89\] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—](#)
Client/Matter: -None-
15. [\[s 90\] Consent known to be given under fear or misconception.—](#)
Client/Matter: -None-
16. [\[s 91\] Exclusion of acts which are offences independently of harm caused.—](#)
Client/Matter: -None-
17. [\[s 92\] Act done in good faith for benefit of a person without consent.—](#)
Client/Matter: -None-
18. [\[s 93\] Communication made in good faith.—](#)
Client/Matter: -None-
19. [\[s 94\] Act to which a person is compelled by threats.—](#)

- Client/Matter:** -None-
20. [\[s 95\] Act causing slight harm.—](#)
- Client/Matter:** -None-
21. [\[s 96\] Things done in private defence.—](#)
- Client/Matter:** -None-
22. [\[s 97\] Right of private defence of the body and of property.—](#)
- Client/Matter:** -None-
23. [\[s 98\] Right of private defence against the act of a person of unsound mind, etc.—](#)
- Client/Matter:** -None-
24. [\[s 99\] Acts against which there is no right of private defence.—](#)
- Client/Matter:** -None-
25. [\[s 100\] When the right of private defence of the body extends to causing death.—](#)
- Client/Matter:** -None-
26. [\[s 101\] When such right extends to causing any harm other than death.—](#)
- Client/Matter:** -None-
27. [\[s 102\] Commencement and continuance of the right of private defence of the body.—](#)
- Client/Matter:** -None-
28. [\[s 103\] When the right of private defence of property extends to causing death.—](#)
- Client/Matter:** -None-
29. [\[s 104\] When such right extends to causing any harm other than death.—](#)
- Client/Matter:** -None-
30. [\[s 105\] Commencement and continuance of the right of private defence of property.—](#)
- Client/Matter:** -None-
31. [\[s 106\] Right of private defence against deadly assault when there is risk of harm to innocent person.—](#)
- Client/Matter:** -None-
32. [\[s 107\] Abetment of a thing.—](#)
- Client/Matter:** -None-
33. [\[s 108\] Abettor—](#)
- Client/Matter:** -None-
34. [\[s 108A\] Abetment in India of offences outside India.—](#)
- Client/Matter:** -None-
35. [\[s 109\] Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—](#)
- Client/Matter:** -None-
36. [\[s 110\] Punishment of abetment if person abetted does act with different intention from that of abettor.—](#)
- Client/Matter:** -None-
37. [\[s 111\] Liability of abettor when one act abetted and different act done.—](#)
- Client/Matter:** -None-
38. [\[s 112\] Abettor when liable to cumulative punishment for act abetted and for act done.—](#)
- Client/Matter:** -None-
39. [\[s 113\] Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.—](#)
- Client/Matter:** -None-
40. [\[s 114\] Abettor present when offence is committed.—](#)

Client/Matter: -None-

41. [\[s 115\] Abetment of offence punishable with death or imprisonment for life.—](#)

Client/Matter: -None-

42. [\[s 116\] Abetment of offence punishable with imprisonment.—](#)

Client/Matter: -None-

43. [\[s 117\] Abetting commission of offence by the public or by more than ten persons.—](#)

Client/Matter: -None-

44. [\[s 118\] Concealing design to commit offence punishable with death or imprisonment for life.—](#)

Client/Matter: -None-

45. [\[s 119\] Public servant concealing design to commit offence which it is his duty to prevent.—](#)

Client/Matter: -None-

46. [\[s 120\] Concealing design to commit offence punishable with imprisonment.—](#)

Client/Matter: -None-

47. [\[s 120A\] Definition of criminal conspiracy.—](#)

Client/Matter: -None-

48. [\[s 120B\] Punishment of criminal conspiracy.—](#)

Client/Matter: -None-

49. [\[s 121\] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—](#)

Client/Matter: -None-

50. [\[s 121A\] Conspiracy to commit offences punishable by section 121.—](#)

Client/Matter: -None-

51. [\[s 122\] Collecting arms, etc., with intention of waging war against the Government of India.—](#)

Client/Matter: -None-

52. [\[s 123\] Concealing with intent to facilitate design to wage war.—](#)

Client/Matter: -None-

53. [\[s 124\] Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.—](#)

Client/Matter: -None-

54. [\[s 124A\] Sedition.—](#)

Client/Matter: -None-

55. [\[s 125\] Waging war against any Asiatic Power in alliance with the Government of India.—](#)

Client/Matter: -None-

56. [\[s 126\] Committing depredation on territories of Power at peace with the Government of India.—](#)

Client/Matter: -None-

57. [\[s 127\] Receiving property taken by war on depredation mentioned in sections 125 and 126.—](#)

Client/Matter: -None-

58. [\[s 128\] Public servant voluntarily allowing prisoner of State or war to escape.—](#)

Client/Matter: -None-

59. [\[s 129\] Public servant negligently suffering such prisoner to escape.—](#)

Client/Matter: -None-

60. [\[s 130\] Aiding escape of, rescuing or harbouring such prisoner.—](#)

Client/Matter: -None-

61. [\[s 131\] Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.—](#)

Client/Matter: -None-

62. [\[s 132\] Abetment of mutiny, if mutiny is committed in consequence thereof.—](#)

Client/Matter: -None-

63. [\[s 133\] Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.—](#)

Client/Matter: -None-

64. [\[s 134\] Abetment of such assault, if the assault is committed.—](#)

Client/Matter: -None-

65. [\[s 135\] Abetment of desertion of soldier, sailor or airman.—](#)

Client/Matter: -None-

66. [\[s 136\] Harboursing deserter.—](#)

Client/Matter: -None-

67. [\[s 137\] Deserter concealed on board merchant vessel through negligence of master.—](#)

Client/Matter: -None-

68. [\[s 138\] Abetment of act of insubordination by soldier, sailor or airman.—](#)

Client/Matter: -None-

69. [\[s 138A\] Application of foregoing sections to the Indian Marine Service.—](#)

Client/Matter: -None-

70. [\[s 139\] Persons subject to certain Acts.—](#)

Client/Matter: -None-

71. [\[s 140\] Wearing garb or carrying token used by soldier, sailor or airman.—](#)

Client/Matter: -None-

72. [\[s 141\] Unlawful assembly.—](#)

Client/Matter: -None-

73. [\[s 142\] Being member of unlawful assembly.—](#)

Client/Matter: -None-

74. [\[s 143\] Punishment.—](#)

Client/Matter: -None-

75. [\[s 144\] Joining unlawful assembly armed with deadly weapon.—](#)

Client/Matter: -None-

76. [\[s 145\] Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.—](#)

Client/Matter: -None-

77. [\[s 146\] Rioting.—](#)

Client/Matter: -None-

78. [\[s 147\] Punishment for rioting.—](#)

Client/Matter: -None-

79. [\[s 148\] Rioting, armed with deadly weapon.—](#)

Client/Matter: -None-

80. [\[s 149\] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—](#)

Client/Matter: -None-

81. [\[s 150\] Hiring, or conniving at hiring, of persons to join unlawful assembly.—](#)

Client/Matter: -None-

82. [\[s 151\] Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.—](#)

Client/Matter: -None-

83. [\[s 152\] Assaulting or obstructing public servant when suppressing riot, etc.—](#)

Client/Matter: -None-

84. [\[s 153\] Wantonly giving provocation with intent to cause riot —](#)

Client/Matter: -None-

85. [\[s 153A\] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.—](#)

Client/Matter: -None-

86. [\[s 153AA\] Punishment for knowingly carrying arms in any procession or organising, or holding or taking part in any mass drill or mass training with arms.—](#)

Client/Matter: -None-

87. [\[s 153B\] \[Imputations, assertions prejudicial to national-integration.—](#)

Client/Matter: -None-

88. [\[s 154\] Owner or occupier of land on which an unlawful assembly is held.—](#)

Client/Matter: -None-

89. [\[s 155\] Liability of person for whose benefit riot is committed.—](#)

Client/Matter: -None-

90. [\[s 156\] Liability of agent of owner or occupier for whose benefit riot is committed.—](#)

Client/Matter: -None-

91. [\[s 157\] Harboursing persons hired for an unlawful assembly.—](#)

Client/Matter: -None-

92. [\[s 158\] Being hired to take part in an unlawful assembly or riot.—](#)

Client/Matter: -None-

93. [\[s 159\] Affray.—](#)

Client/Matter: -None-

94. [\[s 160\] Punishment for committing affray.—](#)

Client/Matter: -None-

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > **CHAPTER IV GENERAL EXCEPTIONS**

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

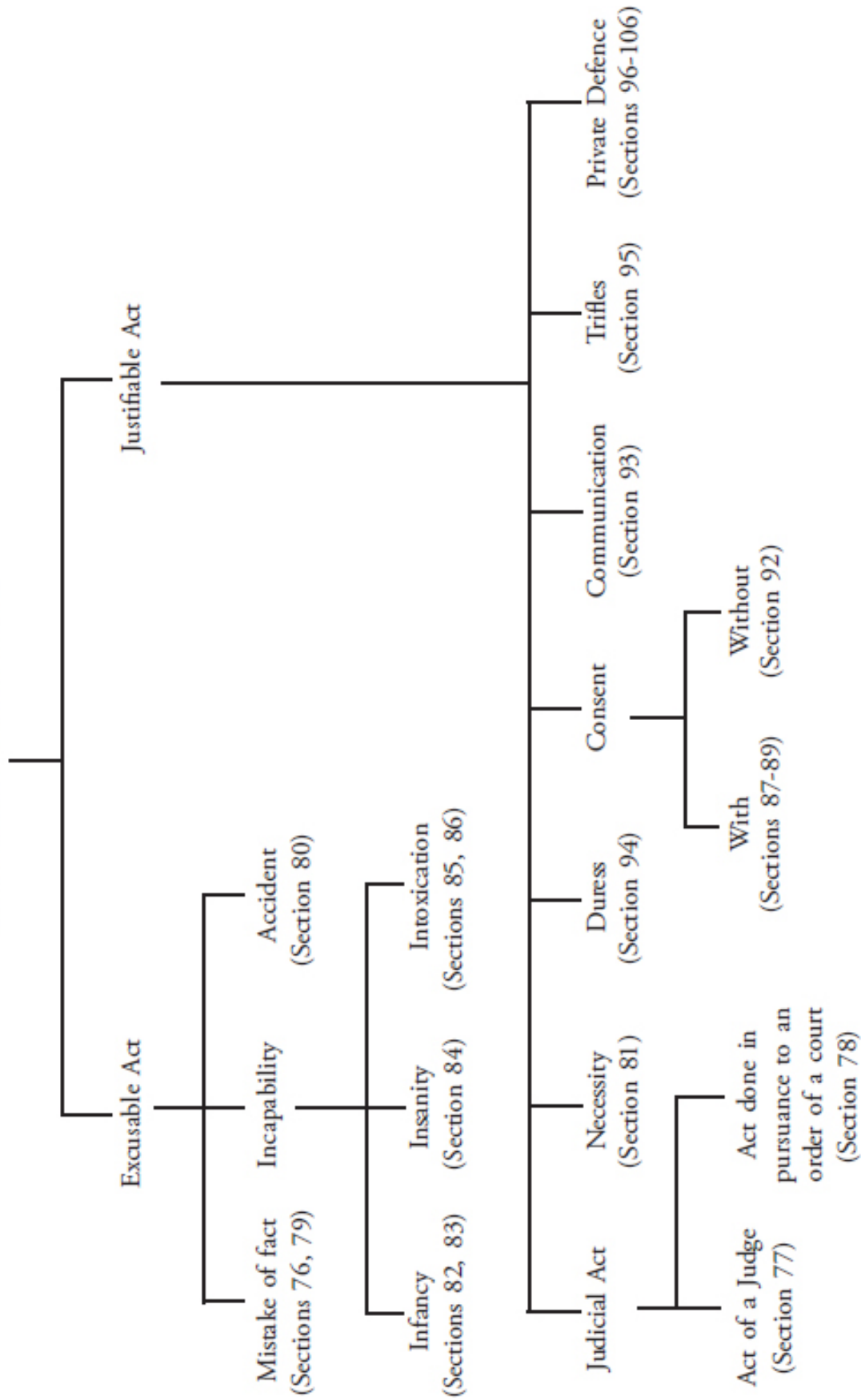
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

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

ILLUSTRATIONS

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

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

[s 76.1] Principle

Mistake and ignorance are words of ancient vintage and rarely distinguished. Mistake of fact always supposes some error of opinion as to the real facts, whereas ignorance of fact may be devoid of error but result in mere want of knowledge or opinion.¹⁹

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

Sections 76 and 79 of the Code incorporate the common law principle of *ignorantia facit doth excusat, ignorantia juris non excusat* (ignorance of fact excuses, ignorance of law does not excuse). The justification for exemption on the ground of mistake of fact and ignorance of fact is based on the principle that a man who is mistaken or ignorant about the existence of a fact cannot form the necessary intention to constitute a crime and is therefore not responsible in law for his deeds. Thus, a *bona fide* – belief in good faith in the existence of facts, which if they do exist, would make an act innocent in law.²⁰ On the other hand, mistake of law is no defence since every man is presumed to know the law and hence responsible in case of its breach.²¹

The act of the police officer in the illustration to section 76, in arresting Z in place of Y for whose arrest, in fact, no warrant was issued, does not make him guilty of wrongful confinement (*section 342, IPC*). It was only, after making reasonable inquiries and on well-founded grounds, when the police officer was convinced that Z was Y, that he arrested Z. The police officer believed in good faith that he was bound by law to arrest Y, because of the direction of a court of law, by issuing a warrant, to arrest him. Had the facts been as supposed, the arrest would have been legal. Since the police officer honestly believed in good faith by reason of a mistake of fact Z, to be Y, he will be protected under *section 76 of the IPC*.

Similarly, in the illustration to section 79, the act of A, in arresting Z in order to bring him before the proper authorities, when Z was acting in self defence, is not culpable. A, presumed in good faith that Z was committing murder and so he thought on reasonable grounds in good faith that he was justified by law to apprehend him. A will be protected under *section 79 of the IPC*.

The justification for exemption from criminal liability on the ground of a mistake of fact is based on the principle that a man who is mistaken about the existence of a fact cannot form the necessary intention required to constitute a crime and is therefore not responsible in law for his deeds. Thus, a *bona fide* belief in the existence of facts, if they do exist, would make an act innocent. But mistake or ignorance of law – *ignorantia juris non (neminem) excusat* is no defence to a charge of crime, howsoever genuine it might have been. In other words, all persons resident in a country, whether subjects or foreigners, are bound by the law of the land. The rule is founded on the fiction that “every man knows the law” or “at any rate ought to know the law” under which he lives or to which he is subject for the time being.²² No doubt, it is not possible even for a professional lawyer to know the entire bulk of law, nevertheless, the rule has been recognised as a basic principle of law on the ground of judicial expediency and public policy. If ignorance of law is to be a defence, it would be open to an accused to allege that he was not aware of the law, and it would be quite impossible for the prosecution to prove that the accused was cognizant of the law. The result would be the acquittal of the accused persons in all the cases rendering the administration of justice next to impossible.²³

[s 76.2] Mistake of fact

Mistake of fact or ignorance of fact under common law is generally a defence, provided that it was one of fact, and provided that had the facts been as the accused supposed, he would have had a defence to the crime with which he is charged. That this ethical principle has long been expressed in criminal law is apparent from an early seventeenth century case, *R v Levett*.²⁴ The accused was held not to have been guilty of unlawful homicide, when he killed a woman (a friend of his servant) who was hiding behind a curtain in his house, mistakenly believing her to be a burglar. This may be called a case of “pure mistake” because he did it ignorantly with no intention of killing the woman, but rather of killing a burglar.

Mistake may give rise to the defence of an accident, as when a gun being handled by a person who mistakenly believes it to be unloaded, goes off and kills someone, but the person is liable for the crime of negligence.²⁵

Wilson: There must be reasonable grounds for the mistake but there is no general rule of law to this effect. Even an unreasonable mistake may entirely exculpate the accused under common law.²⁶ For instance, in *Wilson v Inyang*, (1951) 2 KB 799, an African naturopath physician placed the letters ND, MRDP after his name in an advertisement. He was charged with wilfully and falsely implying that he was a registered medical practitioner contrary to section 40 of the Medical Act, 1858. It was held that as the accused honestly believed in

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

good faith that he was entitled to act as he did in consequence of an examination which he had taken, the offence had not been committed.

The reasonableness of the accused's belief was, in law, an immaterial consideration, although if he were to describe himself as ND again, he would be committing an offence, because he would then know that the description colourably resembled that of MD (Master of Medicine).

Tolson: That mistake must be reasonable, if it is to be a defence, gains support from the decision in the leading case of *R v Tolson*.²⁷ Mrs Tolson was charged with bigamy under section 57 of the Offences Against the Person Act, 1861 for contracting a second marriage during the lifetime of her former husband; she was acquitted on the grounds that she believed in good faith and on reasonable grounds that her husband had died prior to the time of her second marriage.

Mrs Tolson married Mr Tolson on 11 September 1880. After a year he deserted her on 13 December 1881. On inquiries made by her father and others she was led to believe that her husband had been drowned in a vessel bound for America, which went down with all hands (persons) on board. On 10 January 1887, Mrs Tolson, supposing herself to be a widow contracted a second marriage with another man. The circumstances were well known to the second husband and the ceremony was in no way concealed. The intent to commit bigamy was held to be negated by a majority of five to nine judges by the accused's mistaken belief in the death of her husband.

Lolley: However, in a Scottish case *Lolley*, 1812 Russ & Ry 237, it was held by all the judges that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt.

Prince: Similarly, in *Queen v Princess*, 1875 LR 2 CCR 154 (HL), the House of Lords by a majority of 15 to 1 held the accused liable for abduction of a girl under sixteen though he believed in good faith and on reasonable grounds that she was over 16 years. The Court held a mistaken belief even though based on reasonable grounds, that the girl was over sixteen years of age is no defence to a charge of kidnapping – statutory offence of taking a girl under sixteen out of the possession and against the will of her parents or guardian.

Henry Prince was tried and convicted upon the charge of having unlawfully taken Annie Phillips, an unmarried girl under the age of sixteen, out of the possession and against the will of her father contrary to section 55 of the Offences Against the Person Act, 1861 (substantially re-enacted by section 20 of the Sexual Offences Act, 1956) which states:

[W]hoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour.

It was proved that the accused believed on reasonable grounds that the girl was above sixteen (18 years old) and the jury found upon reasonable evidence that before the accused took her away she told him that she was eighteen, and that the accused *bona fide* believed that statement, and that such belief was reasonable. The lower court convicted the accused and the House of Lords by a majority of fifteen to one, upheld the conviction.

The prisoner pleaded that, in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the legislature should be presumed to be to include “knowingly” in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears.

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

Rejecting the appellant's contention the Court said the intention of the legislature have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen. The section in question is one of a series of enactments, beginning with section 48, and ending with section 55, forming a code for the protection of women and guardians of young women.

Section 55 (of Offences Against the Person Act, 1861) on which the present case arises, recognises a legal right of a parent to the possession of the child depending on the real age of the child, and not on what appears. And the object of the legislature, being, as it appears by the Preamble it was, to protect this legal right to the possession, would be baffled, if it were an excuse that the person guilty of the taking thought the child to be above 16. The words “unlawfully takes”... mean without the authority of the master or mistress, or guardian.

While comparing *Prince* case from *Tolson* it is obvious that in case of *Prince* the act in question (i.e. abduction) is *mala in se*, i.e., wrong in itself for which the person is liable irrespective of knowledge or not. On the other hand, in case of *Tolson*, the act of second marriage during life time of the other spouse is simply to *malo in prohibito*—prohibited by law is not a wrong in itself. Even in some religions such as in Islam, in tribals and under Hindu law till 1955²⁸ polygamy was permitted. Bigamy has been made an offence only in order to protect and safeguard the interest of the other spouse and children.

Sherras: In *Sherras v De Rutzen*, [\(1975\) 2 All ER 347](#) (HL),²⁹ the Divisional Court held that even in case of a statutory offence the accused would normally be entitled to acquittal, if he does not know of the facts which the prosecution is required to prove in order to get him convicted of the offence charged.

The appellant, a licensed innkeeper, was convicted by a magistrate under section 16(2) of the Licensing Act, 1872, for supplying liquor to a constable on duty. The appellant's daughter in his presence supplied liquor to the constable without making any inquiry as to whether he was on duty. Prior to entering the public house, which was nearly opposite to a police station, the constable had removed his armlet band, which was an indication that he was off duty.

The appellant's conviction was upheld by the Quarter Sessions on the ground that the knowledge, that the police constable, when served with liquor, was on duty, was not an essential ingredient of the impugned section.

The case was referred to the Divisional Court, which quashed the conviction. Wright said, there is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.

Umma: Following the English decision, the courts in India have acknowledged mistake of fact as a good defence in the case of bigamy and other statutory offences.³⁰ In *Kochu Muhammad Kunju Ismail v Mohammad Kadeja Ummr*, AIR 1959 Ker 151 [\[LNIND 1958 KER 192\]](#), the accused, Mrs Umma, was charged with bigamy under section 494 IPC for contracting a second marriage during the continuance of the first marriage; she was acquitted on the grounds that she honestly and on reasonable grounds believed that she had conducted a divorce from the complainant (husband), albeit the divorce was unauthorised by the Mohammedan law to which the parties belonged.

It was held that if a person charged of committing bigamy believed that he or she was legally free to marry again, it cannot be said that the crime was committed either intentionally or recklessly.

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

Panthom Venkayya: Likewise, in the case of *Panthom Venkayya v Emperor*, AIR 1930 Mad 246 [[LNIND 1929 MAD 296](#)], where the accused was charged of the offence of personation at an election under *section 171D*, *IPC* for having voted once in the morning and for a second time in the afternoon was acquitted. It was found that the accused had no corrupt intention, nor had he been corruptly influenced. In fact, he honestly believed that since his name appeared on the roll of two different villages, he was entitled to cast a vote twice at the election.³¹

Siddharath: Similarly, in *State v Siddharath Ganguram*, AIR 1956 MB 241,³² an illiterate father (who had a vote but fell ill) asked his son (accused) to cast the vote on his behalf. The son was held not guilty of the offence of personation at an election under *sections 171D* and *171F* of the *Penal Code* as he honestly believed in good faith that, thus, authorised by his father, he could exercise his father's vote and applied for a voting paper in his father's name.

[s 76.3] Mistake of law

Mistake of law means a mistake as to the existence or otherwise of any law on a relevant subject as well as a mistake as to what the law is. A mistake or ignorance of law, whether civil or criminal, is no defence in law, howsoever, genuine it might have been. In other words, all persons resident in a country, whether subjects or foreigners, are bound by the law of the land. The rule is founded on the fiction that "every man knows the law, or at any rate ought to know the law under which he lives or to which he is subject for the time being".³³ Without doubt, it is not possible even for professional lawyers to know the entire bulk of law. Nevertheless, the rule has been recognised as a basic principle of law on the ground of judicial expediency and public policy.

If ignorance of the law were a defence, it would be open to an accused charged of a crime to allege that he was not aware of the law on the point; and it would be quite impossible for the prosecution to prove that the accused was cognizant of the law in question. The result would be the acquittal of accused persons in all cases, rendering the administration of justice nigh unto impossible.³⁴ Another important justification for not allowing a mistake of law as a defence apparently is that the operation of a provision of the law is intended to be independent of its being known to everybody. If this were not so, great difficulty would be experienced in the enforcement of the law and would lead to injustice.³⁵ Sections 76 and 79 of the Code have expressly excluded mistake of law from the purview of the exceptions. The maxim is applied in a strict sense. However, since no minimum punishment is provided in the Code, as a general rule the courts have passed considerably lenient sentences when a nonnegligent inviable mistake of law has occurred.

Mayer Hans George: In the case of *State of Maharashtra v Mayer Hans George*,³⁶ the Supreme Court refused to accept the plea of ignorance of the notification issued by the Reserve Bank of India on 24 November 1962 imposing restrictions on the transit of gold to a place outside the territory of India and held the accused, a French national, who left Zurich on his way to Manila 27 November 1962 liable for violating the said notification, when his plane landed in Bombay.

The respondent left Zurich by a Swiss Aeroplane on 27 November 1962 which touched Santa Cruz Airport at 6.08 am on the next day. The customs officers on the basis of previous information searched for the respondent and found him sitting in the plane. On a search of the person of the respondent it was found that he had put on a jacket containing 28 compartments and in 19 of them he was carrying gold slabs weighing approximately 34 kilos. It was also found that the respondent was a passenger bound for Manila.

[s 76.4] Distinction between mistake of fact and mistake of law

Distinction between mistake of fact and mistake of law can be well illustrated by the following example. A, a police officer, who has the right to arrest a person committing a cognizable offence,³⁷ if he arrests B, mistakenly thinking that he has committed murder, when in fact he killed a dacoit in self-defence, A, is not liable for committing the offence of wrongful confinement, his mistake being one of fact.

On the other hand, if the police officer arrests a person for committing an assault, which he wrongfully

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

considers a cognizable offence, whereas it is not cognizable in which he cannot arrest a person, he is liable for wrongful confinement, his mistake being one of law for which he cannot be excused.

[s 76.5] Ingredients

Section 76 deals with two classes of cases wherein a person is excused from criminal liability on the ground of mistake of fact, viz.,

- (1) When a person is bound by law to do something and does it;
- (2) When a person believes in good faith, owing to a mistake of fact and not a mistake of law, that he is bound to do something and does it.

Illustration (a) appended to section 76 explains the first proviso of the section, wherein a soldier who fires on a mob by the order of his superior officer in conformity with the commands of the law, is exempted from criminal liability.³⁸

Likewise, illustration (b) attached to the section expresses the second proposition. It says that arresting Z in place of Y for whose arrest, in fact, no warrant of arrest was issued, does not make the arresting officer guilty of the offence of wrongful confinement under *section 342 of the Penal Code*. It was only after making reasonable inquiries and on well-founded grounds, and after being convinced that Z was the person to be taken into custody, the police officer arrested him. The police officer believed in good faith that he was bound by law to arrest Y, because of the direction of the court to arrest him. Had the facts been what were supposed by the police officer, the arrest would have been legal. Under the circumstances, the police officer honestly believed by reason of a *bona fide* mistake of fact that he arrested Y and so he would be protected by section 76 of the Code.

[s 76.6] Subordinate officer carrying the orders of superior is not liable: Shew Mangal Singh

The Supreme Court in *Shew Mangal Singh*,³⁹ held that a subordinate officer carrying out the orders of a superior officer in obedience with the command is not guilty of committing any offence – *IPC section 76*.

The respondents, who are all police officers, were tried and convicted by the learned Judge, City Sessions Court, Calcutta, under *section 302* read with *section 34* of the *IPC*, on the charge that at about 10.00 pm on 11 November 1970, they along with Bibhuti Chakraborty, the then Deputy Commissioner of Police (North Division) PR Dey, the then Assistant Commissioner of Police (NS) and some others, caused the death of Ranjit Chakraborty and Samir Chakraborty by causing them gunshot injuries.

In an appeal the High Court acquitted them, against which the State of West Bengal has filed this appeal. According to the High Court, the police, while on patrol duty, were compelled to open fire after respondent 1, Shew Mangal Singh, received injuries as a result of the mob violence. Since the orders given by the Deputy Commissioner to open fire were justified, respondents were bound to obey the lawful orders of their superior officer.

A very interesting and important question was raised in the High Court as to whether the command of a superior officer to a subordinate officer, was justified and therefore lawful if, while acting in the execution of that command the subordinate officer causes injury or death.

Held, if that order was justified and lawful, no further question can arise as to whether the respondents, who acted in obedience to that order, believed or did not believe that order to be lawful. Such an inquiry becomes

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

necessary only when the order of the superior officer, which is pleaded as a defence, is found not to be in conformity with the commands of the law.

Since the situation prevailing at the scene of the offence was such as to justify the order given by the Deputy Commissioner of Police to open fire, the respondents can seek the protection of that order and plead in defence that they acted in obedience to that order and therefore they cannot be held guilty. That is the purport of the illustration to section 76. The petition is dismissed.

[s 76.7] Homicide committed under mistaken belief, is excusable

Rosi: In *R v Rosi*, (1884) 15 Cox CC 540, the accused, a boy of twenty-one, was charged for committing murder of his father. The accused was living with his sister, mother and father. The relations between father and mother were strained, and his father frequently used to quarrel with his mother, whom he believed to be unfaithful. In the night when the fatal incident took place, there was a quarrel between the accused's father and mother. The accused's mother called out "murder", and the father forced the mother's to the top of stairs and threatened to knife her. Believing that her mother's life was in danger, the accused shot and killed his father. There was no evidence that the father had a knife.

Holding the accused not guilty of murder of his father. Lopes J, summed up the law in the following words:—

If the prisoner... acted without vindictive feeling towards his father when he fired the shot, that at the time he fired the shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him, from the consequences of homicide.

[s 76.8] Mistaken belief in execution of duty – No defence

A father's mistaken belief that a police officer was unlawfully detaining his son is no defence to a charge of assaulting the officer in the execution of his duty.⁴⁰ Fennell's son was involved in a fight and arrested by the prosecutor, a police officer. Fennell pressed the officer to release his son and he struck the officer who was on the point of taking his son to the police station. Fennell was convicted. Fennell unsuccessfully appealed to the Court of Appeal. The Court laid down two broad principles, viz.:

1. Where a person honestly and reasonably believes that he or his child is in imminent danger of injury, it would be unjust if he were deprived of the right to use reasonable force by way of defence merely because he had made some genuine mistake of fact.
2. On the other hand, if the child is in police custody and not in imminent danger of injury, there is no urgency of the kind which requires an immediate decision, and a father who forcibly releases the child does so at his peril. If in fact the arrest proves to be lawful, the father's use of force cannot be justified.

Adebolajo: Mistaken belief that killing in course of fighting war is not permissible: In *R v Adebolajo*, criminal Court of Appeal held extremists killing British soldier honestly believing that killing carried out in course of fighting war is justification for murder is not permissible. The first defendant (aged 29) and the second defendant (aged 22) had converted to Islam and held extreme religious and political views. They decided that they would kill a soldier in public, in a way that would generate maximum media coverage, in order to advance their cause. Planning for the murder took place over a period of time. They travelled in a car driven by the first defendant. They carried eight knives and a handgun that did not work. They parked near army barracks and

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

waited for a soldier to kill. They saw a soldier, L, walk past. They followed him in the car. L crossed the road, and the first defendant accelerated the car, running L down from behind. L was unconscious and unable to defend himself. The defendants killed him with knives. That was seen, as intended, by members of the public. They dragged L's body into the road, and brought traffic to a halt. Each held the gun at one point and used it to warn off any member of the public who looked as if they might intervene. The first defendant handed out a prepared written statement seeking to justify their cause and their actions. He made a political statement while carrying a bloodied cleaver in his hand, and images were broadcast around the world. Armed police officers arrived and took them in custody.

Both the defendant accused were charge and convicted for murder. The judge concluded that the seriousness of the offence had been exceptionally high and that the murder had been done for the purpose of advancing a political, religious or ideological cause. He sentenced the first defendant to life imprisonment, with a whole life order, and the second defendant to life imprisonment, a minimum term of 45 years.

While refusing the application of the defendants for appeal, the Court said there was no conceivable basis upon which it could be argued that a whole life order was not a just penalty for the first defendant's crime. It was plain that he had intended to commit a barbaric murder for political and ideological purposes. His actions were aimed against the state and against any civilized society. He had carried out the murder in a horrific manner. It was intended to have the maximum effect to promote the misguided political and ideological cause he exposed. He had glorified in the murder and sought to use it to advance his ideological causes by publicizing it and making the statements that he had. The first and second defendant's application for permission to appeal against sentence would be refused considering the nature of the offence.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

- 10 The *Indian Evidence Act, 1872, section 105*.
- 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.
- 14 *Evidence Act, section 113B*.
- 15 *Evidence Act, section 113A*.
- 16 *Evidence Act, section 114A*.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 19 There is a fine distinction between “ignorance of fact” and “mistake of fact”. The former implies a total want of knowledge in reference to the subject matter, whereas the latter admits a knowledge, but implies a wrong conclusion. However, the distinction has not been recognised in general, and taken to mean one and the same. *Huttar v Edgerton*, 6 SC 485 (489); *Parking M Rolling Criminal Law*, (1957), p 806; *Hall Jerome General Principles of Criminal Law*, 2nd Edn, (1960), pp 360-414.
- 20 *Queen v Tolson*, (1889) 23 QBD 168 .
- 21 *State of Maharashtra v Mayer Hans George*, AIR 1965 SC 722 [[LNIND 1964 SC 208](#)] : (1965) 1 SCR 123 [[LNIND 1964 SC 415](#)] : (1965) 1 Cr LJ 641 .
- 22 *State of Maharashtra v Mayer Hans George*, AIR 1965 SC 722 [[LNIND 1964 SC 208](#)] : (1965) 1 SCR 123 [[LNIND 1964 SC 415](#)] : (1965) 1 Cr LJ 641 ; See SS Huda, *Principles of Law of Crimes in British India*, (TLL 1902), pp 219-39; RC Nigam *Principles of Law of Crimes*, vol 1, pp 297, 313; RL Narasimham, *Ignorantia Juris Non Excusat*, 13 JILI (1971), pp 70-73.
- 23 See Law Commission of India (Forty-second Report, 1971), pp 83-85.
- 24 1639 Cro Cat 538 : 1 Hale PC 474 : 79 ER 1064.
- 25 *Reg. v Frederick Jones*, XI Cox CC 544.

[s 76] Act done by a person bound, or by mistake of fact believing himself bound, by law.—

- 26 *Director of Public Prosecution v Morgan*, (1975) 2 All ER 347 (HL). A person cannot be convicted of an offence (e.g., rape) if he acts under a mistaken belief that prosecutrix gave her consent (which was not in reality), even though his mistake is not based on reasonable grounds. *R v K*, (2002) 1 All ER 897 (HL). Honest belief on reasonable grounds that the girl was above 16 years is a good defence to a charge of indecent assault contrary to section 14 of the Sexual Offences Act, 1956; *B (a minor) v DPP*, (2000) 1 All ER 833 (HL). In case of an offence of inciting a child under 14 contrary to section 1(1) of the Indecency with the Children Act, 1960 to commit an act of gross indecency reasonable and honest belief that the child was 14 or over negatives *mens rea*. See for case KD Gaur, Criminal Law: Cases and Materials, 5th Edn, 2008, pp 55-85.
- 27 *Queen v Tolson*, (1889) 23 QBD 168 . See contra *Queen v Prince*, 1875 LR 2 CCR 154; *Director of Public Prosecution v Morgan*, (1975) 2 All ER 347 (HL). Held, a person cannot be convicted of an offence, if he acts under a mistaken belief which the prosecution must prove in the first instance, even though his mistake is not based on reasonable grounds. See commentary to section 90 of the Code.
- 28 *Hindu Marriage Act, 1955*, prohibits bigamy among Hindus.
- 29 See KD Gaur Criminal Law: Cases and Materials, 5th Edn, 2008, pp 64-68 for Facts of the Case.
- 30 *King v Tustipada Mondal*, AIR 1951 Ori 284 [[LNIND 1948 ORI 2](#)] .
- 31 *IPC, section 171D*. See Chapter IXA, *infra* for text.
- 32 *Panthom Venkaya v Emperor*, AIR 1930 Mad 246 [[LNIND 1929 MAD 296](#)] . See KD Gaur, Criminal Law: Cases and Materials, 4th Edn, pp 58 and 59 for facts and decision of the case.
- 33 See Salmond on Jurisprudence, 12th Edn by PJ Fitzgerald, (1975), pp 397-398.
- 34 See Huda SS Principles of Law of Crimes in British India, pp 219-239; Nigam RC Law of Crimes, vol I, pp 297-313; see RL Narsimham *Ignorantia Juris Non Execusat*, 13 JILI (1971), pp 70-78.
- 35 See Law Commission of India, 42nd Report (1971), pp 83-85.
- 36 AIR 1965 SC 722 [[LNIND 1964 SC 208](#)] : (1965) 1 SCR 123 [[LNIND 1964 SC 415](#)] : (1965) 1 Cr LJ 641 . See KD Gaur, Criminal Law: Cases and Materials, 3rd Edn, (1999), pp 59 to 68 for text of George Case.
- 37 *CrPC, 1973, section 2(c)* "cognizable offence" means... an offence for which and "cognizable case" means a case in which a police officer may, in accordance with the First Schedule... or under any other law... arrest without warrant."
- 38 *State of West Bengal v Shew Mangal Singh*, AIR 1981 SC 1917 [[LNIND 1981 SC 355](#)] : (1981) 4 SCC 2 [[LNIND 1981 SC 355](#)] : (1981) 1 SCR 360 : 1981 Cr LJ 1683 : 1981 CAR 350 .
- 39 *State of West Bengal v Shew Mangal Singh*, AIR 1981 SC 1917 [[LNIND 1981 SC 355](#)] : (1981) 4 SCC 2 : (1981) 1 SCR 360 : 1981 Cr LJ 1683 : 1981 CAR 350 .
- 40 *R v Fennell*, (1970) 3 All ER 215 .

[s 77] Act of Judge when acting judicially.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 77] Act of Judge when acting judicially.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

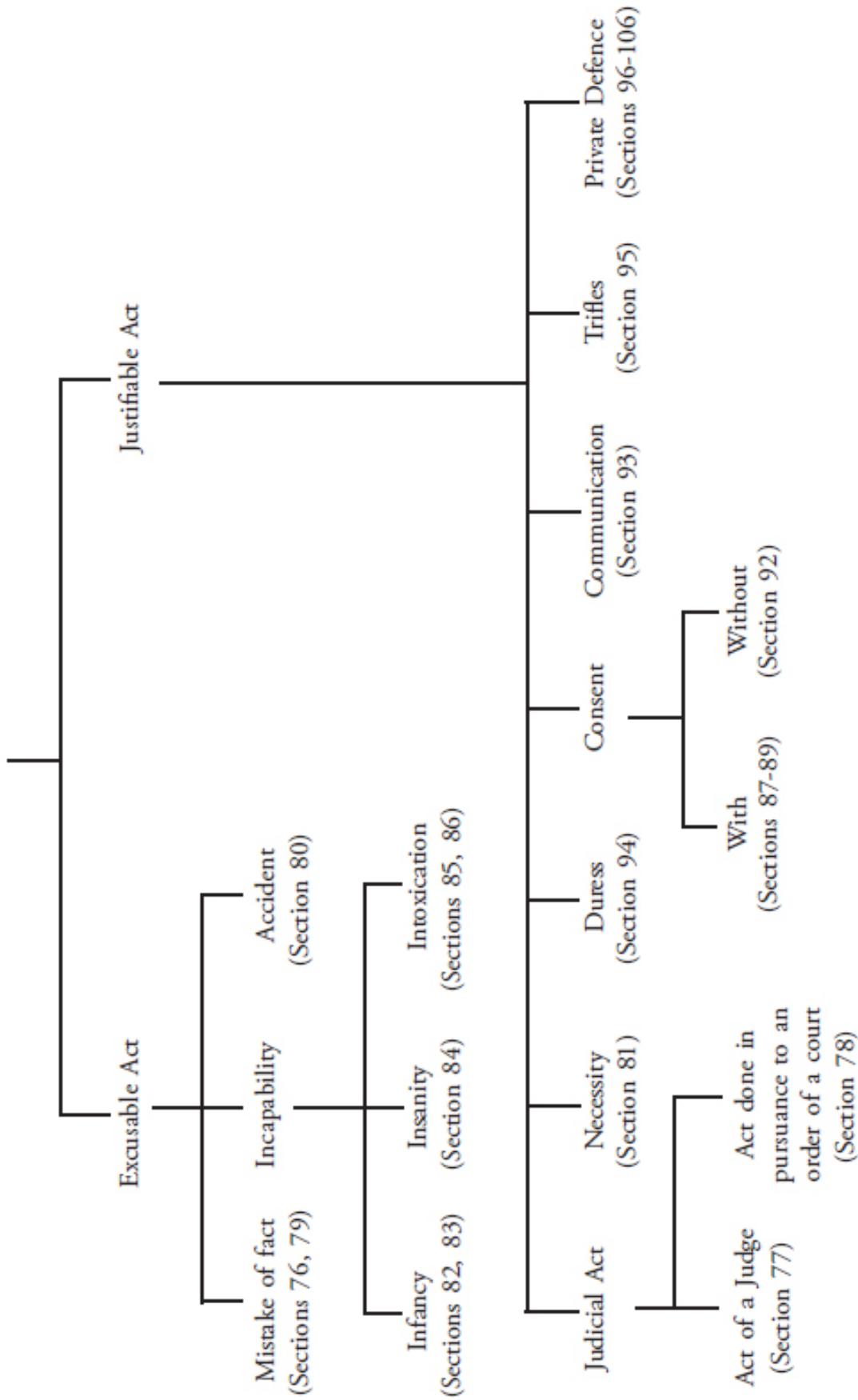
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 77] Act of Judge when acting judicially.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 77] Act of Judge when acting judicially.—

Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

[s 77.1] Rationale for Exemption from liability to Judges

Sections 77 and 78 of the Penal Code give protection to judges⁴¹ and to those who carry out their orders against criminal process just as the Judicial Officers' Protection Act (Act XVIII of 1950) exempts judicial officers from civil liability.⁴² The role of Judges and those engaged in performing judicial functions is such that special protection as regards their official acts and conduct are absolutely necessary for the sake of fearlessness and independence of administration of justice. As pointed out by Markby J, in *Chunder Narian Singh v Birjo Bullub Gooyee*:

The duties which he (a Magistrate) usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken

[s 77] Act of Judge when acting judicially.—

conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any person whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be.⁴³

Protection to judges by securing them immunity from civil liability and criminal prosecution and affording them security of tenure is not a special feature under our law, but is accorded in all democratic countries of the world to maintain an independent judiciary.

[s 77.2] Scope of Immunity

Section 77 extends special immunity to a judge against criminal prosecution with respect to acts done by him judicially in discharge of his official duty.⁴⁴ Thus, to avail the benefit of this section

- (i) the act must have been done by a judge in discharge of his official duty,
- (ii) the act done must be within his jurisdiction, and
- (iii) the act must be performed in good faith.

The scope of immunity is so wide that a judge is protected under this section, even if he exceeds the jurisdiction granted to him by law and prosecutes a man for committing the alleged offence, provided the act was done in good faith and under the official transaction. In *Meghraj v Zakir Hussain*, the Allahabad High Court went to the extent of saying:

No person acting judicially is liable for an act done or ordered to be done in the discharge of his official duty within the limits of his jurisdiction. In such a case, the question whether he acted in good faith does not arise.⁴⁵

Thus, if a Magistrate assumes on an erroneous reading of the law that he had the jurisdiction to decide a particular case, he is not criminally liable for exceeding his jurisdiction, though he had no authority to conduct the case. But the privilege does not extend to acts when a judge knowingly exceeds his authority or does something contrary to law. For instance, if a judge assaults or abuses a man, or takes bribe, he is as much liable as an ordinary man would be for his acts.⁴⁶

¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.

[s 77] Act of Judge when acting judicially.—

- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 41 See *IPC*, section 19 for meaning of "Judge".
- 42 Section 1 of the Act XVII of 1950:

[s 77] Act of Judge when acting judicially.—

No Judge, Magistrate, Justice of the peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.

43 *Chunder Narian Singh v Birjo Bullub Gooyee*, (1874) 14 Beng LR 254 (257).

44 *Meghraj v Zakir Hussain*, ILR (1975) 1 All 280 .

45 *Constitution of India*, Articles 124 and 214 provide for the establishment and *constitution* of a Supreme Court of India and High Courts for each State.

46 *Delhi Judicial Service Association, Tis Hazari Court v State of Gujarat*, AIR 1991 SC 2176 [[LNIND 1991 SC 446](#)] : (1991) 4 SCC 406 [[LNIND 1991 SC 446](#)] : (1991) 3 SCR 936 [[LNIND 1991 SC 446](#)] : 1991 CLR 753 . For facts see Annexure I.

[s 78] Act done pursuant to the judgment or order of Court.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 78] Act done pursuant to the judgment or order of Court.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

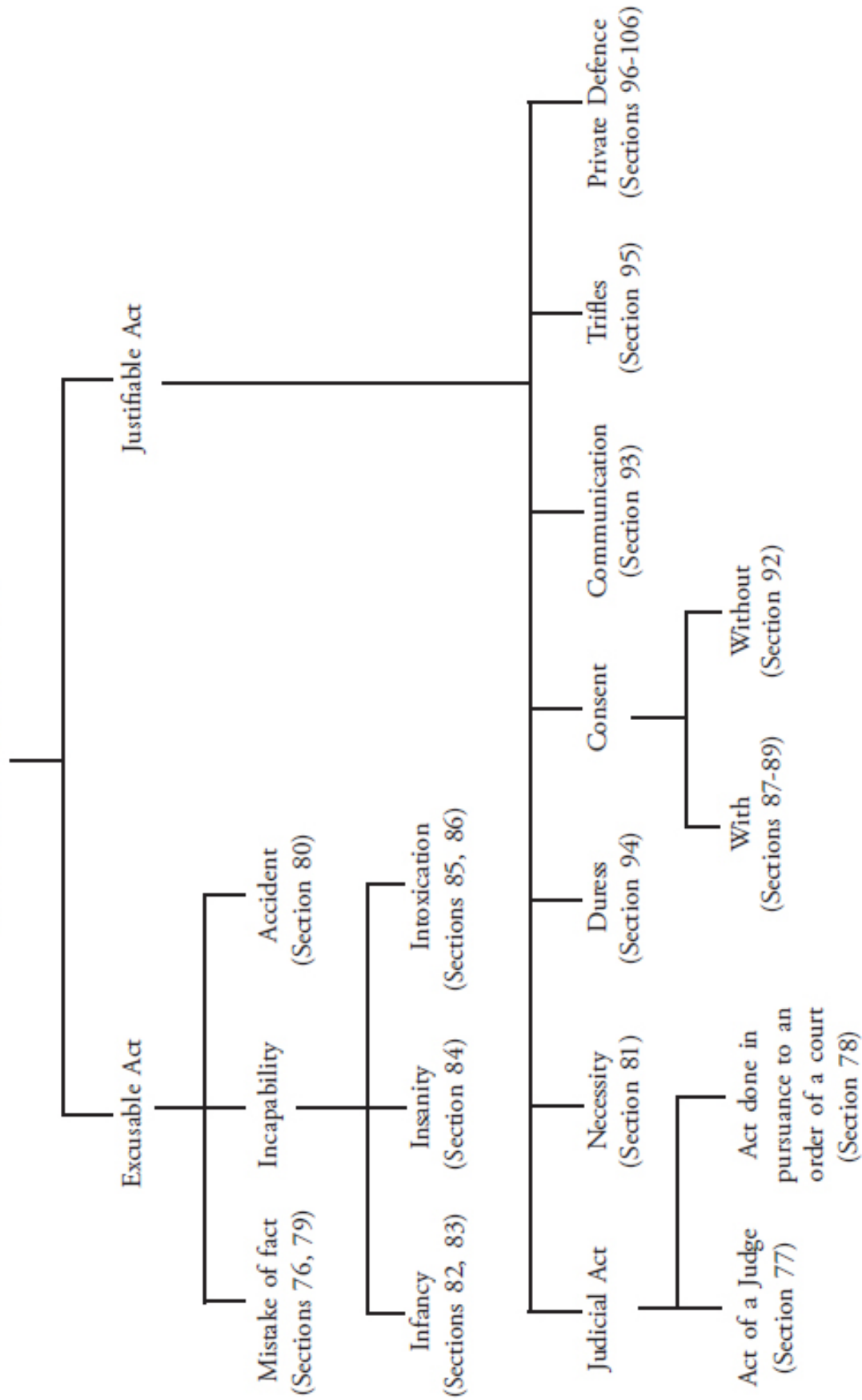
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 78] Act done pursuant to the judgment or order of Court.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 78] Act done pursuant to the judgment or order of Court.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 78] Act done pursuant to the judgment or order of Court.—

Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice; if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

[s 78.1] Act done pursuant to the order of the Court

Section 78 is a corollary to section 77. It grants immunity to ministerial officers acting in pursuance of the judgment or direction issued under the authority or order of a court of law. Under this section (i) an officer is exempted from criminal prosecution provided the act is done in good faith, and (ii) belief in the legality of the order.⁴⁷ If the above conditions are satisfied, an officer will not be liable for prosecution, even if the court issuing the order had no jurisdiction or the order happened to be erroneous. For instance, if a Magistrate who is authorised under section 5 of the Gambling Act (III of 1867) to issue a search-warrant on credible information only, to enter and search suspected gambling houses, issues a search-warrant with no such information, the police officer, executing it in pursuance of such an order is protected under this section.⁴⁸ The police officer is protected in spite of the fact that the warrant was defective in law and consequently illegal.

[s 78] Act done pursuant to the judgment or order of Court.—

Likewise, a jailor charged with the duty of carrying out the sentence of whipping abolished *vide* Abolition of Whipping Act, 1955 executes the sentence upon *B* under the direction of a Magistrate, is not liable for executing an illegal order. The act of the jailor, being an act done in pursuance of the order of a court, is protected under this section.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act, 1872, section 105*.
- 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.
- 14 *Evidence Act, section 113B*.
- 15 *Evidence Act, section 113A*.
- 16 *Evidence Act, section 114A*.

[s 78] Act done pursuant to the judgment or order of Court.—

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

47 See Hari Singh Gour, Penal Law of India, vol I, 11th Edn, 2002, pp 564-569. Alison, Principles of Criminal Law of Scotland, p 673.

The express command of a Magistrate or officer will exonerate an inferior officer or soldier unless the command be to do something plainly illegal or beyond his known duty.

48 *Benwari*, (1895) PR No. 11, p 38; *Vir Singh*, (1895) PR No. 22, p 59.

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

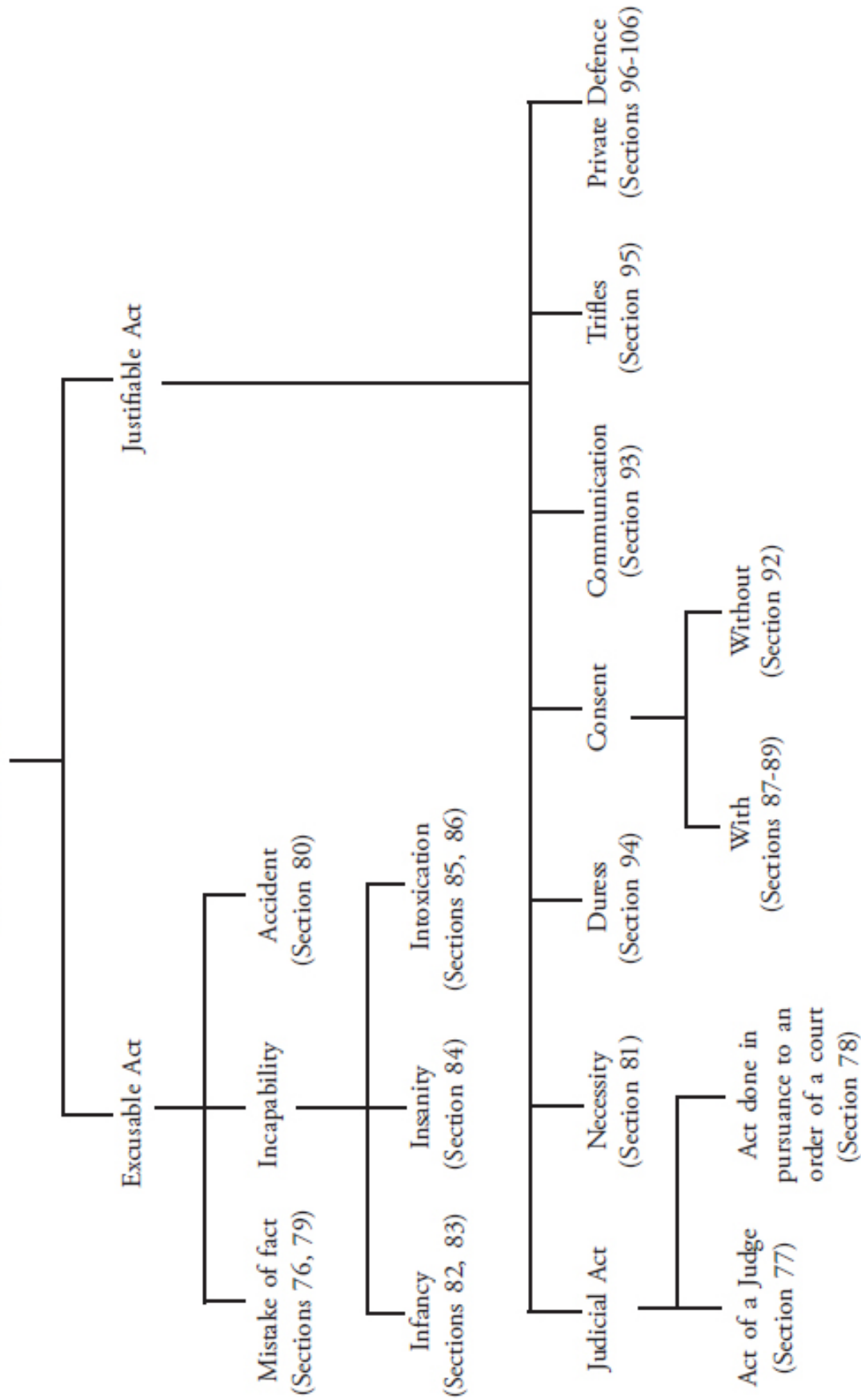
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

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

ILLUSTRATION

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

[s 79.1] Scope

Section 79 is complementary to section 76. In fact, section 79 should have been placed just after section 76 and numbered as section 77. Section 79 exempts a man from criminal liability in those cases where by reason of a mistake (or ignorance) of fact in good faith, and not by reason of a mistake of law, a man considers himself

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

justified by law to do an act in a particular way.⁴⁹ For example, as stated in the illustration appended to the section, A has committed no offence in arresting Z to bring him before the proper authorities, because A presumed in good faith that Z was committing murder; Thus, he thought on reasonable grounds that he was justified by law to arrest a murderer, though in fact, Z, was acting in self-defence and was not a murderer.

Chirangi: In *Chirangi v State*, 1952 Cr LJ 1212 ,⁵⁰ the appellant was given the benefit of *section 79 IPC* and acquitted of the charge of murdering his son, aged 12 years, under *section 302 IPC*. The accused on the day of occurrence took an axe and went with his son (deceased) to a nearby hillock, known as *Budra Mata* in order to gather *siadi* leaves and killed him, the appellant in a moment of delusion considered that his target was a tiger and not his son; and he accordingly assailed it with his axe.

The accused thought, by reason of a mistake of fact, that he was justified in destroying the deceased, whom he did not regard as a human being, but whom he thought was a dangerous animal. Had the appellant thought that the object of his attack was his son, he would have desisted forthwith. The court accordingly held that in the circumstances the accused was protected by the provisions of *section 79 of the Penal Code*.

Bonda Kui: In *Bonda Kui v Emperor*, AIR 1943 Pat 64 , a woman in the middle of the night saw a form, apparently human being dancing in a state of complete nudity with a broomstick tied on one side and a torn mat around the waist. The woman, taking the form to be that of an evil spirit or a thing which consumes human beings, removed her own clothes and with repeated blows from a hatchet felled the thing to the ground. In fact, it was the wife of her husband's brother whom she had killed. The conviction and sentence of the accused woman was set aside by the Patna High Court on the ground that she was fully protected under *section 79, IPC*, since she thought, by a mistake of fact, that she was justified in killing the deceased whom she did not consider to be a human being, but an evil spirit-ghost.

Waryam Singh: In *Waryam Singh v Emperor*, AIR 1926 Lah 554 , it was held that the accused who killed a man with several blows from a stick was not liable for murder, because he believed in good faith at the time of the attack that the object of his assault was not a living human being, but a ghost or some object other than a living human being and so he was protected under *section 79, IPC*.

Beckford: Likewise the Privy Council in *Beckford v R*, [\(1987\) 3 All ER 425](#) (431) : [\(1988\) AC 130](#) (145), held that if the defendant honestly believed the circumstances to be such as would, if true, justify his use of force to defend himself from attack and the force was no more than reasonable to resist the attack, he was entitled to be acquitted of murder, since the intent to act unlawfully would be negated by his belief, however mistaken or unreasonable.

[s 79.2] Good faith

Mistake in order to attract the attention of section 79 must be a *bona fide* mistake in good faith based on genuine grounds. Good faith requires due care, caution and attention. The question of good faith must be considered with reference to the position of the accused and the circumstances under which he acts. The law does not expect the same standard of care and attention from all persons regardless of the position they occupy.⁵¹ In fact, what is due care and attention depends on the position in which a man finds himself and varies in different cases.⁵²

Heien: In *Heien v North Carolina*, 135 S.Ct. 530 (15 December 2014), 8 (6-2) to 1, US Supreme Court held a reasonable mistake of law can justify a traffic stop (just as a reasonable mistake of fact can).

A sheriff's officer stopped Heine's car because only one of its brake lights was working. The stop led to a consent search that yielded cocaine. Surprisingly, however, the North Carolina Court of Appeals ruled that State law requires only one functional brake light ("a stop lamp"), and that the officer in fact had no probable cause to stop the car because there was no violation as a matter of law. But on further appeal, the North Carolina Supreme Court held that the officer's mistake of law had been "reasonable" (for example, because

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

another part of the NC Traffic Code requires that “all ... rear lamps” be working), and that a stop based on a reasonable mistake of law does not violate the Fourth Amendment.

Jaswantrao Manilal Akhaney: In *Jaswantrao Manilal Akhaney v State of Bombay*,⁵³ the Supreme Court rejected the accused’s plea of mistake of fact under section 79 of the Code since there was no genuine mistake as to his right as a managing director to dispose of the securities in the interest of his own bank. The appellant, the managing director of a bank, was charged under section 409, IPC (Criminal breach of trust by banker) for disposing of certain securities deposited with the bank, in contravention of the terms and conditions under which those securities were deposited with the bank.

It was held as incredulous that a man having the status of a managing director of a bank would not know that he had no power to dispose of securities which had been pledged to the bank to cover an overdraft account, when in fact the pledgers had taken no overdraft and owed no money to the bank.⁵⁴

[s 79.3] Distinction between section 76 and section 79

A careful perusal of sections 76 and 79 would reveal that under both sections a person claims exemption by reason of a mistake of fact from criminal liability against an act forbidden by law, nevertheless there is a fine distinction between the two sections as stated below:

1. Under section 76 a person acts under legal compulsion, while under section 79 he acts under a legal justification.

2. Section 76 grants exemption to a person from criminal liability when he believes himself bound by law to do a thing in a particular way although the true state of facts reveal his act to be an offence. For instance, if A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law, A has committed no offence [see illustration (a) to section 76].

Section 79 on the other hand, deals with cases wherein a person by reason of a mistake of fact feels himself to be justified by law in doing an act in a particular way. A seeing Z engaged in inflicting severe blow on B, seizes him and takes him to the police. Later it is shown that Z was acting only in self-defence and as such the seizure of Z by A was unlawful. However, A is protected under section 79 since he acted in good faith under a mistake of fact (see illustration to section 79).

3. Under section 76 a person acts because he believes he must act in a particular way. [Illustration (b) to section 76]; whereas under section 79 a person thinks he has justification for action and acts accordingly (see illustration to section 79).

¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” vide clause (2) to Article 361.

² See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 49 See Law Commission of India, 42nd Report (1971), pp 82-85.
- 50 See *State of Orissa v Ram Bahadur Thapa*, AIR 1960 Ori 161 [[LNIND 1959 ORI 44](#)] . The accused, a Nepali servant who attacked the deceased and killed him believing that he was attacking ghosts and not human beings, was acquitted, giving him the benefit of mistake of fact under section 79, *IPC*.
- 51 *Bhawoo Jiwaji v Mulji Dayal*, 1888 ILR 12 Bom 377.

[s 79] Act done by a person justified, or by mistake of fact believing himself justified, by law.—

- 52** 135 S.Ct. 530 (15 December 2014), 8 (6-2) to 1 (**Roberts**; *Kagan* concurring with Ginsburg; *Sotomayor* dissenting), *affirming* 749 S.E.2d 278 (N.C. 2013). IVth Amendment to US *Constitution*. The right of the people to be secure in their persons, houses property and effects, against unreasonable searches and seizures....”
- 53** AIR 1956 SC 575 [[LNIND 1956 SC 40](#)] : 1956 SCR 483 [[LNIND 1956 SC 40](#)] : 1956 SCJ 613 : 1956 (26) CC 340 : 1956 Cr LJ 1116 ; *Keso Sahu v Saligram Shah*, 1977 Cr LJ 1725 (1728) (Ori). Accused had helped a policeman, who had power to stop the buffalo carts of the complainant on the suspicion that the rice was being smuggled in the carts (which was later found to be incorrect). Held, help given to the policeman by the accused on his request was in good faith and belief that the smuggling was being committed, and so the act falls within *section 79, IPC*.
- 54** *Po Mye v The King*, AIR 1940 Rang 129 (132).

[s 80] Accident in doing a lawful act.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 80] Accident in doing a lawful act.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

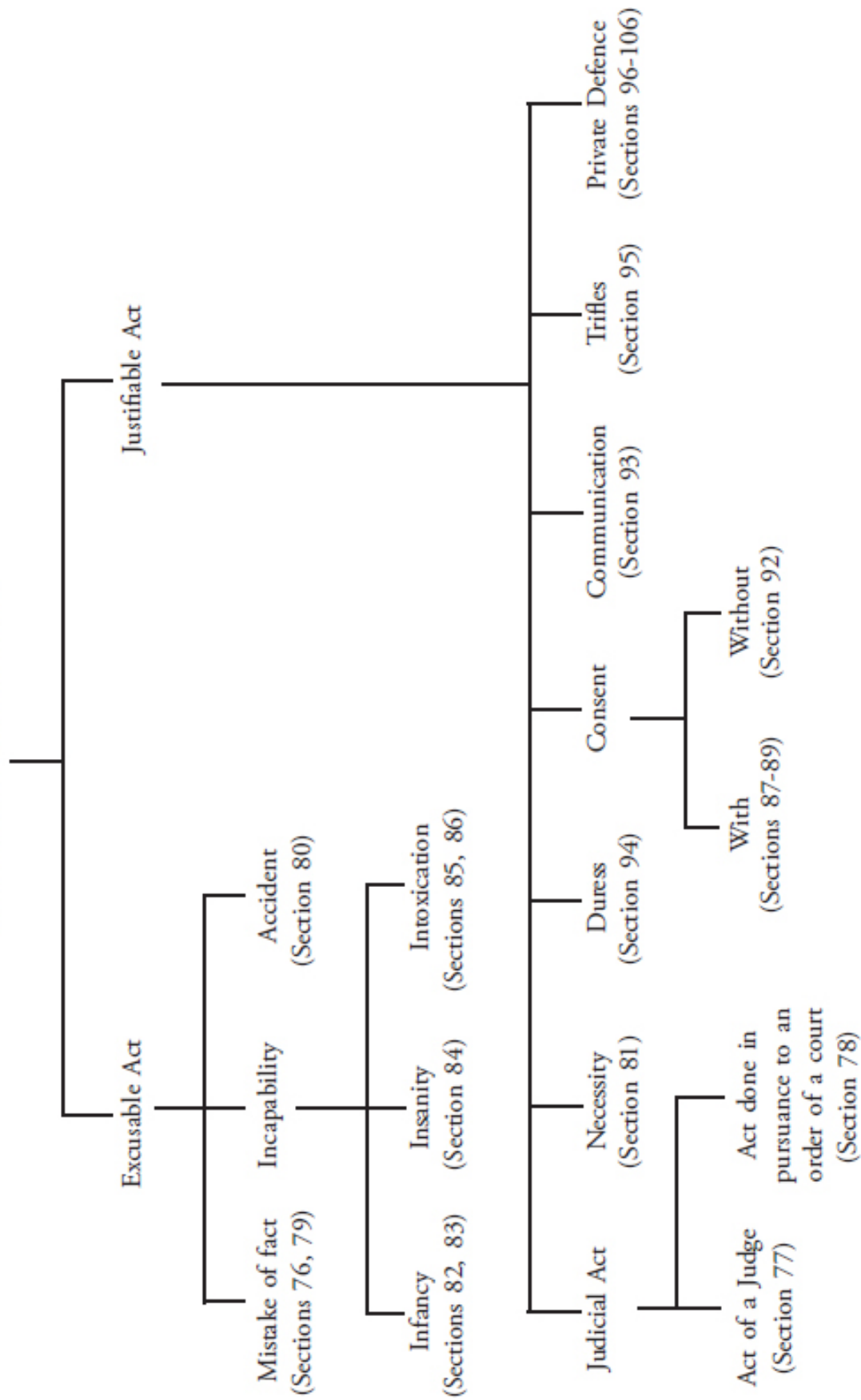
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 80] Accident in doing a lawful act.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 80] Accident in doing a lawful act.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 80] Accident in doing a lawful act.—

Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

ILLUSTRATION

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

[s 80.1] Principle

Section 80 gives statutory recognition to the common law doctrine of *mens rea*, that there can be no crime without a criminal intention.⁵⁵

Section 80 therefore refutes criminal liability in respect of accidental acts. A man is not criminally responsible for unintended and unknown consequences of his lawful acts performed in a lawful manner, by a lawful means,

[s 80] Accident in doing a lawful act.—

with proper care and caution. That is to say, an act is not criminal, if it is done with no criminal intention or knowledge, merely by reason of any harm which it might cause accidentally to any person.

To avail of the benefit of exemption from criminal liability under this section it must be proved that the act was done by: (1) accident or misfortune, (2) without any criminal intention or knowledge, (3) in a lawful manner, (4) by lawful means, and (5) with proper care and caution.

[s 80.2] Accident and misfortune

An accident in ordinary parlance means an event that occurs without one's knowledge and beyond expectation. To quote Stephen,

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.⁵⁶

An accident is an incident that takes place out of the ordinary course of events, which no man of ordinary prudence could anticipate and provide measures to check it. Likewise, a misfortune is an accident with harmful consequences resulting in injury to another. For instance, as appended in the illustration to *section 80, IPC*, while A is at work with a hatchet, the head flies off and kills a man standing nearby; the act of A which resulted in the man's death was solely an accidental one for which A cannot be held liable in law. A's act was lawful, was done in a lawful manner, by lawful means with proper care and caution and with no ill-will against the deceased.

Similarly, if A, a workman while throwing sand from a roof top, gives proper warning, but B, a passer-by is nevertheless killed, the act is accidental one for which A is not liable. But if A takes up a gun, not knowing whether it is loaded, points it in sport at B, pulls the trigger, and B is shot dead, B's death is not accidental since there was want of proper care and caution on the part of A. Accordingly A will be liable for causing B's death by negligence under *section 304A, IPC*. However, if A had reason to believe that the gun was not loaded, B's death would have been accidental.

But if the act is illegal, it will not afford a ground for exemption from criminal liability. A intending to kill B, mixes poison in B's food but C, his cousin, takes the food and dies. Here C's death is an accidental act in the sense of being an act of misfortune. However, A is not exempted from killing C despite the fact that he never intended to kill him, since the act of killing a human being is an illegal act; A is as much liable for killing C as he would have been had B taken the poison, by invoking the principle of transfer of malice.⁵⁷

[s 80.3] Lawful act in a lawful manner

Sometimes difficulty arises in interpreting the clause "lawful act in a lawful manner by lawful means" for fixing criminal liability with respect to accidental acts. For instance, if A, while shooting a jackal in the jungle with an unlicensed gun, by accident kills a man who was hiding behind a bush, he would not be liable for murder. The fact that A used an unlicensed gun would not preclude him from claiming the protection of section 80, because the circumstances under which the act was done were such as to negate the existence of *mens rea*.⁵⁸

It is interesting to note that the framers of the *Penal Code* have gone to the extent of holding that, even if an accident takes place while performing an unlawful act, protection of section 80 would be available if there is no causal connection between the resultant harm and the act in question. In support of this contention, Lord Macaulay has cited the following two illustrations in the Draft *Penal Code*:

[s 80] Accident in doing a lawful act.—

1. A pilot is navigating in the Hooghly with the utmost care and skill. He directs the vessel against a sand bank which has recently been formed, and of which the existence was altogether unknown till the disaster. Several of his passengers are consequently drowned. To hang the pilot... as a murderer on account of the misfortune would be universally allowed to be an act of atrocious injustice.
2. Hundreds of persons in big cities are in the habit of picking pockets... They know that they are guilty of a grave offence. But it has never occurred to one of them, nor would it occur to any rational man, that they are guilty of an offence which endangers life. Unhappily, one of these hundred pick-pockets attempts to take the purse of a gentleman who has a loaded pistol in his pocket.

The thief touches the trigger, the pistol goes off, the gentleman is shot dead. To treat the case of this pick-pocket different from the numerous pick-pockets who steal under exactly similar circumstances with exactly the same intention, with no less risk of causing death, with no greater care to avoid causing death—to send them to the house of correction as thieves, and him to the gallows as a murderer appears to us an unreasonable course.⁵⁹

-
- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
 - 2 *See Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
 - 3 *See IPC, section 6*.
 - 4 *See IPC, section 40*.
 - 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
 - 6 *See Chart* at p 97.
 - 7 *The Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
 - 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
 - 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
 - 10 *The Indian Evidence Act, 1872, section 105*.
 - 11 *The Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.

[s 80] Accident in doing a lawful act.—

- 12** See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13** *Evidence Act, section 111A*.
- 14** *Evidence Act, section 113B*.
- 15** *Evidence Act, section 113A*.
- 16** *Evidence Act, section 114A*.
- 17** *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18** See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 55** See KD Gaur, *Criminal Law: Cases and Materials*, (7th Edn, 2013) section 81 for discussion on *mens rea* and cases.
- 56** Stephen's Digest of Criminal Law, 9th Edn, (1950), Article 316.
- 57** See *IPC, section 301*.
- 58** *State v Rangaswami*, AIR 1952 Ngp 268 .
- 59** Draft *Penal Code*, Note M, Reprints, pp 148-49.

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

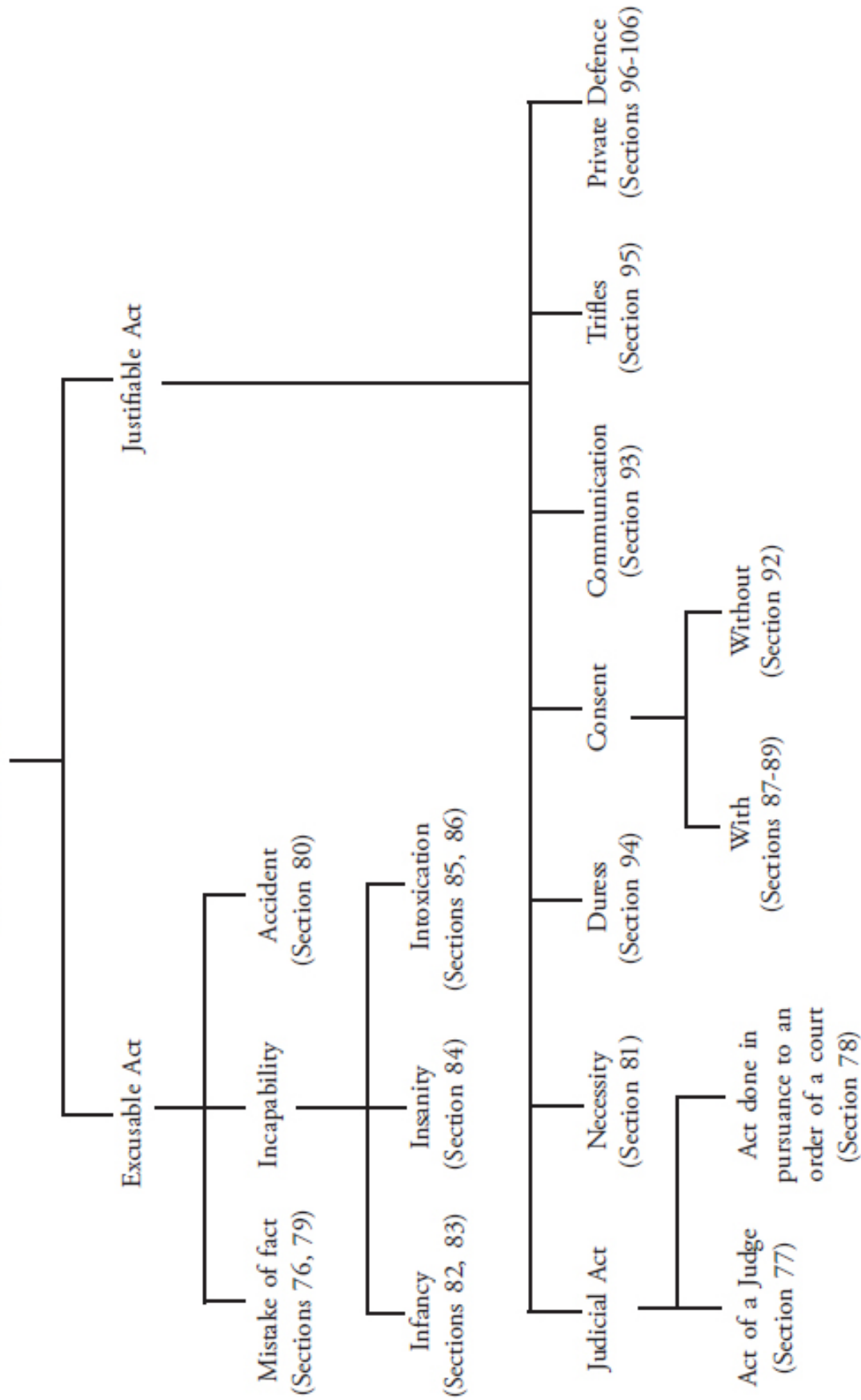
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

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

ILLUSTRATIONS

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

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

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

[s 81.1] Principle

Section 81 of the Code grants immunity to a man from criminal charge with respect to acts committed under compelling circumstances forced by necessity. For instance, as stated by eminent jurist S. Pollard as long ago as 1550 in the case of *Ranigar v Fogossa*:

In every law there are some things, which when they happen a man may break the words of the law, and yet not break the law itself and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter to it; breaking the words of the law is not breaking the law, so long as the intent of the law is not broken. It is a common proverb that *Quod necessitas non habet leegem*, necessity knows no law.⁶⁰

The justification for exemption from criminal action on the ground of necessity has been well summarised by Lord Mansfield in the celebrated case of *George Stratton*, (1779) in the following words:

Whenever necessity forces a man to do an illegal act, forces him to do it, it justifies him, because no man can be guilty of a crime without the will and intention of his mind. It must be involuntary ...A man who is absolutely by natural necessity forced, his will does not go along with the act.⁶¹

Thus, an act which would otherwise be a crime may in some cases be excused if the person accused can show that it was only done in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others, whom he was bound to protect inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.⁶²

[s 81.2] Extent and scope of the defence

The defence of necessity finds place in the Penal laws of almost all the countries influenced by the common law, in Queensland, Western Australia (section 25), certain European Penal Codes, as that of Germany (section 54) as well as in the Soviet Union and the USA.

However, the defence does not give blanket immunity from liability in all circumstances. It is available only in exceptional cases as stated in section 81 of the Code, namely:

- (i) where the act was done in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have caused irreparable damage;
- (ii) that no more harm was done than was necessary for that purpose; and

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

- (iii) that the evil inflicted was not disproportionate to the evil avoided.

Bentham categorises three situations in which the defence of necessity could be made available in case of a *criminal act*, viz.,

- (i) the harm was done to avert a greater evil,
- (ii) other means were less effective, and
- (iii) that the means employed were more efficient.

[s 81.3] Ingredients

Section 81 gives legal protection to the doctrine of salvage, i.e., self-preservation (rescue of property and things from damage by wrecking, fire, etc.) common to all nations. It sanctions and justifies the doing of a lesser evil in order to avert a greater evil.⁶³ The two *Illustrations* appended to the section explain this proposition.

To attract the provisions of this section the following conditions must be satisfied, viz.,

- (i) the act must have been done without any criminal intention to cause harm;⁶⁴
- (ii) the act must be done in good faith for the purpose of preventing or avoiding other harm to person or property; and
- (iii) the harm must have been done in order to avert a greater harm.

The explanation to the section makes it clear that it is a question of fact to be decided in accordance with each case as to whether the harm to be prevented or avoided was of such a nature as to justify or excuse taking the risk of the act.

[s 81.4] Preventing harm to person or property

The harm caused need not be necessarily less than the harm averted though this would be material to ascertain whether the act was done in good faith or not. Two *Illustrations* appended to the section explain the law on this point very nicely. There are two important areas of conflict on the application of doctrine of salvage (necessity) which need a special mention. These are:

- (1) necessity and homicide, and
- (2) necessity and larceny.

[s 81.5] Necessity and homicide

The necessity which justifies homicide is of two kinds:

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

- (i) The necessity which is of a private nature;
- (ii) The necessity which relates to the public justice and safety.

The former is that necessity which obliges a man to his own defence and safeguard. In other words, homicide is justifiable only in self-defence (*sections 96-106, IPC*) and when it is necessary for the good of the society.⁶⁵

The same principle cannot be extended to where a person puts other's life in jeopardy. Such a case is assumed in *Illustration (a)* of section 81. A captain runs down a boat with two passengers, imperiling their lives, for the sake of saving several passengers on another boat. Such a case presents some analogy with the case supposed by Lord Bacon of two ship wrecked persons clinging to a plank not large enough to support both, so one pushes the other off to save himself and consequently the other drowns.⁶⁶

Blackstone is of the view that this is not a crime on the ground of self-defence "since both remaining on the same weak plank is a mutual though innocent attempt upon and an endangering of each other's life".⁶⁷

Both in this case as well as in the case of the captain of the vessel, there was no direct bodily harm, but harm nevertheless, which jeopardised life. Harm to this extent is in extreme cases evidently justifiable. Holmes observes:

If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can.

It must be observed that thrusting the new-comer away from the plank does not directly kill him; he is left to find another plank if possible. If according to Holmes' supposition, it is the new-comer who succeeds in shaking off the first occupier and capturing the plank, the new-comer likewise, according to Bacon, is free from criminal responsibility. The compulsion of circumstances excuses him in taking the plank by force from one already in possession of it.

A's killing B to save not only himself but also C is justified. The doctrine of necessity applies only where the value preserved is greater than that destroyed in breaking the letter of the law. Where it is merely a case of one life against another life the doctrine of necessity must generally be silent, because the two lives must be accounted equal in the eye of the law, and there is nothing to choose between them.

However as an exception: mother's life to be saved over a child in the womb.⁶⁸

The position is different where the killing results in a net saving of life. Here killing should be regarded as not merely excusing from punishment but as legally justifiable. For instance, a captain is justified in choosing who is to enter first in the lifeboat and is not guilty of killing of those who could not be rescued and left in the water to die. When the boat is in the sea and full to capacity, the commander can order that those persons struggling to get aboard also be beaten off, for otherwise all those in the lifeboat will be lost.

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

However, as discussed below necessity does not justify:

- (i) Indiscriminate throwing of passengers overboard to save the sinking vessel (*Holmes* 1897); and
- (ii) Deliberate killing of an unoffending and unresisting man to quench hunger (*Dudley and Stephens*, 1884).

Holmes: In *US v Holmes*, 26 Fed Cas 360,⁶⁹ (1892), Holmes was a member of the crew who, under the order of the mate, threw overboard 16 male passengers. Holmes was charged with manslaughter (culpable homicide) but not with murder, as the act was illegal, but only for two reasons:

1. Sailors who were not necessary for navigation ought to have been sacrificed before the passengers.
2. The choice of these sailors should have been determined by lot, as there was sufficient time to do so.

Dudley and Stephens: In *Queen v Dudley and Stephens*, (1884) 14 QBD 273,⁷⁰ the well-known *Mignonets'* case it was held that the shipwrecked sailors who killed the cabin boy for food were guilty of murder, notwithstanding the finding of the jury that if the men had not fed upon the body of the boy, they probably would not have survived to be rescued and that the boy, being in a much weaker condition, was likely to have died before them.

The court said that the deliberate killing of man howsoever great the temptation might be killing cannot be justified by necessity. Though the law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequences; and such divorce would follow, if the temptation to murder were to be held by law an absolute defence to it.

The court on the question of conservation of a man's own life in extreme cases of hardships laid down following principles, viz.,

1. Self-preservation is not an absolute necessity.
2. No man has a right to take other's life to preserve his own life, unless it is in self-defence i.e., private defence (*sections 96 to 106, IPC*).
3. There is no necessity that justifies private homicide, i.e., to conserve one's life, as distinguished from public necessity or even necessity when it is a justification.

[s 81.6] Necessity and larceny (theft)

Since the defence of necessity involves a collusion of interests and a consequential judgment of value, it is capable of raising problems of great ethical and social difficulty. For example, a conflict may arise between the values of life and property. A thorny question on this issue is that of stealing to avert hunger. For example, a starving man will never hesitate to steal, if that is the only way of preserving his life. How is the law to view this?

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

Bacon declared that stealing of food to satisfy hunger was not larceny (theft). However, Hobbes puts the rule more cautiously and says that a man may unlawfully take food in famine, if he cannot obtain it for money or from charity. He further qualifies that this excuse is not available when poverty is due to one's own conduct.

Hale denies this excuse and along with Blackstone formulates the rule that "economic necessity is no defence of theft and larceny".

Similarly, the framers of the Code rejected the defence of theft on the ground that idleness would be promoted by law, if anyone having gone without food for 36 hours could claim the benefit of necessity as a defence to the charge of the crime of stealing.⁷¹

The law must set its face against anarchy, but it can morally do so only on the condition of itself making provision for the relief of extreme need and that the necessity of appeasing hunger is a defence in exceptional cases. For instance, *D*, a miner trapped by a fall of rock while waiting to be dug out, eats the rations left behind by other members of his party, as his only means of survival. There is no reason to doubt that necessity would be a defence. It is, in fact, a settled law that should the provisions for a ship's company fail, the master may under maritime custom break open the private chests of the mariners or passengers and make distribution of any provisions found therein for the preservation of the Company.⁷²

Similarly, if *D*'s house is on fire and he takes *P*'s fire extinguisher and uses the chemical inside to extinguish the fire, there would be no reason for regarding *D*'s act as theft unless *P*'s house was itself in danger from the fire and *D*'s act unreasonably increased the danger to *P*'s house by depriving *P* of his right to use the fire extinguisher to save his property.

[s 81.7] Encroachment of Private Property to Preserve Life in Case of Imminent Danger is a Necessity

Loughman: In an Australian case *R v Loughman*, [\(1939\) 1 KB 687](#) : (1938) 2 All ER 615 , the Court held that there is no general rule, giving rise to a defence of necessity. But in case of great and imminent danger, in order to preserve life the law permits an encroachment on private property.⁷³

The applicant was tried and convicted on a charge of escaping from prison, contrary to section 132(1)⁷⁴ of the Community Welfare Services Act, 1970 along with three other prisoners. The applicant relied on the defence of necessity. His case was that he had been insulted and threatened, and that on the day of his escape he had been told that he would be killed that night. He had heard rumours of the escape, and joined in it without prior arrangement in order to avoid the threatened attack, but would not have done so had he not thought that he would be killed.

The trial judge ruled that since there was no violence of necessity the accused is convicted. While, dismissing the appeal the Supreme Court of Victoria spelled out the following guidelines to justify necessity as a ground for exemption from criminal liability:

- (i) the law recognises a defence of necessity.
- (ii) the defence of necessity involves the following elements:
 - (a) The *criminal act* must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect.

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

- (b) The accused must honestly believe, on reasonable grounds, that he was placed in a situation of imminent peril.
- (c) The acts done to avoid the peril must not be out of proportion to the peril to be avoided.
- (d) The harm to be justified must have been committed under the pressure either of physical forces or exerted by some human agency so that an urgent situation of imminent peril has been created.
- (e) The accused must have acted with the intention of avoiding greater harm or so as to have made possible the preservation of at least an equal value.
- (f) There was no alternative open to the accused other than that adopted by him, to avoid the greater harm or to conserve the value.
- (g) The doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse. The accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril.
- (h) The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is:
 - (i) Would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?
 - (ii) The well-known defence of self-defence, if not capable of being brought within the general description of a defence of necessity, is at least analogous to it, but in comparing the kind of necessity which requires self-defence with the necessity which requires escape from prison there is of course, an essential difference is that in the former the accused will always or almost always attack the person threatening him, whereas in a case where a prisoner pleads necessity as a justification for escaping, the *criminal act* which he commits is not directed to the person making the threat.

1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.

2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).

3 See *IPC, section 6*.

4 See *IPC, section 40*.

5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.

6 See Chart at p 97.

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 60 See KD Gaur, *Criminal Law: Cases and Materials*, (8th Edn, 2015), section 81; *Moore v Hussey*, (1609) Hob 93 (96). "All laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity either of compulsion or inconvenience."
- 61 (1779) 21 St Tr 1046, 1223; see Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, (1997) Vol 1, p 261.
- 62 See Stephen's Digest of Criminal Law, (9th Edn, 1950) *Article 316*; Nigam RC, *Law of Crimes in India*, Vol I, (1965), pp 328-340.
- 63 Gour, *Penal Law of India*, (11th Edn, 2000), pp 599 to 605.
- 64 See commentary under section 39, *IPC* for provisions relating to *mens rea* (guilty mind).
- 65 *Queen v Dudley and Stephens*, (1884) 14 QBD 273 .
- 66 Bacon's Elements C. 5 Hawk, PC 73.

[s 81] Act likely to cause harm, but done without criminal intent, and to prevent other harm.—

67 4 Black, Commentaries, p 186.

68 *AG of Ireland v X*, [\(1992\) 1 IR 1](#) ; *Rex v Bourne*, [\(1938\) 3 All ER 615](#) .

69 See Dix, GE and Sharlot E Michael, *Criminal Law, Cases and Materials*, 3rd Edn, (1987), pp 718-720 for text of Holmes case.

70 See KD Gaur, *Criminal Law: Cases and Materials*, (7th Edn, 2013), pp 226-227 for text of the case.

71 Draft *Penal Code*, Note B, pp 111, 112, 113: The authors of the Code said: ...Nothing is more usual than for thieves to urge distress and hunger as excuses of their thefts. It is certain, indeed that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and that the disgrace which that punishment brings with it to the mass of mankind. (Nonetheless) we think it in the... highest degree pernicious (destructive effect) to enact that no act done under the fear even of instant death should be an offence. 'It would be a *fortiori* absurd' to enact that "no act under the fear of any other evil should be an offence.'

72 Hale, PC 478.

73 (2005) EWCA Crimes 1415 : [\(2006\) 1 All ER 988](#) (CA). Court of Appeal, Criminal Division, Mance LJ, Newman and Rulford JJ.

74 Draft *Penal Code*, Note B, pp 111, 112, 113: The authors of the Code said: ...Nothing is more usual than for thieves to urge distress and hunger as excuses of their thefts. It is certain, indeed that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and that the disgrace which that punishment brings with it to the mass of mankind. (Nonetheless) we think it in the... highest degree pernicious (destructive effect) to enact that no act done under the fear even of instant death should be an offence. 'It would be a *fortiori* absurd' to enact that "no act under the fear of any other evil should be an offence.'

[s 82] Act of a child under seven years of age.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 82] Act of a child under seven years of age.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

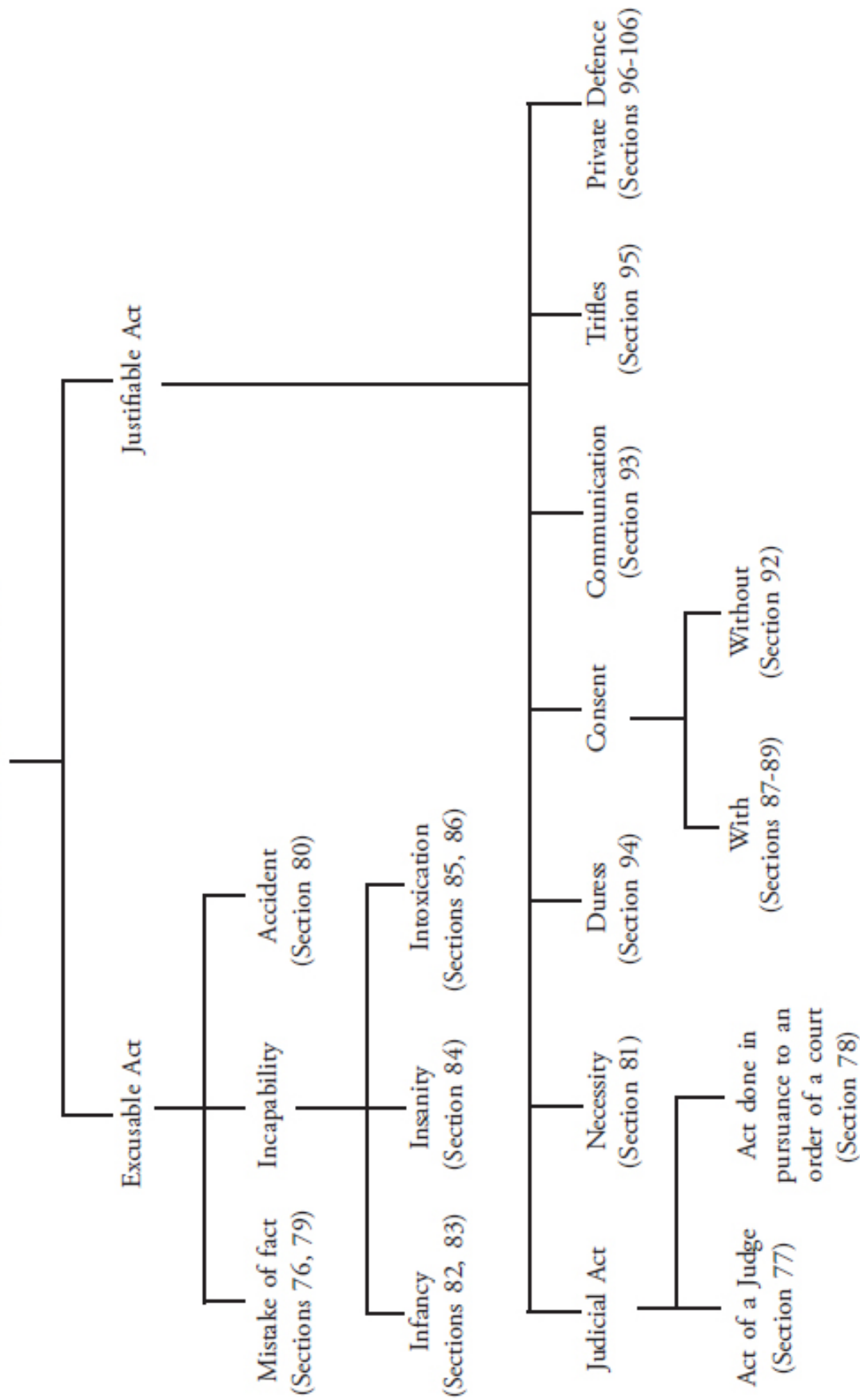
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 82] Act of a child under seven years of age.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 82] Act of a child under seven years of age.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 82] Act of a child under seven years of age.—

Nothing is an offence which is done by a child under seven years of age.

[s 82.1] Principle

After the notion was accepted that moral delinquency was a prerequisite of criminal guilt, it was felt that liability could not be imputed to very young children. But there was much uncertainty as regards the age at which a child should be held fully responsible for criminal acts.⁷⁵ Initially the age of twelve was set as the age for criminal responsibility.⁷⁶ Later, the law became more severe and the age for the termination of immunity was fixed at seven years.⁷⁷

Blackstone has explained the reason for exempting infants from criminal liability in the following words:

Infancy is a defect of the understanding, and infants under the age of discretion ought not to be punished by any criminal prosecution whatsoever.⁷⁸

[s 82] Act of a child under seven years of age.—

However, there appears to be no absolute rule as regards the age of discretion. It differs from country to country.⁷⁹ For instance, in England, Malaysia and Singapore the age of complete immunity is 10 years, and for partial 14 years; in the United States the age of absolute incapacity varies from state-to-state between 8 years and 12 years; in Canada a child under 7 years is completely exempt, and between 7 and 14 years liability is dependent on the maturity of the child; in Australia, Queensland, Western Australia and Tasmania the minimum age for immunity is 7 years; while in New South Wales, Victoria and South Australia 8 years; in Germany, Austria, Norway and Czechoslovakia the minimum age is 14 years; while in Denmark and Sweden it is 15 years; in Argentina a minor under 16 years is exempted from criminal liability and in France a child below 13 years of age is not punishable; in Pakistan, Bangladesh, Myanmar, Thailand, Sri Lanka, Iran, Syria and Lebanon the minimum age of liability is 7 years, while in the Philippines 9 years, in Turkey and Iraq 11 years and in Japan 14 years.⁸⁰

[s 82.2] Scope of immunity

Sections 82 and 83 of the *Penal Code* grant immunity to an infant below a particular age from criminal responsibility. Section 82 totally absolves a child under 7 years of age from criminal responsibility, whereas section 83 grants partial immunity against prosecution and punishment for a child above 7 and under 12 years of age.⁸¹ This rule is based on the general proposition that an infant below a certain age is incapable of distinguishing between right and wrong and so no criminal responsibility should be fastened in law for his deeds.

A careful perusal of the provisions under sections 82 and 83, *IPC* reveal an interesting lacuna in the drafting of the said provisions. For instance, while section 82 confers immunity on a child under seven years and section 83 to one above 7 years, no provision has been made in regard to an infant of 7 years of age. Perhaps, it would be appropriate to resolve this ambiguity by amending section 82 of the *Penal Code* by replacing the word “under” with “up to” after “a child” and before “seven years”. After the proposed amendment section 82 would read as follows:

“Nothing is an offence which is done by a child up to seven years of age.”

Until such an amendment is effected the benefit of doubt should be resolved in favour of an infant up to 7 years under section 82 of the *Penal Code*.⁸²

[s 82.3] Absolute immunity

Section 82 of the Code completely makes an infant below 7 years of age immune from criminal liability, since a child below this age is considered *doli incapax* in law. That is to say, a child under such an age cannot form the necessary intention to constitute a crime since he possesses no adequate discretion or understanding at this age for his deeds. Thus, if a child below 7 years of age is charged for committing a crime, the fact that he was at that time below 7 years of age is *ipso facto* an answer to the prosecution. The scope of the immunity granted under this section is wide enough to exempt a child not only from prosecution for offences under the *Penal Code*, but also from offences under the special as well as local laws, as explained under section 40 of the Code.

[s 82.4] Child Protection Scheme – Berkshire Community Health Trust

In *Berkshire Community Health NHS Trust*⁸³ it was held to ensure public confidence in the Child Protection Scheme it is necessary to strike a proper balance between the need to safeguard a child from parental abuse and the protection to be given to a parent from unnecessary interference in his family life.

Healthcare professionals and social workers mistakenly diagnosing and investigating child abuse by parents.

[s 82] Act of a child under seven years of age.—

Parents claiming damages for resulting psychiatric injury. Duty of care owed by healthcare professionals or social workers to parents. Yes. But no damages payable since act was done in good faith for benefit of child.

In each of three cases the parents of young children brought actions for negligence against healthcare authorities and, in one case a local authority, claiming damages for alleged psychiatric harm caused as a result of unfounded allegations made by healthcare and child care professionals, that the parents had abused their children. In each case the judge determined as a preliminary issue, that no duty of care was owed to the parents by any of the defendants on the ground that it was not fair, just and reasonable to impose such a duty.

The actions were dismissed and on the parents' appeals, which were heard together, the Court of Appeal affirmed the judges' rulings.

On appeal by the parents, House of Lords⁸⁴ held, dismissing the appeal (Lord Bingham of Cornhill dissenting), that public confidence in the child protection scheme could only be maintained if a proper balance was struck between the need to safeguard a child from parental abuse and the protection to be given to a parent from unnecessary interference in his family life; that the child, not the parent, was the doctor's patient in whose best interests he was obliged to act and although the interests of the parent and the child were normally coincident they were not so where the possibility of abuse arose; that where the doctor's suspicions were aroused he had to be able to act single-mindedly in the child's interests without regard to the possibility of a claim by the parent; that, given the seriousness of child abuse as a social problem, healthcare and other child care professionals should not be subject to conflicting duties when deciding whether a child might have been abused and what further steps should be taken; that potential disruption to the suspected parent's family life did not justify according him a higher level of protection than other suspects of crime, that the investigations should be conducted in good faith; and that, in the absence of sufficient proximity, it was, accordingly, not fair, just and reasonable that the common law duty of care claimed by the parents should be imposed.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 *See Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 *See IPC, section 6*.
- 4 *See IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 *See Chart* at p 97.
- 7 *The Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.

[s 82] Act of a child under seven years of age.—

- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 75 See Kean, The History of the Criminal Liability of Children, (1937) 53 LQR 364; Williams, GL, The Criminal Responsibility of Children, (1954) CLR 493 .
- 76 Kenny's Outlines of Criminal Law, (1966), 17th Edn, pp 78-79.
- 77 1 Hale, PC 27, 28.
- 78 Commentaries, vol IV, pp 20, 22.
- 79 See RC Nigam, Law of Crimes in India, vol I, p 351; Bardick, Law of Crimes, (1946), vol 1, pp 906-907.
- 80 See Law Commission of India, 42nd Report, (1971), pp 87-89.
- 81 Full criminal responsibility commences after one has attained the age of 12 years, though civil liability commences only after one has completed 18 years.
- 82 Gaur, Penal Law of India, (11th Edn, vol 1, 2000), pp 610-613, pp 594-597.

[s 82] Act of a child under seven years of age.—

- 83** *D v East Berkshire Community Health NHS Trust, MAK v Dewsbury Healthcare NHS Trust, RK v Oldham NHS Trust, (2005) UKHL 23 .*
- 84** Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn, Lord Drown of Eaton-under-Heywood delivered the judgment.

End of Document

[s 83] Act of a child above seven and under twelve of immature understanding.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER IV GENERAL EXCEPTIONS

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 83] Act of a child above seven and under twelve of immature understanding.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

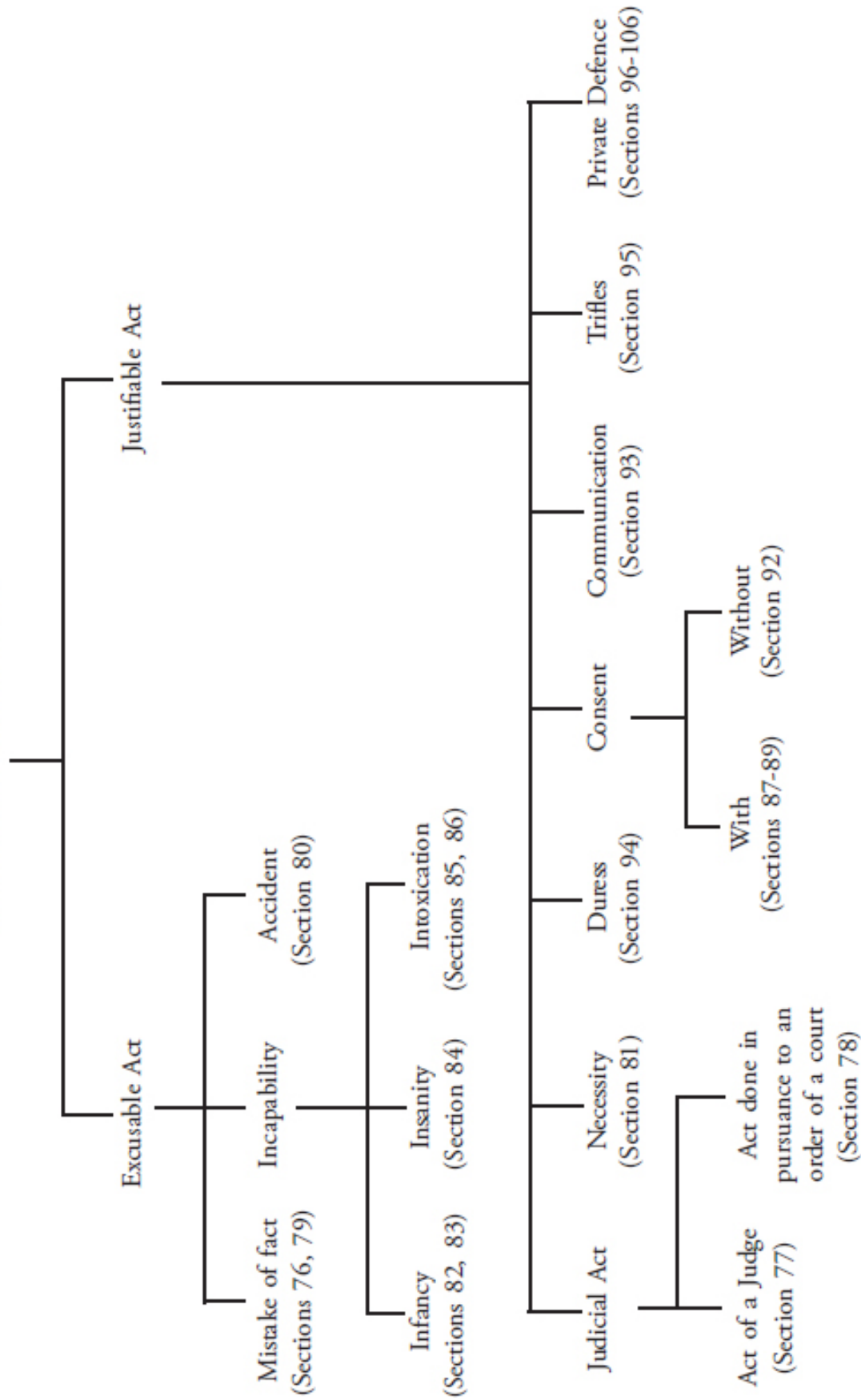
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 83] Act of a child above seven and under twelve of immature understanding.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 83] Act of a child above seven and under twelve of immature understanding.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 83] Act of a child above seven and under twelve of immature understanding.—

Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

[s 83.1] Qualified immunity to a child between age of 7 and 12 years

Section 83 provides qualified immunity to a child above seven years and under twelve years of age. In other words, if it shows that a child within the age group of 7 to 12 years has not attained the requisite degree of understanding and maturity to judge the nature and consequences of his conduct, he is exempted from criminal responsibility. The presumption of innocence of a child is based on the principle that “the younger the child in age, the lesser the probability of being corrupt”. This is to say, malice makes up for age, i.e., *malitia supplet aetatem*. Hence as age advances the maxim loses force. In the absence of such proof a child above 7 years and under 12 years of age is as much liable for his deeds as an adult criminal. The maturity of his understanding can be inferred from the nature of the act and his subsequent conduct and other allied factors, such as his behaviour, conduct and appearance in court.

[s 83] Act of a child above seven and under twelve of immature understanding.—

For instance, if a child aged nine years picks up a necklace valued at Rs 100 lying on a table in his friend's house and immediately sells it for Rs 20 and misappropriates the money, these acts show that he was sufficiently mature to understand the nature and consequence of his deed of theft. Hence, he would not be protected under this section. His deed would constitute theft within the meaning of section 378 of the Code. Under the English law a child between the age of 10 and 14 years as against 7 to 12 years under Indian Law enjoys the privilege of qualified immunity. The presumption may be rebutted by evidence to the contrary.

Hiralal Mallick: In *Hiralal Mallick v State of Bihar*,⁸⁵ the Supreme Court held that a child below 7 years is completely free of any criminal responsibility but a child between 7 and 12 years of age is qualified to avail the defence of *doli incapax*, if it is proved that he has not attained sufficient maturity of understanding to judge the nature and consequences of his act. This presumption may be rebutted by evidence of “mischievous discretion, i.e., knowledge that what was done was morally wrong”.⁸⁶

The appellant aged 12 years along with his two elder brothers participated in a concerted action and used a sharp weapon, a sword on the neck of the deceased to avenge and ran like others. No evidence was led about the youth's feeble understanding of his action and hence the defence was not allowed and accused was held liable for the offence.

Ulla: In *Ulla Mahapatra*,⁸⁷ is a boy of about 12 years of age. He has been convicted of an offence under section 302, *Penal Code* for causing the death of a Dandasi boy named Ranka Naik by a Kathi (knife) and has been sentenced to transportation for life. (Life imprisonment).

Deceased died as a result of a blow given by Appellant with a kathi. When appellant picked up his knife and advanced towards deceased with a threatening gesture, saying that he would cut him to bite, and did actually cut him, his entire action could only lead to one inference, that he does what he intended to do and that he knew all time that a blow inflicted with a kathi would effectuate his intention—Sentence reduced as Appellant shall be sent to reformatory school for five years considering his age.

Marimuthu: On the other hand, in *Marimuthu*⁸⁸ a girl aged 10 years who picked up a silver button and gave it to her mother was not held liable for theft. It was held that these factors were not sufficient to show maturity on her part to understand the nature of her act.

[s 83.2] Presumption as to Age between Ten and Fourteen is Rebuttable under Common Law

Gorrie: It was held in *R v Gorrie*, (1909) that at common law a child aged between 10 and 14 is rebuttably presumed incapable of committing an offence. This presumption is rebutted if the prosecution proves that the child had a mischievous discretion.

Gorrie, aged 13 years, and three other schoolboys were playing near their homes. Gorrie had a penknife, with which he was cutting a piece of wood. Something was said in fun about Germans, and Gorrie chased one of the boys. The penknife, which Gorrie happened to have opened in his hand at the time, occasioned a trifling wound in the boy's buttock. The boy did not report the wound, consequently died later of septic poisoning. Gorrie was charged with manslaughter (culpable homicide).

In the case of persons under 14 years of age, the law presumed that they were not criminally responsible. They were not supposed to have that discretion which makes them criminally responsible. But in any particular case, if the prosecution could show that although the accused was under 14 years of age, the act was done with what was called mischievous discretion, then they could rebut the presumption that the child was not responsible. If it was an intentional stab, (move), it would be manslaughter.

Since the boy was under 14, the law presumed that he was not responsible criminally, unless prosecution gives

[s 83] Act of a child above seven and under twelve of immature understanding.—

very clear and complete evidence of what was called mischievous discretion; that meant that they must satisfy that when the boy did this he knew that he was doing what wrong – not merely what was wrong, but what was gravely wrong, seriously wrong. Since there was no evidence that this boy when, as alleged, he jabbed the other with the knife in this horse-play, had any consciousness that he was doing that which was gravely wrong, he is not guilty.

Runeckles: Similarly, in *R v Runeckles*,⁸⁹ (1984) the Divisional Court (UK) held that at common law a child under 14 is presumed not to have reached the age of discretion and is to be deemed *doli incapax*. The presumption is rebuttable and the burden of rebutting is upon the prosecution.

On 2 July 1982, the defendant aged 13, and another girl had a discussion with the victim in a public place. After the discussion the victim went home, to which house the defendant and her companion then went. On their arrival at the home, the front door was opened. The victim was hit by the defendant with a milk bottle and was then stabbed by the defendant with a broken bottle. The defendant and her companion fled and sought to hide in a garden, when they were apprehended by a police officer. In those circumstances the justices convicted the defendant and her companion. The defendants pleaded before the Divisional Court that the defendant's conviction must be quashed because of the operation of the presumption which applies in regard to the acts of children aged between 10 and 14; and the prosecution could rebut this presumption only by showing that the child appreciated that, that which he or she had done was morally wrong; and that this could not have been done on the facts of this case.

Upholding the conviction, the Court said, that the presumption of *doli incapax* had been rebutted by the prosecution by strong and poignant evidence.

Dismissing the appeal the court held, taking the matters together, the justices were justified in finding that they were satisfied so as to be sure that the presumption had been rebutted, and that this 13 years old girl (who from her statement seemed of normal intelligence) appreciated that what she did to her victim was a seriously wrong thing to do. Thus, there was evidence on which one could conclude that the defendant had mischievous discretion.

R v G: In *R v G*, (2003) 4 All ER 763, the House of Lords held that liability for criminal damage is determined according to the subjective standard depending on the intellectual capability of the offender in case of children.

The defendants, boys of 11 and 12, were engaged on a camping trip. They obtained access to the backyard of a shop, opened up bundles of newspapers, and set some of them alight and threw the burning newspapers under a large wheelie-bin, where they left them to burn. The boys decamped leaving the bin alight, and the fire spread to the shop and adjoining buildings causing approximately 1 million pound damage.

The boys were charged and convicted under sections 1(1) and (3) of the Criminal Damage Act, 1971 for being reckless applying the principle of objective recklessness enunciated by the House of Lords in *R Caldwell*, (1981) 1 All ER 961 (HL), in 1981. According to the said principle liability for criminal damage is determined according to the standard of an ordinary reasonable adult irrespective of the age or intellectual capabilities of the offender when the criminal damage offence is implicated.

Their appeal to the Court of Appeal was rejected. Accordingly, they moved the House of Lords. Allowing the appeal the House of Lords overruled its earlier verdict in *Caldwell* and held that the requisite *mens rea* for criminal damage demanded a subjective test to be satisfied. Lord Bingham said that:

It is a statutory principle that conviction of serious crimes should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was capable.... It is clearly

[s 83] Act of a child above seven and under twelve of immature understanding.—

blameworthy to take an obvious and significant risk of causing injurious result to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication; *D.P.P. v. Majewski*, (1976) 2 All ER 142. Such a person may fairly be accused of stupidity or lack of imagination, but neither of these feelings should expose him to conviction of serious crime or the risk of punishment.

[s 83.3] Damage of Vehicle Sufficient to Rebut the Presumption of *doli incapax*

C v Director of Public Prosecutions: The House of Lords in *C v Director of Public Prosecutions*, (1995) 2 All ER 43 (HL) [Lord], (1995) held that presumption that a child aged between ten and 14 is *doli incapax* is rebuttable by clear and positive evidence that the child knew that his act was seriously wrong.

At about 3 pm on 8 June 1992 two policemen on mobile patrol saw a Honda 125 cc motor cycle parked in the private doorway of a house in Liverpool. Two boys were tampering with the motor cycle. The appellant was holding the handlebars while the other boy tried with a crowbar to force open the chain and padlock securing the motor cycle. The police approached on foot and both boys ran off. One policeman chased the appellant, who then climbed over wall at the rear of the property and was arrested by another policeman. The damage to the motor cycle included the detaching of the lead to the coil and battery and the dislodging of the mounting.

The appellant's solicitor submitted that the prosecution has not adduced, sufficient evidence to prove that the appellant, who was born on 29 June 1979 and was therefore just 13 years old at the time of the alleged offence, had guilty knowledge and knew that what he was doing was seriously wrong as opposed to merely naughty or mischievous and so he is not liable.

However, on the basis of the facts, the justices found that the appellant knew that what he had done was seriously wrong, observing that the damage done to the motor cycle was substantial and that the appellant and his accomplice ran from the police, leaving the crow bar behind. They drew from these facts inference that the appellant knew he was in serious trouble because he had done something seriously wrong. The appellant was therefore convicted under section 9(1) of the Criminal Attempts Act, 1981⁹⁰ for the attempt to commit theft at pound 4, payable by his mother, who was also bound over to ensure his future good behaviour.

Dismissing the appeal Divisional Court held that the presumption that a child aged between ten and fourteen who was charged with a criminal offence was *doli incapax* unless that presumption was rebutted by positive proof adduced by the prosecution that in fact he knew that what he did was seriously wrong, was outdated and should be treated as being no longer good law.

The appellant appealed to the House of Lords, contending that the Divisional Court, in holding that the presumption was no longer part of the law of England, had engaged in unjustified judicial law making and was bound by authority to recognise and apply the presumption.

Allowing the appeal and dismissing the charge against the accused their Lordships held that the presumption that a child between the ages of 10 and 14 was *doli incapax* and the rules that the presumption could only be rebutted by clear positive evidence that the child knew that his act was seriously wrong, and that evidence of the acts amounting to the offence itself was not sufficient to rebut the presumption, were still part of English law.

The prosecution was required to prove, according to the criminal standard of proof, that a child defendant between the ages of 10 and 14 did the act charged and that when doing that act he knew that it was wrong act as distinct from an act of mere naughtiness or childish mischief, and the evidence to prove the defendant's guilty knowledge could not be mere proof of the doing of the act as distinct from an act of mere naughtiness or childish mischief, and the evidence to prove the defendant's guilty knowledge could not be mere proof of the doing of the act charged, however horrifying or obviously wrong that act might have been. It followed that the Divisional Court had been wrong not to apply the presumption.

[s 83] Act of a child above seven and under twelve of immature understanding.—

[s 83.4] *Doli Incapax* Defence of a Child between 10 and 14 – Abolished in England *vide* Crime and Disorder Act, 1998, section 34

JTB: In *R v JTB*, (2009) 3 All ER : [2009] UKHL 20,⁹¹ (2009), the House of Lords held that presumption of *doli incapax* in case of child between 10 and 14 is abolished *vide* Crime and Disorder Act, 1998. The defendant was charged and convicted on 4 October 2007 with offences of causing or inciting a child under the age of 13 to engage in sexual activity⁹² contrary to section 13(1)⁹³ of the Sexual Offences Act, 2003. At the time of the activity he was 12 years old; he admitted the activity but said that he had not thought that what he was doing was wrong since it is a defence that he was *doli incapax*.⁹⁴ He considered that section 34 of the 1998 Act had abolished only the presumption that a child aged between 10 and 14 years had the defence, leaving it open to the child to prove that, at the material time, he was *doli incapax*.

The defendant appealed to the House of Lords after having lost in the Court of Appeal. Dismissing the appeal, the House of Lords held that section 34 of the 1998 Act abolished both the presumption and the defence of *doli incapax*. While the defence of *doli incapax* and the rebuttable presumption were two different things, they had, in recent times, always co-existed and it had become customary to speak of “the presumption of *doli incapax*” as embracing both the presumption and the defence.

Executions of juveniles since 1990

The use of the death penalty for crimes committed by people younger than 18 is prohibited under international human rights law, yet some countries still execute child offenders. Their significance goes beyond their number and calls into question the commitment of the executing states to respect international law.⁹⁵

Since 1990, Amnesty International has documented 82 executions of child offenders in 9 countries: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, the USA and Yemen. Several of these countries have changed their laws to exclude the practice. Executions of child offenders represent a tiny fraction of the total of executions worldwide recorded by Amnesty International each year. The USA and Iran have each executed more child offenders than the other eight countries combined. Iran continued to impose death sentence on and execute juvenile offenders. At least 160 juvenile offenders were on death row at the end of 2015. Some of them had been in prison for more than a decade. At least 73 juvenile offenders were executed between 2005 and 2015. Four of them were executed in 2015. Samad Zahabi was hanged in secret in Dizel Abad Prison in Kermanshah Province in October 2015 for shooting a fellow shepherd during a row over who should graze their sheep. He was 17 years old at the time of the commission of the crime and was sentenced to death by the Provincial Criminal Court of Kermanshah Province.⁹⁶

[s 83.5] Juveniles – Immunity of person up to 18 years

Under the *Indian Penal Code* a child at 12 years of age attains full responsibility for his or her deeds and he or she is liable under criminal law to the same extent as an adult criminal. However, in case of contractual obligation a child attains majority at the age of 18 years to safeguard and protect the interest of juveniles and for their care and maintenance, welfare, training, education and rehabilitation of neglected and delinquent children a number of social legislations have been passed so that they may not be exploited, ill-treated and put into undesirable channels by anti-social elements in the community.

Emphasis is being given to the rehabilitation⁹⁷ of juvenile delinquents rather than sending them in jail. *Section 27 of the Criminal Procedure Code, 1973*⁹⁸ and Juvenile Justice (Care and Protection of Children) Act, 2000, section 18(1) have made separate provisions for trial, rehabilitation and social integration of juvenile offenders,⁹⁹ instead of sending them to prisons.

Umesh Singh: In case of non-compliance of the statutory provisions, conviction of the child below 18 years would be set aside. In *Umesh Singh v State of Bihar*,¹⁰⁰ one of the accused Arvind Singh was charged for murder under section 302, IPC read with section 149, IPC and for causing hurt by dangerous weapons under section 324 read with section 148, IPC and under section 27 of the Arms Act, 1959 for using arms or

[s 83] Act of a child above seven and under twelve of immature understanding.—

ammunitions without licence. He was 13 years old on the date of the occurrence of the crime. His trial was conducted along with other accused who were not children and the court found them guilty of the offence.

However, the contention of a separate trial of the accused as envisaged in the *Criminal Procedure Code, 1973* had not been raised either before the trial court or the High Court. In such circumstances, the Apex Court, relying on *Bhola Bhagat v State of Bihar*,¹⁰¹ while sustaining the conviction of the appellant under all charges, held that the sentence awarded to the accused is set aside.¹⁰²

[s 83.6] Juvenile Justice (Care and Protection of Children) Act, 2000

To protect and safeguard the interest of children (below 18 years) against exploitation and child abuse the General Assembly of the United Nations on 20 November 1989 adopted the Convention on the Rights of the Child wherein a set of standards to be adhered to by all State parties in securing the best interests of the child has been prescribed. The Convention laid emphasis on social re-integration of child victims, to the maximum possible extent without resorting to judicial proceedings. The Government of India, having ratified the Convention on 11 December 1992, redrafted the existing law relating to juveniles¹⁰³ in 2000 keeping in view the standards prescribed in the Conventions of the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of the Juvenile Justice, 1985 (The Beijing Rules), the United Nations Rules for the Protection of the Juveniles deprived of their Liberty (1990) and other relevant international instruments. The Juvenile Justice Act, 1986 was accordingly repealed and the *Juvenile Justice (Care and Protection of Children) Act 56 of 2000* was enacted by the Parliament and came into force on 30 December 2000.¹⁰⁴

The Act 56 of 2000 is a comprehensive piece of legislation consisting of 70 sections divided into five chapters. Chapter I consisting of three sections is preliminary chapter. Section 2 defines the various terms used in the Act, Chapter 2 (sections 4 to 28) is titled as “Juveniles in Conflict with Law” instead of “Delinquent Juveniles”¹⁰⁵ as provided in Chapter 4 of the (repealed) Juvenile Justice Act, 1986. Chapter 3 in sections 29 to 39 provide for *constitution* of Child Welfare Committee (section 29). Children’s Home (section 34) and Shelter Homes (section 37) to look after the interests of the children in the need of care and protection. To monitor proper functioning of these institutions, section 36 provides for social auditing by Central and State Governments. A separate Chapter 4 (sections 40 to 45) is devoted to Rehabilitation and Social Integration of Children by implementation of various schemes, such as adoption, foster care, sponsorship, and sending the child to an after care organization (section 40). Chapter 5 (in sections 46 to 70) deals with miscellaneous provisions.

Section 2 of the Act in clauses 2(d), 2(k) and 2(1) has widened the concept and scope of the terms “Juvenile”, “juvenile in conflict with law” and “child in need of care” which are given below. The new provisions of the Act are noteworthy and will go a long way in tackling the problems of delinquent and neglected children in proper atmosphere with the ultimate goal of rehabilitation and social integration.

[s 83.6.1] Juvenile

Section 2(k) of the Act 56 of 2000 has widened the scope of the term juvenile to include “juvenile” or “child” who has not completed eighteen years of age. The artificial distinction of age between male (16) and female (18) child as provided under section 2(h) of the earlier Act 53 of 1986 has been abolished. It is fixed at 18 years for both boys and girls equally. It is a welcome step. It may be noted that the age of “Juvenile for fixing criminal liability” is not uniform in all countries. It varies according to the legal norms of the particular country as given in the chart.

[s 83.6.2] “Juvenile in conflict with law”

Section 2(l) of the Act 56 of 2000 has preferred to use the word “juvenile in conflict with law” in place of “delinquent juvenile” for a juvenile who is alleged to have committed an “offence” as provided in section 2(e) of the (repealed) Juvenile Justice Act, 1986.

[s 83.6.3] “Child in Need of Care”

[s 83] Act of a child above seven and under twelve of immature understanding.—

Section 2(d) of the Act 56 of 2000 gives a comprehensive meaning of the term “child in need of care” so that proper attention might be given to such neglected children. Clause (d) to section 2 says: a child will be treated as ‘Child in need of care and protection, which means a child—

- (i) Who is found without any home or settled place or abode and without any ostensible means of subsistence,
- (ii) Who resides with a person (whether a guardian of the child or not) and such person—
 - (a) Has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
 - (b) Has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,
- (iii) Who is mentally or physically challenged or ill children suffering from terminal disease or incurable disease having no one to support or look after,
- (iv) Who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
- (v) Who does not have parent and no one is willing to take care of or whose parents have abandoned him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,
- (vi) Who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
- (vii) Who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
- (viii) Who is being or is likely to be abused for unconscionable gains,
- (ix) Who is victim of any armed conflict, civil commotion or natural calamity.

Age of Juvenile Delinquents Under Major Legal Systems Fixing Liability for *Criminal Act**

Name of the country	Age of absolute immunity from criminal liability	Age for differential treatment as juvenile delinquents
1. Russia	Below 16 years	(a) 14-16 years serious offences only
		(b) 16-18 years for other cases
2. Poland	Below 16 years	(a) Juvenile below 18 years
		(b) Young offenders below 21 years
3. Germany	Below 14 years	(a) Juvenile 14-18 years
		(b) Adolescent 18-21 years.
4. Japan	Below 14 years	Juvenile under 20 years

[s 83] Act of a child above seven and under twelve of immature understanding.—

5. England	10 years up to 14 years conditional	(a) Under 17 years and 15-21 years for some offences
6. Canada	Under 7 years; 7-14 years (conditional)	(a) Under 16 years
		(b) 16-18 years varying from province-to-province.
7. U.S.A.	7 years to 12 years (different in different States)	16-18 years; Varies from State-to-State but mostly 18 years
8. China	16 years	(a) Child 9-13 years
		(b) Juvenile 14-20 years
9. Korea	14 years	(a) 14-18 years
		(b) Under 20 years
10. India, (i) Myanmar, (ii) Sri Lanka, (iii) (Pakistan and Bangladesh similar to India)	7 years (conditional immunity from 7 to 12 years)	18 years for both male and female
11. Malaysia	10 years	(a) Child 14 years
		(b) Juvenile 10-18 years
12. Indonesia	10 years	10-18 years
13. Philippines	9 years 9-15 years conditional	9-18 years
*Source: Basic materials of Juvenile Justice systems compiled by UN Institute for Asia and far East, Thailand.		

[s 83.7] Salient features of the Juvenile Justice Act, 2000

Some of the important features of the Act listed below show the concern of the law makers for care, treatment, protection and rehabilitation of children. For instance:

[s 83.7.1] Execution of a child below 18 years Prohibited

No juvenile, i.e., a child below 18 years of age shall be sentenced to death or imprisonment for life for any offence under *Indian Penal Code*. In the USA execution of a child of sixteen or above at the time of the commission of crime was valid till 2005 when the United States Supreme Court in *Christopher Simons*,¹⁰⁶ by a split majority of 5 to 4 held death penalty for offenders under the age of 18 years at the time of the commission of crime cruel and unusual punishment contrary to VIIIth and IXth Amendment to the US *Constitution* and national decency.

[s 83.7.2] Classification of Children age wise for proper Attraction

A classification of children according to the age group viz., (i) 7 to 12, (ii) 12 to 16, and (iii) 16 to 18 have been

[s 83] Act of a child above seven and under twelve of immature understanding.—

made to give proper attention considering the physical, mental status, nature and gravity of the offence committed by the child for induction in Observation Homes have been made (section 8).

[s 83.7.3] Separate Trial for Children

A provision for separate trial of juveniles has been provided (section 18), and provisions of Chapter VIII of the *Criminal Procedure Code, 1973* relating to the “Security for keeping the Peace and Good behaviour” will not be applicable in case of juveniles (section 17).

[s 83.7.4] Appeal Barred against order of Acquittal

No appeal shall lie from any order of acquittal made by the Juvenile Justice Board¹ for trial of a juvenile alleged to have committed an offence [section 52(2)(a)]; and no second appeal shall lie from any order of the Court of Session passed in appeal [section 52(3)].

[s 83.7.5] Establishment of Juvenile Police Units

To handle the problems of juvenile crimes expeditiously a provision for the establishment of Special Juvenile Police Units has been made in every police station, which will be manned by trained officers to deal with the problems of juveniles in a friendly manner [section 63(1)].

[s 83.8] Determination of the Age of Juvenile – Yardstick

Eerati Laxaman: In *Eerati Laxaman v State of Andhra Pradesh*, AIR 2009 SC 1816 [[LNIND 2009 SC 158](#)],¹⁰⁷ the open Court held that age of a juvenile is to be determined at midnight of day preceding anniversary of birthday.

The appellant was convicted by the trial as well as High Court for commission of an offence punishable under section 302, IPC on the ground that the offence being committed at about 1.00 pm on 9 May 1994 when he was not a “Juvenile” within section 2(h) of the Juvenile Justice Act, 1986, being above 16 years of age. He was sentenced to undergo imprisonment for life. Allegations against him were that on or about 9 May 1994 at about 1.00 pm (in the afternoon) he committed murder of Pittala Chandrakala by pouring kerosene over her and setting her on fire with a matchstick. High Court confirmed the sentence.

In appeal before the Apex Court the question which arose for consideration is as to whether the appellant had completed the age of 16 years on 9 May 1994 so as to deprive him of the benefit of trial according to section 20 of the Juvenile Justice Act, 1986.

Allowing the appeal and setting aside the order of conviction, the Apex Court remitted the matter to the Juvenile Justice Board to be decided in terms of section 20 of the Juvenile Justice Act, 1986 since the appellant was Juvenile on the day, the offence was committed.¹⁰⁸

The Apex Court held that while calculating a person’s age, the day of his birth must be counted as a whole day and any specified age in law is to be calculated as having been attained on the day preceding the anniversary of the birthday.¹⁰⁹ A legal day commences at 12 O’clock midnight and continues until the same hour the following night. Thus, when the accused was born on 10 May 1978, the said day was to be counted as a whole day and it could not be said that he had attained the age of 16 years before 12 O’clock in the midnight of the previous day, i.e., 9 May 1994.

Pratap Singh: In *Pratap Singh v State of Jharkhand*,¹¹⁰ the Apex Court in view of conflict between the decisions of Bihar and Rajasthan High Courts in *Arnit Das v State of Bihar*,¹¹¹ and *Umesh Chandra v State of*

[s 83] Act of a child above seven and under twelve of immature understanding.—

Rajasthan, AIR 1982 SC 1057 [[LNIND 1982 SC 80](#)],¹¹² regarding the date by reference to which age of a boy or a girl has to be determined in respect of pending cases, held that the provision of the Juvenile Justice (Care and Protection) Act, 2000 would be applicable even to those cases initiated and pending before the Court for offences committed under the Juvenile Justice Act of 1986, provided the offender has not completed 18 years of age as on 1 April 2001 when the Act of 2000 came into force.

Raju: In *Raju v State of Haryana*,¹¹³ Mohan M Shantanagoudar J, said for the Apex Court that conviction and sentence of the appellant under section 376(2)(g) of the IPC is set aside. For gang rape of the prosecutrix along with two other persons, viz. Raju and Raja @ Raj Kumar alleging that the three persons had intercepted the prosecutrix when she was passing by some fields along with her one-year old brother and had taken her to a field nearby, whereupon Raju s/o Bhim and Raja @ Raj Kumar s/o Makshi engaged in the gang rape of the prosecutrix, while the Appellant stood outside the field. The prosecutrix was aged 15 years at the time of the accident, which occurred on 14 September 2000. The three accused were convicted for the offence punishable under section 376(2)(d) of IPC, and sentenced to 10 years' rigorous imprisonment and a fine of Rs 500/-.

There is sufficient evidence on record in the form of the certificate dated 24 March 2012 issued by the Dayanand Arya Middle School, Sohna, to indicate that the name Raj Kumar appearing on such certificate was the full name of the Appellant.

In light of the above discussion, court is of the opinion that it has been conclusively established that the date of birth of the Appellant was 12 July 1984 and as such he was aged 16 years, 2 months and 2 days at the time of commission of the offence dated 14 September 2000. In such circumstances, we do not have any doubt that the inquiry conducted by the Registrar (Judicial) upon the direction of the Apex Court in the instant matter amounts to an inquiry conducted by this court itself, and is conclusive proof of the age of the Appellant as provided in rule 12(3) of the 2007 Rules. As the Appellant satisfies the requirement of section 2(k) and (l) of the 2000 Act, the said Act is applicable to him in full force in light of sections 7A and 20.

Criminal appeal hereby stands allowed and the order of the High Court affirming the conviction and sentence is set aside.

Determination of Age of a Deaf and Dumb never Admitted to School: Durga Ram: In *Durga Ram alias Gunga v State of Rajasthan*, AIR 2015 SC 1016 [[LNIND 2015 SC 15](#)],¹¹⁴ Apex Court held in case of an appellant accused charged of rape and murder under sections 376/302 IPC, a deaf and dumb who was never admitted to any school determination of his age is possible only by reference to medical opinion obtained from duly constituted Medical Board in terms of rule 12(3)(b). Opinion tendered by Board that appellant's age has been placed in range of 30 to 36 years and taking average of two extremities concluded that appellant's age on date of examination was about 16 years ago was about 33 years. Appellant was thus, juvenile on date of occurrence of crime being 17 years, 2 months. Hence, entitled to benefit of provisions of Act, even though offence committed by him is heinous.

There was a "Jaagran" on offside of village and his 7 years old daughter found missing. Her dead body was found in neighbouring village in a naked condition with injuries on her private parts and her head smashed with a stone lying nearby. Medical evidence showing that she died homicidal death. Evidence of witnesses that accused also participated in "Jaagran" along with other villagers. Blood-stained clothes of blood group of deceased recovered at instance of accused. No explanation offered by accused for the injuries sustained by him one of which was found even at his penis. Circumstances form a complete chain. Accused guilty of offence of rape and murder.

While dismissing the appeal and upholding the conviction of the offence of rape and murder under section 376 read with section 302 IPC Apex Court held the above circumstances form a complete chain and lead to an irresistible conclusion that the appellant was responsible for the offence of rape and murder of the hapless baby, Kamala who appears to have been picked up from the place where she was sleeping with other children and taken at a distance only to be raped and eventually killed. The trial Court, in the light of the evidence on

[s 83] Act of a child above seven and under twelve of immature understanding.—

record and careful analysis undertaken by it, correctly came to the conclusion that the appellant was guilty of murder of the deceased. There is no reason whatsoever for Court to interfere with that finding.

[s 83.9] Juvenile Violence in media—A matter of concern

In recent years media and television serials depicting violent and vulgar crimes, indecent scenes creating revulsions and prevailing unhealthy conditions in a family and neighbourhood with ever growing number of slums, family discord and conflict leading to disintegration, of joint family etc., have led to the feeling of insecurity amongst children. All this has resulted in enormous increase of heinous crimes like murder, robbery, theft, misappropriation, suicide, rape, kidnapping etc., by children which were unheard of in the past. The children are big imitators, and they imitate language, behaviour, gesture, actions etc., all the time. A study of the violence on Indian television and its impact on children commissioned by UNESCO accused the act of “bombarding young minds with all kinds of violent images cutting across channels, programmes and viewing times”.

Boy dies imitating “Reality show stunt”: Chandan: In a horrifying and pathetic case a 9-year-old boy Chandan Singh Rawat a student of class IV died while trying to re-enact a stunt shown on a “TV reality show” at Vikas Nagar in Lucknow on Saturday 18 April 2009 around 9 pm in the evening.

Three children Nakul, Mitali and Rahul along with their cousins Chandan and Kamlesh were playing on the terrace of the house at Vikas Nagar, Lucknow, where he was staying. After a while four kids returned, leaving Chandan behind, for dinner. When somebody went looking for Chandan, he was found hanging with one end of a stocking tied around his neck and another to the handle of his house’s terrace door.

A day earlier to the incident on Friday 17 April 2009 “Chandan had asked his aunt Nanda, while watching a dance reality show on a TV channel, if he could also perform the same stunt that a contestant was performing with a rope in his hand. And on the fateful evening on Saturday, 19 April 2009, the boy had told his cousin that he was going to perform a stunt by hanging himself.” After an hour of this conversation, Chandan was found hanging.

Shaktiman: In one episode of “*Shaktiman*”¹¹⁵ superhero of Indian TV, there were as many as 17 acts of violence in approximately 20 minutes. These included assaulting, slapping, punching, shooting, strangling, burning, pushing, stabbing as well as grotesque (disturbed) representations, bodily transformations and supernatural occurrences. All this has long lasting impact on children and they try to imitate and practice in actual life without understanding the nature and consequences of such acts. For instance, one 6-year-old boy of Lucknow leapt off the balcony of his second floor flat trying to imitate realty Show a bungee-jumper of a soft drink commercial and in the process he died.¹¹⁶ Three teenagers from Minnesota (USA) squashed to death as they aped a scene from a Walt Disney cartoon, *The program*, by lying down in the middle of a two-lane highway.¹¹⁷

Some of the shocking incidents¹¹⁸ of murder listed below in footnote- (i) to (v)¹¹⁹ indicate the extent to which children have become prone to indulging in acts of violence leading to serious consequences.

In a shocking incident in Indore (Madhya Pradesh), a nine-year-old boy earned the dubious tag of being the country’s youngest rape suspect after he was booked on 18 August 2009 for the alleged rape of a six-year-old girl after subjecting her to violent assault. Charged for rape under section 376, IPC, the accused was granted bail by a Juvenile Court after spending a night in a police lockup.¹²⁰

Children of daily wagers from Jalora locality Mohalla were playing at the girl’s residence while their parents were out for work. The boy apparently dragged the girl inside the bathroom and restrained her there. When she fought back, he allegedly beat her up before assaulting her.

[s 83] Act of a child above seven and under twelve of immature understanding.—

Police registered a case on the complaint of the victims' parents, who found her daughter crying and bleeding profusely when they returned home in the evening. A medical examination of the victim and the accused confirmed rape. The accused had injuries on her seemingly inflicted after the victim put up resistance.

It is high time that the joint and concerted efforts should be made by all concerned parties, such as, parents, guardians, teachers including social scientists, jurists, judges, law makers and NGOs to take constructive steps to eradicate and control child violence to the maximum possible extent by taking various legal, social, economic, reformatory and educative measures so as to divert the mind of children for constructive and social work instead of allowing them to go astray.

Section 360 CrPC, 1973 provides for release on probation with good conduct or admonition where any person under 21 years of age or a woman is convicted of an offence not punishable with death or imprisonment for life.¹²¹

Australia: In *Beckett*,¹²² it was held that a child under the age of seventeen years, convicted of murder after the coming into operation of the Australian Criminal Code Amendment Act of 1922 cannot be sentenced to imprisonment, but must be dealt with in accordance with section 24 of the State Children Act of 1911 Australia.

At the Circuit Court at Maryborough on 28 August 1922 Clive Beckett, a boy of the age of thirteen years and nine months, was convicted of wilful murder, and was sentenced to imprisonment with hard labour for life. He appealed from the sentence to the Supreme Court sitting as the Court of Criminal Appeal, and that Court, by a majority of 3 to 2 *McCawley CJ, O'Sullivan and Blair JJ, Shand and Lukin JJ* dissenting), dismissed the appeal.

From that decision Beckett applied to the High Court of Australia¹²³ for special leave to appeal; and on the hearing of the application special leave to appeal was granted, while allowing the appeal the Court held, section 24 of the State Children Act of 1911 applies to a conviction by the Supreme Court and therefore applies to any conviction of a child where the penalty is imprisonment. That being so, when the Criminal Code Amendment Act of 1922 was passed, section 24 of the State Children Act applied to a child convicted of murder, and he must be dealt with as provided in that section and the sentence passed upon the appellant was quashed.

Alakh Alok Srivastava. Supreme Court in *Alakh Alok Srivastava v UOI*,¹²⁴ held into writ petition, a self-contained comprehensive legislation be enacted *inter alia* to provide for prosecution of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the judicial process incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

1. The instant writ petition initially raised two issues, first, the treatment of an eight-month old female child who had become a victim of a crime committed under *Protection of Children from Sexual Offences Act, 2012* (the *POCSO Act*) and the second, speedy trial and monitoring of the trials under the *POCSO Act* in a child friendly court regard being had to the letter and spirit of the provisions contained in the said Act.

2. The first prayer was dealt vide orders dated 31 January 2018, 1 February 2018 and 12 March 2018 as per direction of the Court by the doctors of All India Institute of Medical Sciences, New Delhi.

3. Regarding second prayer the Court issued the following directions:—

[s 83] Act of a child above seven and under twelve of immature understanding.—

- (i) The High Courts shall ensure that the cases registered under the *POCSO Act* are tried and disposed of by the Special Courts and the presiding officers of the said Courts are sensitized in the matters of child protection and psychological response.
- (ii) The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the *POCSO Act*.
- (iii) The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the *POCSO Act* and thus, complete the trial in a time-bound manner or within a specific time frame under the Act.
- (iv) The Chief Justices of the High Courts are required to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the *POCSO Act*. the High Courts were three Judges are not available the Chief Justices of the said Courts shall constitute one Judge Committee.
- (v) The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.
- (vi) Adequate steps shall be taken by the High Courts to provide child friendly atmosphere in the Special Courts keeping in view the provisions of the *POCSO Act* so that the spirit of the Act is observed.

The Registry is directed to communicate this order to the Registrar General of the High Courts so that it can be immediately implemented.

Death penalty for child sex abuse.¹²⁵ Protection of Children against Sexual Offences (Amendment) Act, 2019 passed by Parliament has made death penalty as the maximum punishment for aggravated penetrative sexual assault whereas earlier it was life imprisonment. Thus, India has joined small club of 14 witnesses that have death penalty. This includes China, Thailand, Qatar, Bahrain, Jordan and Kuwait. 123 countries do not have death as punishment for sex crimes against kids.

It is surprising to note that Madhya Pradesh has been ordering hanging of one person every month from 2019. Since the state amended the child sexual assault law in May 2018, its courts have awarded death penalty in 25 cases, the latest one on 11 July 2019. And it is a model that is set to be followed in the rest of the country now that the Protection of Children against Sexual Offences (POCSO) Amendment Act, 2019 has been passed by Parliament.

Among the most significant changes in the Act is the introduction of death penalty as the maximum punishment for aggravated penetrative sexual assault. The maximum punishment earlier was life imprisonment.

While there is no sympathy for child rapists and murderers and their heinous crimes, child rights activists and lawyers have expressed concern over how crime is turning into a gladiator sport with the public baying for blood. They argue that most survivors want accountability, an apology and closure rather than retribution. Vidya Reddy from the Tulir-Centre for Prevention and Healing Child Sexual Abuse has described the amendments as a myopic policy decision. Also, data shows that rapes are usually by people known to the victim, such as immediate family, relatives, neighbors, employers, co-workers, or other known persons. "Fear of the death penalty will serve as a pressure upon children and their families to turn hostile, as the trauma and guilt of sending someone they known to the gallows is a very heavy burden, one that cannot be on a child's consciences" she says. There is also a fear that the accused might kill the victims to protect themselves.

Since 15 May 2018 year, convicts in 25 cases have been sentenced to death. Another 175 have got life sentences. It has also led to quick disposal of cases. This is sending a good message to the society."

[s 83] Act of a child above seven and under twelve of immature understanding.—

Parag Bhati. In *Parag Bhati (Juvenile) thr. Legal Guidance-Mother Smt. Rajni Bhati v State of UP*,¹²⁶ Supreme Court speaking through AK Sikri J said: Section 7A of Juvenile Justice (Care and Protection of Children) Act, 2000 and rule 12 of Juvenile Justice (Care and Protection) Rules, 2007 provide the benefit of the principle of benevolent legislation attached to the Act would apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue. (Supreme Court 2016)

Per AK Sikri J.—The appellant-accused was convicted under sections 302, 394, 504 and 506 of the *Penal Code of India*. The accused got arrested with regard to the crime in question and was produced before the Juvenile Court and was remanded and kept in Juvenile Home. The Chief Medical Officer opined that the age of the appellant was about 19 years and was a major and accordingly, transferred the case before the Chief Judicial Magistrate. The appellant preferred an appeal against the said decision before the District and Sessions Judge which was dismissed. Revision filed by the appellant in the High Court was dismissed. While dismissing the appeal, the Apex Court held:

- (i) Under section 7A of the Act, the Court is enjoined to make an inquiry and take such evidence as may be necessary to determine the age of the person who claims to be a juvenile. However, under rule 12, the Board is enjoined to take evidence by obtaining the matriculation certificate if available, and in its absence, the date of birth certificate from the school first attended and if it is also not available then the birth certificate given by the local body. In case any of the above certificates are not available then it can seek medical opinion from a duly constituted medical board to determine the age of the accused person claiming juvenility.
- (ii) The Board, on merits, conducted proceedings to register a case against father of the appellant for producing forged evidence and giving false statement before the Court which fact had already been proved that the documents which were produced on behalf of the appellant were forged.
- (iii) The Board did not give the benefit of one year as provided in rule 12 of the rules in favour of the appellant on the ground that the complainant had filed the photocopy of Panchayat Electoral Roll, according to which, the age had been mentioned as 19 years which was issued much before the date of the incident. Therefore, the Board rightly did not give the benefit of one year to the appellant under the rules.
- (iv) If there is a clear and unambiguous case in favour of the juvenile accused that he was a minor below the age of 18 years on the date of incident and the documentary evidence at least *prima facie* proves the same, he would be entitled to the special protection under the Act. But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach cannot be permitted as the Courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice. Appeal dismissed.

¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.

[s 83] Act of a child above seven and under twelve of immature understanding.—

- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 85 1977 Cr LJ 1921 (SC) : AIR 1977 SC 2236 [[LNIND 1977 SC 254](#)] : (1977) 4 SCC 44 [[LNIND 1977 SC 254](#)] : (1978) 1 SCR 301 : 1977 CAR 320 .

[s 83] Act of a child above seven and under twelve of immature understanding.—

86 *R v Owen*, (1830) 4 C and P 236 : 172 ER 685.

87 AIR 1950 Ori 261 [[LNIND 1950 ORI 4](#)] : 16 (1950) CLT 102 , Bachu Jagannadha Das and Lingaraj Panigrahi JJ, delivered the judgment.

88 *Marimuthu*, (1909) 9 Cr LJ 392 (Mad).

89 *R v Runeckles*, (1984) 79 Cr App R 255 (Divisional Court).

90 For the Criminal Attempts Act, 1981, see section 12 Halsbury's Statutes (4th Edn) (1994 re-issue), 797. For criminal capacity of children under section 14, see section 11(1) Halsbury's Laws (4th Edn re-issue) para 34, and for cases on the subject, section 14(1) Digest (2nd re-issue) 9192, 703714.

91 Lord Phillips of Worth Matravers, Lord Redger of Earlsferry, Lord Carswell Lord Brown of Eaton-under-Heywood and Lord Mance, 16 February, 29 April 2009.

92 The victims of this activity were young boys and the activity included and penetration with penis, oral sex and masturbation.

93 Sexual Offences Act, 2003, section 13(1) states that:

Rape of a child under 13:

(1) A person commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person with his penis, and

(b) the other person is under 13,

(2) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

94 Section 34 of the Crimes and Disorder Act, 1998 (section 50) states:

The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.

95 See KD Gaur, *Criminal Cases and Materials*, 8th Edn (2015) (Lexis Nexis). For details of executions and countries that still execute children for various crimes specified in their respective Penal Codes.

96 Amnesty International, 2016, p 50.

97 Juvenile Justice (Care and Protection of Children) Act, 2000 in Chapter IV sections 40 to 45 provide for "Rehabilitation and Social Integration" of Children rather than punishment. Section 40 states that rehabilitation and social integration of a child shall begin during the stay of the child in a Children's home or Special home and it shall be carried out by (i) adoption, (ii) foster care, (ii) sponsorship, and (iv) sending the child to an after care organization.

98 *CrPC*, 1973, section 27 states as follows: *Jurisdiction in case of Juveniles*: Any offence not punishable with death or imprisonment for life by any person who at the date when he appears or is brought before the court is under the age of sixteen years, may be tried by the court of a Chief Judicial Magistrate, or by any court specially empowered ...providing for the treatment, training and rehabilitation of youthful offenders.

[s 83] Act of a child above seven and under twelve of immature understanding.—

- 99** Juvenile Justice (Care and Protection of Children) Act, 2000, section 18(1) ...No juvenile shall be charged with or tried for any offence together with a person who is not a juvenile.
- And sub-section (2) to section 18 prohibits joint trial of juveniles with adults. It states that: If a juvenile is accused of an offence for which under *section 223 of the CrPC, 1973* (that deals with joint trial), or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition contained in sub-section (1), have been charged and tried together, the Board taking cognizance of that offence shall direct separate trials of the juveniles and other person.
- 100** 2000 (5) Supreme 92 : JT 2000 (6) SC 508 : 2000 (II) Ori LR (SC) 371 : Raj LW 2000 (2) SC 300 : (2000) 4 Scale 511 : (2000) 6 SCC 89 [[LNIND 2000 SC 871](#)] : 2000 Cr LJ 3167 .
- 101** AIR 1998 SC 236 [[LNIND 1997 SC 1359](#)] : (1997) 8 SCC 720 [[LNIND 1997 SC 1359](#)] : 1998 (1) BLJR 628 : 1998 Cr LJ 390 : JT 1997 (8) SC 537 : (1997) 6 Scale 558 .
- 102** *Gopi Nath Ghosh v State of West Bengal*, 1984 Supp (1) SCC 228 : AIR 1984 SC 237 [[LNIND 1983 SC 331](#)] : 1984 Cr LJ 168 : 1983 (2) Crimes 937 (SC) : (1983) 2 Scale 756 [[LNIND 1983 SC 331](#)] : (1984) 1 SCR 803 [[LNIND 1983 SC 331](#)] : 1984 CAR 91 ; *Bhoop Ram v State of Uttar Pradesh*, (1989) 3 SCC 1 : AIR 1989 SC 1329 : 1989 CLR 360 ; *Pradeep Kumar v State of Uttar Pradesh*, 1995 Supp (4) SCC 419 : AIR 1994 SC 104 .
- 103** Juvenile Justice Act 53 of 1986 is repealed *vide* section 69(1) of the Act 56 of 2000.
- 104** The Act 56 of 2000 envisages to consolidate and amend the law relating to “juveniles in conflict with law” and “children in need of care-and-protection”, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of the matters in the best interest of the children and for their ultimate rehabilitation through various institutions.
- 105** “Delinquent Juvenile” consists of two words – “delinquent” and “juvenile”. Delinquent is derived from Latin term “*delinquere*” meaning neglect and “juvenile” means young persons. Thus, “delinquent juvenile” in brief means “neglect on the part of juveniles to conform to the accepted standard of behaviour in a given society.”
- 106** *Donald P Roper v Christopher Simons*, (2005) US 125 : (2005) US Lexis 2200; *Standford v Kentucky*, 492 US 361 (1989). Petitioner was approximately 17 years and 4 months old at the time he committed murder in Kentucky. Held, by a majority of 5 to 4 that death sentence of a person of 16 or above does not amount to “cruel and unusual punishment” prohibited under VIIIth Amendment to US *Constitution*. However, if the child is below 16 years the execution would amount to ‘cruel and unusual punishment’. *Thomson v Oklahoma*, 487 US 815 (1988). The petitioner when he was 15 years old actively participated in a brutal murder. Since the petitioner was a “child” as a matter of Oklahoma law, his death sentence was vacated. See KD Gaur, Criminal Law: Cases and Materials, 7th Edn, 2013 (Lexis Nexis), pp 438-441; for facts of the case; and for details of Execution of child offenders pp 342-344.
- 107** Dr Mukundukami Sharma JJ.
- 108** Inquiry by Juvenile Courts regarding delinquent Juveniles.—Where a juvenile having been charged with an offence appears or is produced before a Juvenile Court the Juvenile Court shall hold the inquiry in accordance with the provisions of section 39 and may, subject to the provisions of this Act, make such order in relation to the juvenile as it deems fit.
- 109** Inquiry by Juvenile Courts regarding delinquent Juveniles.—Where a juvenile having been charged with an offence appears or is produced before a Juvenile Court the Juvenile Court shall hold the inquiry in accordance with the provisions of section 39 and may, subject to the provisions of this Act, make such order in relation to the juvenile as it deems fit.
- 110** *Pratap Singh v State of Jharkhand*, (2005) 3 SCC 551 [[LNIND 2005 SC 100](#)] : 2005 AIR SCW 3088 : AIR 2005 SC 2731 [[LNIND 2005 SC 100](#)] : (2005) 1 Scale 763 [[LNIND 2005 SC 929](#)] . In *Prabh Dayal Sesma v State of Rajasthan*,

[s 83] Act of a child above seven and under twelve of immature understanding.—

(1986) 4 SCC 59 [[LNIND 1986 SC 281](#)] : AIR 1986 SC 1948 [[LNIND 1986 SC 281](#)] , the Apex Court categorically held that in absence of any express provision, while calculating a person's age the day of his birth must be counted as a whole day and any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday. See *Salag Ram Sharma v State of Rajasthan*, (2005) 10 SCC 77 : 2008 AIR SCW 2056.

111 (2001) 2 SCC (Jour) 9.

112 Juvenile Justice Act, 1986 section 2(h) "Juvenile" means a boy who has not attained the age of sixteen years or a girl who has not "attained the age of eighteen years"; According to the Juvenile Justice (Care and Protection) Act, 2000 age for both a boy and a girl has been fixed at 18 years).

113 2019 (2) Mad LJ (CrI) 29 : [LNIND 2019 SC 175](#) : 2019 SCC Online SC 258 : AIR Online [2019 SC 98](#) : AIR 2019 SC 1136 [[LNIND 2019 SC 175](#)] , N.V Ramana, Mohan M Shantanagoudar, Indira Banerjee JJ, delivered the judgment.

114 AIR 2015 SC 1016 [[LNIND 2015 SC 15](#)] TS Thakur and R Banumathi JJ.

115 See Sweta Rajpal, Blame it on TV, but there are other factors too, The Hindustan Times, 29 October 2000, p 11.

116 Vandana Majumdar, *Growing Up Violent*, The Hindustan Times, 29 October 2000, p 11.

117 See Sweta Rajpal, *Blame it on TV, But there are other factors too*, The Hindustan Times, 29 October 2000, p 11.

118 Vandana Majumdar, *Alarming Increase in Violence among Children*, Hindustan Times, 29 October 2000, p 11 (New Delhi Edn.). Some of the incidents of crimes committed by children are listed below:

- (i) **Badal**, 11 years old boy, a student of Class IV, resident of Sahibabad, Lucknow on 26 June 2000, while on his way to his aunt's house met a little boy cradling (holding) his six-months old baby sister. Badal snatched the infant Shweta, ran off with her towards a big nallah (drain), and drowned her. The boy reported to have said, "I used to often see this baby every day on my way to aunt's house and would wonder what it would be like to see her drown." He confessed that he had killed two kids earlier as well. He had similarly choked three-year old Sheetal and her elder sister – five years old Bharati, whom he had lured with a Banana. After killing Bharati, he had come back and non-chantingly played with her brother. He explains the reason for killing them was "his liking to see the bubbles in the water and the kids struggle as he drowned them", and the idea had struck him after he watched a television serial, "Captain House."
- (ii) **Rajesh**, a 10 years old boy from Sarshi of Purnia district in Bihar on 24 May 2000 shot his classmate Munna after a quarrel when they were watching TV. It appears that Munna did not give Rajesh enough space to sit before the screen, which resulted in a fight. An enraged Rajesh went out, returned with a revolver and shot Munna at point blank range. See KD Gaur Criminal Law: 5th Edn, 2008, pp 153-155 for facts of *Basdev v State of Pepsu*, AIR 1956 SC 488 [[LNIND 1956 SC 34](#)] : 1956 SCR 363 [[LNIND 1956 SC 34](#)] : 1956 SCJ 554 .
- (iii) A, 14 years old boy on 7 May 2000 resident of Vikaspuri, Delhi killed his mother because she accused him of stealing her jewellery.
- (iv) **Hemant**, a sixteen-year-old student of DAV School in Vasant Vihar, Delhi on 27 October 1999 was heckled to death by four neighbourhood boys in a school compound at RK Puram, New Delhi. The apparent reason being that the boys mistakenly believed that Hemant's father owned a petrol pump (when he was a manager) and wanted to abduct Hemant for ransom but panicked and killed him.
- (v) A 14 years old student of the Army Public School in Delhi killed his classmate because the latter had refused to give him Rs 10. And in a gruesome incident at Hatipur village in Kanpur in March 1999, two four-year old kids were battered to death by their three-year old friend and left her body in a nallah (drain).

119 Times of India, 19 August 2009, p 7 (Lucknow Edn.).

120 Times of India, 19 August 2009, p 7 (Lucknow Edn.).

[s 83] Act of a child above seven and under twelve of immature understanding.—

121 *Abdul Qayum v State of Bihar*, (1972) 1 SCC (Cri) 106 : AIR 1972 SC 214 [[LNIND 1971 SC 662](#)] : (1972) 2 SCR 381 : 1972 (1) SCJ 475 : 1972 Cr LJ 47 ; *Ratilal v Purshottam*, (1979) 4 SCC 559 : AIR 1979 SC 1290 : 1979 Cr LJ 855 .

122 *Beckett v The King*, 31 CLR 246 (1922) Australia.

123 In Australia High Court of Australia is the highest judicial court and in every State there is Supreme Court of that State from where appeal goes to High Court of Australia.

124 AIR 2018 SC 2440 : 2018 (3) Bom CR 746 : 2018 (2) Crimes 324 : 2018 Cr LJ 2929 : 2018 (2) Jab LJ 259 : JT 2018 (4) SC 625 : 2018 (7) Scale 88 : 2018 SCC Online SC 478. Decided on 1 May 2018. Dipak Misra CJI and AM Khandwilkar and DY Chandrachud JJ delivered the judgment.

125 Himanshi Dhawan and Ashutosh Shukla, Times of India, 4 August 2019, p 13.

126 AIR 2016 SC 2418 [[LNIND 2016 SC 232](#)] : 2016 (2) Andh LD (Cri) 212 (SC) : 2016 (4) All LJ 266 : 2016 (95) All CC 552 : 2016 Cr LJ 2928 : 2016 (2) Crimes 268 [[LNIND 2016 SC 232](#)] (SC) : 2016 (3) JCC 1836 : 2016 (2) Ren CR (Criminal) 1031 : 2016 (5) Scale 298 [[LNIND 2016 SC 232](#)] : 2016 (12) SCC 744 [[LNIND 2016 SC 232](#)] : 2016 (4) Supreme 174 , AK Sikri and RK Agrawal JJ.

[s 84] Act of a person of unsound mind.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 84] Act of a person of unsound mind.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

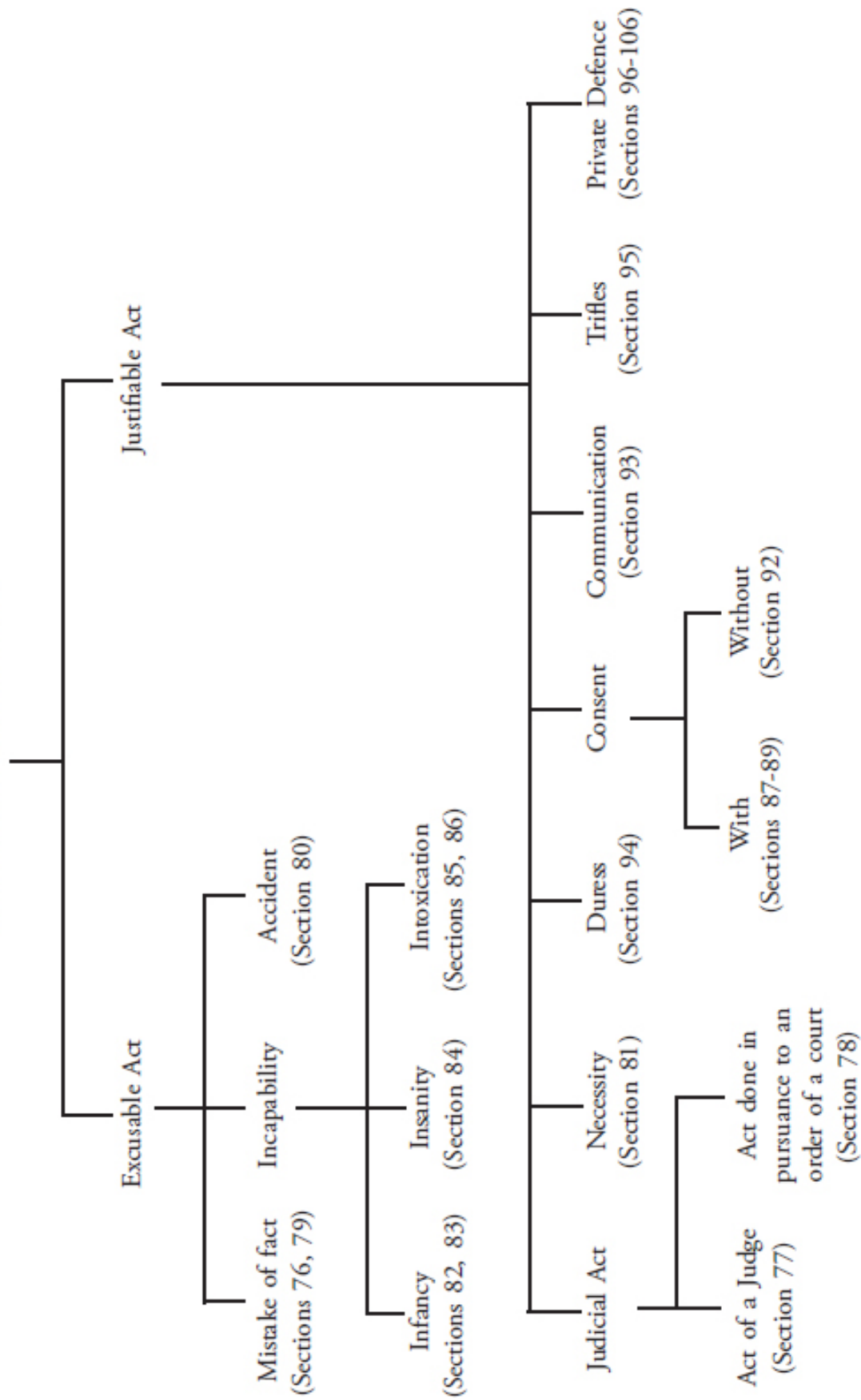
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 84] Act of a person of unsound mind.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 84] Act of a person of unsound mind.—

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

[s 84.1] Principle

Section 84 states that unsoundness of mind is a defence of a person to a criminal charge on the theory that “one who is insane has no mind and hence cannot have the necessary *mens rea* to commit a crime.”¹²⁷ Being deprived of free will a mad man is placed in even a worse predicament than a child because the latter can at least control his will and regulate his conduct, whereas the former cannot. In fact, a mad man is punished by his own madness – *Furiosus furore sui punier*. Moreover, the act of an insane person being unintentional and involuntary, no court can correct him by way of punishment.¹²⁸ But at the same time the society has to be protected against the attack of maniacs. Accordingly, a provision has been made under *section 330 of the Criminal Procedure Code, 1973* for the detention of such persons in lunatic asylums.¹²⁹

[s 84.2] Unsoundness of Mind – Insanity – Meaning

[s 84] Act of a person of unsound mind.—

Unsoundness of mind is commonly termed insanity and according to medical science, is a disorder of the mind which impairs the mental faculties of a man. In other words, insanity is another name for mental abnormality due to various factors and exists in various degrees. Insanity is popularly denoted by idiocy, madness, lunacy, to describe mental derangement, mental disorder and all the other forms of mental abnormality known to medical science. Thus, an uncontrollable impulse driving a man to kill or wound would come within the scope¹³⁰ of the medical definition of insanity.

However, insanity in law differs markedly from the medical concept. Insanity in law means a disorder of the mind which impairs the cognitive faculty, i.e., the reasoning capacity of a man, to such an extent as to render him incapable of understanding the nature and consequences of his actions. It excludes from its purview insanity which could be engendered by emotional or volitional factors. In other words, every aberrative act performed by a person cannot exempt him from criminal responsibility; it is only insanity of a particular or appropriate kind which is regarded as insanity in law that will exempt a man from criminal liability.

[s 84.3] Test of Insanity

The important questions that arise regarding insanity are:

how is it to be detected and what should be the demarcating line between “sanity” and “insanity” in order to extend to a man the protection of law from criminal prosecution.

A number of tests¹³¹ have been given from time to time for this purpose and the kind and degree of insanity available as a defence against a crime. But the most notable of all is the “right and wrong test” formulated in *McNaughten’s* case.¹³² In this case the law relating to insanity is to be found in the form of replies given by the 15 judges of the House of Lords to the five questions put to them with a view to clarifying the law on this subject. Over time those questions and particularly the answers to the second and third questions assumed great significance inasmuch as they find place in the *Penal Code* of almost all countries in the world influenced by common law.

These questions were:

Question II.—What are the proper questions to be submitted to the jury when a person afflicted with insane delusions respecting one or more particular subject or person, is charged with the commission of a crime (murder, for instance), and insanity is set up as a defence;

Question III.—In what terms ought the question to be left to the jury as to the prisoner’s state of mind at the time when the act was committed?

The answers to these questions were:

To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such a defect of reason due to disease of the mind as not to know the nature and the quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

Section 84 of the Penal Code has been drafted in the light of the replies to the second and the third questions, which is generally known as the M'Naughten Rules.

However, section 84 uses a more comprehensive term, “unsoundness of mind”, instead of “insanity”. As stated by Huda, the use of the word “unsoundness of mind” has the advantage of doing away with the necessity of defining insanity and of artificially bringing within its scope different conditions and affliction of the mind which ordinarily do not come within its meaning, but which nonetheless stand on the same footing in regard to the exemptions from criminal liability.¹³³

[s 84.4] Ingredients of section 84

To invoke the benefit of section 84, it must be proved that at the time of commission of the offence, the accused was (insane) *non compos mentis* (not of sound mind) and that the unsoundness of mind was of such a degree and nature as to fulfil one of the tests laid down in the section. These are:

first, the accused was incapable of knowing the nature of the act, and

secondly, that the accused was precluded by reason of unsoundness of mind from understanding that what he was doing was either wrong or contrary to law.

The first category covers two situations, namely, automatism and mistake of fact due to unsoundness of mind as a defence. For instance, if a mad man cuts off the head of a man sleeping on the road, because it would be fun to watch him searching for his head when he awoke, the act shows that he did not know the nature and quality of his act. In fact, he has no idea that his fun could never happen, the moment the head was separated from the rest of the man's body, as the man would never recover consciousness.

The second category covers those cases wherein a man by reason of delusion is unable to appreciate the distinction between right and wrong. For instance, in *Shibo Koeri* in which the accused killed his uncle by severing his head and neck with a sword while shouting “Victory to Kali”, and thereafter attempted to strike others including his father, it was held that the accused's case fell within the latter part of the section.¹³⁴ It was found that the accused was suffering from a fit of insanity at the time he attacked the deceased with the sword and was by reason of unsoundness of mind, incapable of knowing that he was doing an act which was wrong or contrary to law, and hence he was acquitted of the charge of murder. The law on the point has been well summarised by their Lordships of the Calcutta High Court in *Kader Nasayer Shah* in the following words:

It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is (i) wrong or (ii) contrary to law.

A person strikes another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to haven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under

[s 84] Act of a person of unsound mind.—

insane delusion believe an innocent man whom he kills to be a man that was going to take his life; in which case by reason of his insane delusion he is incapable of knowing that he is doing what is contrary to the law of the land.¹³⁵

Leading Cases on Insanity.—Surendra Mishra: In *Surendra Mishra v State of Jharkhand*, AIR 2011 SC 627 [LNIND 2011 SC 27] : JT 2011 (1) SC 83 [LNIND 2011 SC 27] ,, the Supreme Court held that an accused who seeks exoneration from criminal liability of an act under section 84 is to prove legal insanity and not medical insanity. Merely because the accused is conceited, odd and his brain is not all right, or that the mental or physical ailments from which he suffered have rendered his intellect and attacked his emotions or indulges in certain unusual acts, or had fits of insanity on short intervals or that he was subjects to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application.

Dayabhai Chhaganbhai: In *Dayabhai Chhaganbhai Thakkar*,¹³⁶ the Supreme Court held that in determining whether the accused has established that his case comes within the purview of section 84, the Court has to consider the circumstances which preceded, attended and followed the crime. The relevant facts are the motive for the crime, the previous history as to the mental condition of the accused, the state of his mind at the time of the offence, and the events immediately after the incident which throw a light on the state of his mind.

The accused was convicted under *section 302, IPC*, for murder of his wife. One night while the two were sleeping in their room as usual, the neighbours were awakened on hearing her cries that she was being killed. They found the door of the room bolted from inside and called upon the accused to open it. When he opened the room, they found his wife dead with as many as 44-knife injuries on her body.

At the trial the plea of insanity was rejected in view of the fact that in the statements made to the police immediately after the incident, there was no indication whatsoever that they had found his conduct on emerging from the room to be that of a person who had lost his sanity. The Sessions Judge accordingly convicted the accused and on appeal the High Court confirmed the conviction.

Rejecting the defence of insanity and dismissing the appeal, Supreme Court held that the evidence on record was not sufficient even to throw a reasonable doubt that the act might have been committed when the accused was under a fit of insanity. The Court said it is that only that unsoundness of mind which materially impairs the cognitive (reasoning) faculty of the mind can constitute a ground for exemption from criminal liability. The nature and the extent of the unsoundness of mind required must reach that stage that would make the offender incapable of knowing the nature of his act or that what he is doing is either wrong or contrary to law. The Court explained these two different conditions of mind with the help of following illustrations.

- (1) A person strikes another believing in consequence of a delusion, that he is striking a bird. He does not know the nature of his act;
- (2) A person kills a child under an insane delusion that he is saving him from sin and sending him to paradise. Here he is incapable of knowing, by reason of his insanity, that he is doing what is morally wrong although he is aware of the nature of the act.

Hari Singh: In a fairly recent case of *Hari Singh Gond v State of Madhya Pradesh*¹³⁷ (2009), the accused was convicted under *section 302, IPC* read with *section 201, IPC* and sentenced to life imprisonment which was confirmed by High Court of Madhya Pradesh for beating to death Hari Lal (deceased) with stick several times due to which he died. Thereafter the accused put some grains on fire which were lying in that room, due to which not only the house caught the fire but Harilal was also burnt.

Rejecting the defence plea of unsoundness of mind under *section 84, IPC* on the ground of unusual behaviour of the accused; as reported by the witnesses, the Supreme Court held that the standard to be applied for deciding applicability of section 84 is whether according to the ordinary standard, adopted by reasonable man, the act was right or wrong. The mere fact that an accused is conceited (exaggerated opinion) odd traceable (peculiar person) and his brain is not quite all right or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short interval, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer (strange) cannot be sufficient to attract the application of this section. It was held on facts of case that section 84 had no application.

Ashiruddin: In *Ashiruddin v The King* (1949), AIR 1949 Cal 182, the Calcutta High Court allowed the defence of insanity under *section 84 IPC* on the ground that the accused had sacrificed his son of five years while acting under the delusion of a dream, believing it to be right. The accused had dreamt that he was commanded by someone in paradise to sacrifice his son of five years. The next morning the accused took his son to a mosque and killed him by thrusting a knife in his throat. He then went straight to his uncle but, finding a *chaukidar* (watch man) nearby, took his uncle to a tank some distance away and slowly related the story. On these facts, it was held by a Bench of the Calcutta High Court that the case of insanity under *section 84, IPC* was made out.

It was held in this case that to enable an accused to obtain the benefit of section 84 he should be able to establish any one of the following three elements, viz.,

- (1) that the nature of the act was not known to the accused, or
- (2) that the act was not known by him to be contrary to law, or
- (3) that the act was not known by him to be wrong.

On the above facts, the Bench held that the third element was established by the accused, namely, that the accused did not know that the act was wrong. This was obvious on the ground that the accused was labouring under a belief that his dream was a reality.

Laxmi: The Allahabad High Court on the other hand, in *Laxmi v State*, AIR 1953 All 534,¹³⁸ expressed its disagreement with the Calcutta view and observed that it will be open to an accused in every case to plead that he had dreamt a dream enjoining him to do a *criminal act*, and believing that his dream was a command by a higher authority, he was impelled to do the *criminal act*, and therefore, he would be protected by section 84.

The Court further held that if cognition and reason are found to be still alive and vibrant, it will not avail a man to say that at the crucial moment he had been befogged by an overhanging cloud of intuition which cast deep dark shadows over his mental faculties. "Legal insanity" is not the same thing as "medical insanity" and a case that falls within the latter category need not necessarily fall within the former. Further the case where a murderer is struck with an insane delusion is different from the case of a man suffering from organic insanity (insanity affecting an organ of the body).

Ahmadulla: In *State of Madhya Pradesh v Ahmadulla*¹³⁹ (1961), one day in the dead of the night the accused went carrying a torch to his mother-in-law's house and managed to enter her room by stealth. Finding her asleep he killed her by severing her head with a knife. He then put the head and knife in a cloth bag and hid it in an underground cell and hid the torch in a cash box.

The accused pleaded unsoundness of mind in his defence and in support of the plea two doctors and the father of the accused were examined. The civil surgeon deposed that he had examined the accused two years ago and found that he had an epileptic type of insanity at that time. The other doctor deposed that he found the accused two months after the incident suffering from epileptic insanity. The father stated that he had observed the accused to be in a disturbed mental state for two days and that in the morning after the crime, he found him unconscious with his hands and feet stiffened (a symptom found in epilepsy).

The Apex Court held that to establish insanity it must be clearly proved that at the time of committing the act the accused was labouring under such a defect of reason, as not to know the physical nature and quality of the act he was doing, or that although he knew its quality and nature, he did not know that what he was doing was wrong or contrary to law. The burden of proof that the mental condition of the accused at the crucial point of time, when the offence was committed, was of such a degree as is described in *section 84 IPC*, lies on the person who claims the benefit of this exception.¹⁴⁰

Applying the above principles to the facts and circumstances of the case, the Supreme Court observed that there was no basis in evidence for finding that at the crucial time when the accused killed his mother-in-law, he was incapable from unsoundness of mind of knowing that what he was doing was wrong. The plea of insanity under an epileptic fit can succeed only, if it is established, that at the very time when the murder was committed the accused was under an epileptic seizure which rendered him incapable of knowing the nature of his act. It is not enough to show that some months before or after the incident the accused was found to be suffering from epileptic insanity. Moreover, the circumstances in which the murder was committed (in the dead of night, with access to the house of the deceased being obtained by scaling a wall, and the foresight to carry a torch) showed that the crime was committed not in a sudden fit of (epilepsy) insanity, but rather was preceded by careful planning, exhibited cool calculation in execution of plan, and was directed against a person considered an enemy by the accused.

Ratan Lal: In *Ratan Lal v State of Madhya Pradesh*¹⁴¹ (1971), the appellant on 22 January 1965, set fire to the grass lying in the *Khalihayan* (open land) of Nemichand at the time of the setting of the sun. He was caught on the spot while setting the fire. On being asked why he had done it, the accused replied; "I burnt it and do whatever you want." According to the psychiatric he was a lunatic in terms of the Indian Lunacy Act, 1912. The report said the accused "(1) remains depressed, (2) does not talk, (3) he is a case of manic depression and psychosis and (4) needs treatment".

The trial magistrate held that the accused was not liable to punishment under *section 435 of the Penal Code* (mischief by fire with intent to cause damage) as he was insane at the time of the commission of the offence and did not know that he was doing anything wrong or contrary to law. The High Court, on appeal filed by the state, reversed the trial magistrate's finding and held the accused liable for the offence charged.

The Supreme Court allowed the appeal, set aside the conviction, and held that the behaviour of the appellant on the day of occurrence, and the medical evidence indicated that the appellant was insane within the meaning of *section 84, IPC*.

Seralli Wali: In *Seralli Wali Mohammad v State of Maharashtra*¹⁴² (1972), the accused was charged and committed under *section 302, IPC* for having caused the death of his wife and a female child with a chopper. Rejecting the plea of insanity the Supreme Court observed that the law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive was proved as to why the accused murdered his wife and child, nor the fact that he made no attempt to run away when the door was broken open, could not indicate that he was insane or that he did not have the necessary *mens rea* for the commission of the offence.

Chhagan: Similarly, it was held in *Chhagan v State*, 1976 Cr LJ 671, that it would be most dangerous to admit

[s 84] Act of a person of unsound mind.—

a defence of insanity upon arguments merely derived from the character of the crime. A somewhat queer behaviour on the part of the accused preceding the commission of the crime did not establish that he could be called *non compos mentis*.

Legal insanity is established only if it is known that the cognitive faculties of the person are such that he does not know what he has done or what will follow his act. Thus, in *Balagopal Re*, 1976 Cr LJ 1978 (1981-82) (Mad), the accused who was living very amicably with his wife and behaved in a friendly manner towards her, murdered her and his son by stabbing them with a knife. No motive could be suggested. The medical opinion was definite about the accused not being in a position to understand the nature of the act. It was held that the plea of insanity could well be substantiated by the statement of the doctor.

Phulabai: In *Phulabai Sadhu Shinde v State of Maharashtra*, 1976 Cr LJ 1519 (Bom), the Bombay High Court went even further to grant the plea of insanity to the accused, who was suffering from chronic and incurable illness. The accused in an attempt to commit suicide jumped into a well along with her child resulting in the latter's death. The plea of insanity was advanced though medical evidence was absent in the case. The court granted the benefit of the plea of unsoundness of mind on the basis that the absence of medical evidence did not justify exclusion of common sense.

Jai Lal: In *Jai Lal v Delhi Administration*¹⁴³ (1969), the appellant was convicted under *section 302, IPC* for having killed a small girl aged 1½ years with a knife at 1.45 pm on 25 November 1961 and stabbed two other persons. The accused pleaded that he was suffering from insanity as a result of schizophrenia¹⁴⁴ within the meaning of *section 84, IPC*.

To establish as to whether the appellant was suffering from such incapacity at the time of the commission of the act or not as to claim benefit of *section 84, IPC*, the state of his mind before and after the crucial time is relevant. There is evidence of a medical character that between 12 October 1960 and 12 January 1961, he was suffering from schizophrenia. He was completely cured of this disorder on 12 January 1961, when he resumed his normal duties. He had another attack of this disorder in the middle of December 1961. The attack lasted until September 1962 when he was found to be normal again. He had a high-strung temperament and was easily excitable. But there was positive evidence that even at the moment of his greatest excitation he could distinguish between right and wrong. From 12 January up to 24 November 1961, he attended office and discharged his duties in a normal manner. On the morning of 25 November 1961, his mind was normal. He went to his office from home all alone. He wrote a sensible application asking for casual leave for one day. At 1.45 pm he stabbed and killed a child and soon thereafter he stabbed two other persons. On his arrest soon after 2.45 pm he gave normal and intelligent answers to the Investigating Officers. Nothing abnormal was noticed in him until 16 December 1961.

In view of the above findings the Court held that the appellant was not insane within *section 84, IPC* at the time of the killing and stabbing and that he was aware of the consequences of his acts. The accused was accordingly held liable for murder under *section 302, IPC*.

Ram Lal: Likewise, the Supreme Court in *Ram Lal v State of Rajasthan*, (1977) Cr LJ (NOC) 168 (Raj),¹⁴⁵ held that to take protection of *section 84, IPC* the person must be *non compos mentis* at the time of commission of the crime. The law presumes every person of the age of discretion to be sane unless the contrary is proved; and even if a lunatic has lucid intervals the law presumes the offence to have been committed in a lucid interval unless it appears to have been committed during derangement.

The appellant lacked motive in killing an eight-year-old boy and the Doctor's report showed that he was a case of epilepsy with retarded mental faculties such as to place him in the category of severe abnormality. There was no evidence that at the time of murder the accused was acting in a state of hallucination, or under the influence of epileptic insanity. On the contrary, his running away to his village after the occurrence showed that he was conscious of the fact, which was enough to demolish the plea of insanity.

[s 84] Act of a person of unsound mind.—

Amrit Bhushan: In *Amrit Bhushan v UOI*,¹⁴⁶ the Supreme Court said that insanity as an exception to criminal liability must rest on the fact that the accused was incapable of understanding the nature and consequences of his act at the time of commission of the offence. If it were not possible to do so, the responsibility could not be absolved.

Mazzi: In *Mazzi v The Queen*, 34 ALJK 307 : (1961) ALR 137,¹⁴⁷ the High Court of Australia held that when a defence of insanity to a criminal charge is strongly supported by expert evidence that the accused was suffering from a disease or disorder of the mind, namely paranoid schizophrenia¹⁴⁸ at the time of the commission of the offence; the charge should explain not only the test to be applied to determine that defence, but also the real meaning of the expert evidence in its bearing upon that test and the considerations which may properly be used in deciding whether to accept or reject the evidence advanced.

This is an application for special leave to appeal from an order of the Full Court of the Supreme Court of Victoria refusing leave to appeal from a conviction for murder. The decision was that of a majority of the Court, *Herring CJ* and *Gavan Duffy J*, *Monahan J* dissenting.

On 23 December 1959 the prisoner killed a woman named Myrtle Bourke by stabbing her with a knife which he took from kitchen where they were at the time. She lived some doors up the street. They had become acquainted and had established a sexual association.

He left her on the kitchen floor and went off to the police station and signed a written statement recounting what had occurred. At the trial his defence was insanity. The defence was supported by three physicians, psychiatrists, who were called for the prisoner. No evidence was called by the Crown in rebuttal. The three physicians, two government officers and one private-deposed to the opinion that the prisoner suffered from a disease or disorder of the mind, namely paranoid schizophrenia, as a result of which he had stabbed the woman. They considered that in consequence of this disease or disorder he had no appreciation of the wrongness of his act and they went as far as saying that it might well be that he had not a full or sufficient appreciation of the nature and quality of his Act.

All three experts were of opinion that he should be certified as an insane person.

While allowing the appeal the court said:

We set aside the sentence and verdict upon the prisoner to enter a verdict of “not guilty upon the ground of insanity” and to direct that the appellant be kept in strict custody, until becomes cure as per doctors observation.

[s 84.5] Irresistible Impulse

Insanity affects not only the cognitive (reasoning) faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. Indian law like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties, because it is thought that those are the cases in which the exemption rightly applies, and those cases in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception because it is thought that the object of criminal law is to make people control their insane as well as sane impulses.

Trial of an Incompetent Criminal is Barred: Charles L Ryan: In *Charles L Ryan v Ernest Valencia Gonzales*

[s 84] Act of a person of unsound mind.—

and *Terry Tibbals v Sean Carter*, 133 S.Ct. 696 (2013) : 184 L.Ed. 2d 528 (2013),¹⁴⁹ the US Supreme Court held that the criminal trial of an incompetent defendant violates due process clause.

A defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.

Following affirmance of capital murder conviction, petitioner sought federal *habeas* relief. The United States District Court for the District of Arizona, denied petitioner's motion for a competency hearing, and petitioner sought a writ of *mandamus* to stay proceedings.

The Court of Appeals for the Ninth Circuit granted petition, and appeal was allowed.

A separate petitioner convicted in State Court of aggravated murder and sentenced to death sought federal *habeas* relief. The Court of Appeals for the Sixth Circuit, Martin, remanded, and appeal was taken.

Petitions were consolidated and *certiorari* was granted for review of judgment.

The Supreme Court of United States speaking through Justice Thomas, held that:

- (1) statute guaranteeing federal *habeas* petitioners on death row right to counsel did not provide petitioners a right to competence during federal *habeas* proceeding; and
 - (i) Whether due process prohibits Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong; and
 - (ii) Whether Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime (*mens rea*, or guilty mind).

At trial, defendant did not contest the shooting and death, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so. Defendant challenged a 1993 amendment to Arizona's insanity rule, excising (deleting) the express reference to the cognitive (knowledge) incapacity element of the *McNaughten* test.

The court held that history showed no deference to *McNaughten* that could elevate its formula to the level of fundamental principle, so as to limit the traditional recognition of a State's capacity to define crimes and defenses. Because allowing mental-disease evidence on *mens rea* could easily mislead, it was not unreasonable to confine consideration of that kind of evidence to the insanity defense.

Certiorari Granted, for review of the judgment, by the US Supreme Court.

Idaho Law of Insanity: John Joseph: In *John Joseph Delling v State of Idaho*. [*United States*], 133 S.Ct. 504 :

[s 84] Act of a person of unsound mind.—

184 L.Ed. 2d 480 (US Supreme Court),¹⁵⁰ it was held that the law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong. State of Idaho [of the United States] has however made an exception to the rule, namely, a person may be insane but nevertheless has ability to control his actions and liable for *criminal act*.

US Supreme Court by a majority of 6¹⁵¹ to 3¹⁵² held that the State of Idaho's modification of insanity defense is consistent with the 14th Amendment¹⁵³ to US *Constitution* that guarantees "due process of law".

If a defendant establishes an insanity defense, he is not criminally liable, though the Government may confine him civilly for as long as he continues to pose a danger to himself or others by reason of mental illness.

State of Idaho and a few other states in the United States have modified traditional insanity defense. Idaho provides that

Mental condition shall not be defense to any charge of criminal conduct.

Another provision, of the same statute provides, however, that the above restriction is not

intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense.

And the Idaho courts have made clear that prosecutors are

still required to prove beyond a reasonable doubt that a defendant had the mental capacity to form the necessary intent.

Thus, in Idaho, insanity remains relevant to criminal liability, but only in respect to intent. Insanity continues to have relevance at sentencing as well. A court must "receiv[e]" evidence of mental condition at sentencing and, if mental condition proves to be a "significant factor," must consider a string of issues deemed relevant to punishment, including, notably,

[t]he capacity of the defendant to appreciate the wrongfulness of his conduct.

In addition, if the court imposes a prison sentence on a person who "suffers from any mental condition requiring treatment," Idaho law mandates that "the defendant shall receive treatment" in an appropriate facility. May be insane, nevertheless have ability to control action. Still, the step that Idaho has taken is significant. As that

[s 84] Act of a person of unsound mind.—

State's courts recognize, it "may allow the conviction of persons who may be insane by some former insanity test or medical standard, but who nevertheless have the ability to form intent and to control their actions.

That is, the difference between the traditional insanity defense and Idaho's standard is that the latter permits the conviction of an individual who knew what he was doing, but had no capacity to understand that it was wrong.

To illustrate with a simplified example: Idaho law would distinguish the following two cases.

Case One: The defendant, due to insanity, believes that the victim is a wolf. He shoots and kills the victim.

Case Two: The defendant knows that the victim is a human being but due to insanity, believes that a wolf, a supernatural figure, has ordered him to kill the victim.

In *Case One*, the defendant does not know that he has killed a human being, and his insanity negates a mental element necessary to commit the crime (offering a similar example of how mental illness may rebut *mens rea*).

In *Case Two*, the defendant has intentionally killed a victim whom he knows is a human being; he possesses the necessary *mens rea*.

In both cases the defendant is unable, due to insanity, to appreciate the true quality of his act, and therefore unable to perceive that it is wrong.

But in Idaho, the defendant in *Case One* could defend the charge by arguing that he lacked the *mens rea*, whereas the defendant in *Case Two* would not be able to raise a defense based on his mental illness.

Much the same outcome seems likely to occur in other States that have modified the insanity defense in similar ways. For example, in *State v Bethel*, 275 Kan 456 (459) : 66 P. 3d 840 (843) (Kan 2003), under a similar Kansas statute, evidence that a schizophrenic defendant's "mental state precluded him from understanding the difference between right and wrong or from understanding the consequences of his actions ...does not constitute a defense to the charged crimes."

Insanity: Michael Clark: In *Eric Michael Clark v Arizona*, 548 US 735 (2006) : 2006 US Lexis 5184,¹⁵⁴ US Supreme Court by a majority of 5 to 4 held that under State of Arizona law, a defendant will not be adjudged insane unless he demonstrates that at the time of the commission of the *criminal act* he was afflicted with a mental disease or defect of such severity that he did not know the *criminal act* was wrong.

In the early hours of 21 June 2000, Officer Jeffrey Moritz of the Flagstaff Police responded in uniform to complaints that a pickup truck with loud music blaring was circling a residential block. When he located the truck, the officer turned on the emergency lights and siren of his marked patrol car, which prompted petitioner Eric Clark, the truck's driver (then 17), to pull over. Officer Moritz got out of the patrol car and told Clark to stay where he was. Less than a minute later, Clark shot the officer, who died soon after. Clark ran away on foot but was arrested with gunpowder residue on his hands; the gun that killed the officer was found nearby, stuffed into a knit cap.

Clark was charged and convicted with first-degree murder under *Ariz. Rev. Stat. Ann. §13-1105(A)(3)* for intentionally or knowingly killing a law enforcement officer in the line of duty.¹⁵⁵ In March 2001, Clark was found suffering from paranoid schizophrenia – a severe mental disease distorted by delusion and hallucination and

[s 84] Act of a person of unsound mind.—

was found incompetent to stand trial and was committed to a state hospital for treatment, but two years later the same trial court found his competence restored and ordered him to be tried.

The judge issued a verdict of first-degree murder, finding that Clark shot and caused the death of Officer Moritz beyond a reasonable doubt and that Clark had not shown that he was insane at the time. The judge noted that though Clark was indisputably afflicted with paranoid schizophrenia at the time of the shooting, the mental illness “did not... distort his perception of reality so severely that he did not know his actions were wrong.”

The judge relied on “the facts of the crime, the evaluations of the experts, [Clark’s] actions and behavior both before and after the shooting, and the observations of those that knew [Clark].” The sentence was life imprisonment without the possibility of release for 25 years.

The Court of Appeals of Arizona affirmed Clark’s conviction, rejecting Clark’s contention of violating due process clause.¹⁵⁶

Clark moved the US Supreme Court to vacate the judgment and sentence, arguing, among other things, that Arizona’s insanity test violated due process. As to the insanity standard, Clark claimed that the Arizona Legislature had impermissibly narrowed its standard in 1993 when it eliminated the first part of the two-part insanity test announced in *M’Naughten*’s case that to establish a defence on the ground of insanity, it must be clearly proved that,

- (i) at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or
- (ii) if he did know it, that he did not know he was doing what was wrong.

The first part asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing.

The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong.

When the Arizona Legislature first codified an insanity rule, it adopted the full *M’Naughten* statement.

However, in 1993, the legislature dropped the cognitive (mental) incapacity part, leaving only moral incapacity as the nub (crux) of the stated definition.

Thus under current Arizona law, a defendant will not be adjudged insane unless he demonstrates by clear and convincing evidence that

- (1) at the time of crime, the accused was “Afflicted

[s 84] Act of a person of unsound mind.—

- (i) with a mental disease or
 - (ii) defect of such severity that [he] did not know the *criminal act* was wrong”; and
- (2) aiming to rebut the prosecution's evidence of requisite *mens rea* (guilty mind) that he had acted intentionally or knowingly to kill an officer.

Arizona's narrowing of its definition of insanity, in 1993 eliminating the part of *M'Naughten* test¹⁵⁷ asking whether mental defect left defendant unable to understand what he was doing, leaving only the question whether mental disease or defect left defendant unable to understand that his action was wrong, did not violate due process; elimination of part of *M'Naughten* test did not offend fundamental principle or shortchange (less than some minimum) some constitutional minimum.

Defendant was convicted of first-degree murder for killing police officer in line of duty.

Held: US Supreme Court by a majority of 5 to 4 that:

1. Arizona's narrowing of its insanity test, and
2. Exclusion of evidence of mental illness and incapacity due to mental illness on issue of *mens rea* did not violate due process.

Uttam Nandram Somwanshi: In *Uttam Nandram Somwanshi v State of Maharashtra*,¹⁵⁸ Supreme Court held that the defence has not been successful in proving that “at the crucial point of time” or “at the time of doing the act” by unsoundness of mind, the accused/appellant was incapable of knowing the nature of his act. Hence not entitled to the benefit of *Exception 84* unsoundness of mind for murder—Supreme Court 2016. Appeal dismissed.

Sessions Court acquitted accused/appellant on charge of murder under section 302 read with section 54 of Code, 1860. Division Bench of High Court set aside acquittal order by holding accused guilty for offence of murder. Hence, present appeal. Whether, accused was entitled for benefit of section 84 of Code Facts. The Division Bench of the High Court set aside the order of acquittal passed by the Sessions Court on the charge of murder under section 302 read with section 504 (intentional insult with intent to provoke breach of peace) of *Indian Penal Code, 1860* holding the accused/appellant guilty for the offence of murder.

Held: (i) The Division Bench of the High Court with reference to the conduct of the accused seen before the incident, concluded that he was working to a plan. On the day he was produced before the Magistrate, there were no signs of unsoundness of mind. The defence had not been successful in proving that “at the crucial point of time” or “at the time of doing the act” by unsoundness of mind, the accused was incapable of knowing the nature of his act. Regarding evidence of unsoundness of mind brought on record was not regarding unsoundness of mind soon before or after the incident. Soon before the incident, the accused appeared to have conscientiously acted upon the plan and, therefore, the Division Bench of the High Court was rightly not agreed with the finding of fact recorded by the Trial Court on the charge holding him not guilty. The case of the accused did not fall within the purview of general exceptions available under *section 84 of IPC, 1860*. The conclusion arrived at by the Division Bench was based on proper appreciation of the evidence. More so, there was absence of defence for unsoundness of mind of the accused on the date of the incident. Appeal dismissed, conviction upheld.

John Brown: In *AG for State of South Australia v John Whelan Brown*, ([1960 AC 432](#)) (PC), (1960), the Rivy

[s 84] Act of a person of unsound mind.—

General reversing the order of the High Court and restoring the verdict of the trial court held that where the defence of insanity is raised in criminal proceedings, the law will not recognise irresistible impulse – which *per se* affords no defence – as a symptom from which the jury may without evidence infer insanity within the *M'Naughten Rules*. [At the trial of the respondent on a charge of murder by shooting, in which the only evidence was insanity, the medical evidence for the respondent was *inter alia* that he was a schizoid personality (mentally abnormal) and that at the moment of shooting he knew the nature and quality of his act but did not know that what he was doing was wrong.

[s 84.6] Automatism

Charlson: In *R v Charlson*, [\(1955\) 1 All ER 859](#),¹⁵⁹, automatism was recognised as a defence to a criminal charge of maliciously causing grievous hurt under section 20 of the Offences Against Persons Act, 1861. The accused hit his son aged ten years over the head with a mallet and threw him out of a window. It was established that the accused might have been suffering from a cerebral tumour which would cause acts of impulsive violence. The court accordingly gave a verdict of not guilty.

Quick and Paddison: In *R v Quick; R v Paddison*, [\(1973\) 3 All ER 347](#) (CA), the appellant, a nurse at a mental hospital, was charged with assault occasioning actual bodily harm to a paraplegic spastic (physically disabled because of cerebral paralysis) patient at the hospital. The accused pleaded not guilty to the assault on the ground of automatism. It was found that the accused had been a diabetic since the age of seven and, on the morning of the day in question, he had taken insulin as prescribed by the doctor. The accused had taken a small breakfast and drinks including whisky and a quarter of a bottle of rum before the assault took place. Medical evidence showed that at the time of assault the appellant was suffering from hypoglycaemia, a deficiency of blood sugar, after an insulin injection.

Allowing the appeal, the Court of Appeal held that the accused is entitled to plead automatism but not insanity. In order to sustain a defence of insanity on the ground that the accused was suffering from a disorder of the mind, the accused had to show a malfunctioning of the mind of transitory effect caused by the application to the body of some external factor, such as, violence, drugs, including anaesthetics, alcohol and hypnotic influence, which could not be said to be due to disease.

The mental condition from which the appellant alleged that he had been suffering, had not been caused by his diabetes but by the use of insulin prescribed by the doctor; the alleged malfunctioning of his mind had therefore been caused by an external factor and not by a bodily disorder in the nature of a disease of mind.

Holms¹⁶⁰: Plea of Insanity rejected. Doctors' opinion on insanity upheld.—The appellant committed a homicidal attack on his landlady. He then went to a police station, said that he was giving himself up for murder, and gave a full and detailed account of what he had done. He was charged upon indictment for murder. The only defence was a plea of insanity. A doctor, called to give evidence on behalf of the appellant, was asked in cross-examination whether in his opinion the appellant's conduct immediately after the murder would indicate:

(1) that he knew the nature of the act he was committing, or

(2) that the appellant knew that his conduct was contrary to the law of the land.

The doctor answered both questions in the affirmative. The appellant was convicted of murder. The principal ground of his appeal against conviction was that the judge was wrong in allowing the questions put to the doctor and his answers to be admitted in evidence.

While dismissing the appeal, the court held, the questions were admissible; had the doctor's answers to be admitted been "No" it would be a very great misfortune and a great hardship to a defendant setting up a plea of insanity if the doctor were not allowed to answer these questions.

[s 84] Act of a person of unsound mind.—

[s 84.7] Diminished Responsibility

Although the M'Naughten Rules still hold the field in England despite the recommendations of the Royal Commission, a new defence to murder, known as "Diminished Responsibility" was introduced by the Homicide Act of 1957. If established, it entitles the accused to be found guilty of manslaughter (culpable homicide) instead of murder. Section 2 of that Act enacts:

- (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
- (2)
- (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

Dietschmann: In *R v Dietschmann*, (2003) UKHL 10 : [\(2003\) 1 All ER 897](#) (HL),¹⁶¹ the House of Lords held that where a defendant,¹⁶² who had taken drink prior to killing the victim but who was not suffering from alcohol dependency syndrome such as to constitute an abnormality of mind, sought to prove the defence of diminished responsibility under section 2(a) of the 1957 Act, he did not have to show that, if he had not taken drink, he would have killed as he had in fact done. In referring to substantial impairment of mental responsibility, the subsection did not require the killing. Even if the defendant would not have killed if he had not taken drink, the causative effect of the drink did not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his acts. Accordingly, in the instant case, the appeal would be remitted to the court of appeal for it to decide whether to allow the appeal, quash the conviction.

Seers: It was held in *R v Seers (John Samuel)*,¹⁶³ that the test of Diminished Responsibility is not whether a person can be described in popular language as partially insane or on borderline of insanity.

The test of diminished responsibility is not whether "a person can be described in popular language as partially insane or on the borderline of insanity." S stabbed his estranged wife and was tried for murder. At his trial he raised the defence of diminished responsibility. The prosecution accepted he was suffering from depression but disputed its severity. The judge directed the jury that the test was "whether he could be described in popular language as partially insane or on the borderline of insanity".

S appealed on the ground of misdirection.

Held, allowing the appeal, that this was the wrong test, and the evidence here which amounted to less than that could properly have resulted in a verdict of manslaughter.

[s 84.8] Diminished Responsibility in Singapore

The defence of diminished responsibility was included in the Singapore *Penal Code* in 1961 under section 300 as an *Exception VII* to Murder. The said provision is based on section 2(1) of the English Homicide Act, 1957. *Exception VII* states that:

Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as

[s 84] Act of a person of unsound mind.—

substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

The defence of diminished responsibility was successfully raised in Malaysia for the first time in *Mohamed Bin Jamal, v Public Prosecutor*,¹⁶⁴ in 1964 and in *Lee Soo Meng v PP*¹⁶⁵ (unreported) where the accused killed his nagging wife under an irresistible impulse.

[s 84.9] Diminished Responsibility in Barbados

The provisions on diminished responsibility in Barbados are similar (*pari materia*) with English Law. In *Walter*, 1978 All ER 542 (PC), the appellant, who was convicted of murder moved the Privy Council for substituting the charge to manslaughter under “diminished responsibility” in the light of the medical evidence.

The court held that on an issue of diminished responsibility, the court is entitled and indeed bound to consider not only the medical evidence but the evidence on the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the accused before, at the time of and after the conduct and any history of mental abnormality.

In the present case their Lordships of the Privy Council said that inability of the accused to exercise will power to control physical acts, provided that it is due to abnormality of mind from one of the causes specified in the parenthesis in the sub-section is sufficient to entitle the accused to the benefit of the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be.

The medical evidence as to the appellant's ability to control his physical acts at the time of the killing; the evidence of the revolting circumstances of the killing and the subsequent mutilations, as of the previous sexual history of the appellant pointed, to the conclusion that the accused was what would be described in ordinary language as on the border-line of insanity or partially insane. Hence, entitled to the benefit of diminished responsibility.¹⁶⁶

[s 84.10] A Plea for Introduction of Diminished Responsibility in India

The Law Commission of India, after considering the desirability of introducing the test of diminished responsibility under *section 84, IPC* gave its opinion in the negative due to the complicated medico-legal issues it would introduce in trial.

It is respectfully submitted that the Law Commission's view needs modification since it is not in conformity with the latest scientific and technological advances made during the last century in this direction. Assuming that the three compartments of the mind are those controlling cognition, emotion and the will, section 84 only exempts one whose cognitive faculties are affected. As such, the section has been regarded as too narrow and outdated, inasmuch as it makes no provision for a case where one's emotion and the will are so affected as to render the control of the cognitive faculties ineffectual.

Courts in India have also stressed the need for adopting a more progressive attitude in the application of the principle enunciated in *section 84, IPC* for determining the criminal responsibility of a person suffering from “mental disorders” in the light of recent advances in medical science, especially in the field of psychiatry. The development of psychiatry as a recognised branch of medical science calls for a revision of law as to what constitutes unsoundness of mind for the purpose of *section 84 of the Penal Code*.

Therefore, the Indian law should be amended in line with the English law and the defence of diminished responsibility be recognised as a partial defence to murder under *section 84, IPC*. Singapore *Penal Code* has also recognised “Diminished Responsibility” as a partial defence to insanity. The liability, should be reduced

[s 84] Act of a person of unsound mind.—

from murder to culpable homicide not amounting murder under a new *Exception VII* to *section 300, IPC* as stated below:

Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, *section 105*.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.

[s 84] Act of a person of unsound mind.—

- 14 *Evidence Act, section 113B.*
- 15 *Evidence Act, section 113A.*
- 16 *Evidence Act, section 114A.*
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 127 Gour, *Penal Law of India* (11th Edn, vol I, 2000) pp 602, 603-705: "A mad man has no will"; *Furiosis nulla voluntas est*; 'A mad man is like one who is absent: *Furiosus absentis loco est*.
- 128 Hall, Jerome, *General Principles of Criminal Law*, 2nd Edn (1960), p 449. *Manusmriti*, vol VIII, p 312; A child and an insane were immune from criminal liability.
- 129 See *Criminal Procedure Code* (1973), Chapter 34, sections 328-329. See KM Sharma, *Defence of Insanity in Indian Criminal Law* (1965) 7 JILI, pp 325-383.
- 130 See *Essays on the Indian Penal Code*, ILI (1962), pp 73-83; Hall Jerome, 65, Yale LJ 761, 781 (1956).
- 131 See RC Nigam, *Law of Crimes in India*, (vol I, 1965), p 364. Some of the tests to identify insanity are "wild beast test"; "counting twenty pence test"; "good and evil test" and so on.
- 132 (1843) 10 Clark & Fennelly 200-214 (HL); Revised Reports, Vol 59 8 ER 718. The accused, Daniel Mc'Naughten, was charged for the murder of Edward Drummond, Secretary to then Prime Minister, Sir Robert Peel, on 20 January 1843. The accused was suffering from an insane delusion that Sir Robert Peel had injured him and that he mistook Drummond for Sir Robert. Accordingly, he shot and killed him. The accused pleaded not guilty on the ground of insanity. The defence led evidence of accused's insanity, particularly his obsession with the given morbid delusion. The jury returned a verdict of "not guilty" on the ground of insanity.
- 133 Huda, SS, *Principles of Law of Crimes in British India*, (TLL 1902) p 271.
- 134 *Shibo Koeri*, (1905-06) 10 Cal WN 725.
- 135 *Queen-Empress v Kader Nasyer Shah*, 1896 ILR 23 Cal 604 (608).
- 136 *Dayabhai Chaganbhai Thakkar v State of Gujarat*, AIR 1964 SC 1563 [[LNIND 1964 SC 88](#)] .
- 137 AIR 2009 SC 31 [[LNIND 2008 SC 1728](#)] : 2009 Cr LJ 346 : 2008 AIR SCW 6882 : (2008) 12 Scale 102 [[LNIND 2008 SC 1728](#)] , Dr Arijit Pasayat and Dr Mukundakam Sharma JJ.

[s 84] Act of a person of unsound mind.—

- 138** The accused has been found guilty of having murdered his stepbrother, Cheddilal. His conduct prior to the incident as well as at the time of the incident does not support the contention that he was insane at the time when the offence was committed. His conduct subsequent to the incident also does not lend support to this contention. The conduct and history of the appellant in the court of inquiry as well as in the trial court also militates against the contention that the appellant was liable to recurring fits of insanity at short intervals.
- 139** AIR 1961 SC 990 [[LNIND 1961 SC 36](#)] : (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43 .
- 140** *Vide section 105, Evidence Act, 1872 and illustration (a) thereto.*
- 141** AIR 1971 SC 778 [[LNIND 1970 SC 487](#)] : (1970) 3 SCC 553 : (1971) 3 SCR 251 : 1971 Cr LJ 654 : 1971 CAR 80 .
- 142** AIR 1972 SC 2443 : 1972 Cr LJ 1523 : (1973) 4 SCC 79 : 1973 (5) UJ 204 .
- 143** AIR 1969 SC 15 [[LNIND 1968 SC 135](#)] : (1969) 1 SCR 140 [[LNIND 1968 SC 135](#)] : 1969 Cr LJ 259 : 1968 CAR 198 .
- 144** “Schizophrenia” is a general term referring to a group of severe mental disorders marked by a splitting or disintegration of the personality. The most striking clinical features include general psychological disharmony, emotional impoverishment, dilapidation of thought processes, absence of social rapport, delusion, hallucinations and peculiarities of conduct.
- 145** *Benar Singh Tanti v State*, 1977 Cr LJ 296 (Gau).
- 146** AIR 1977 SC 608 [[LNIND 1976 SC 458](#)] : (1977) 1 SCC 180 [[LNIND 1976 SC 458](#)] : (1977) 2 SCR 240 : (1977) 1 SCJ 213 : 1977 Cr LJ 376 (SC) See Chapter III, for provisions relating to commutation of death sentence.
- 147** Dixon CJ, McTiernan, Fullagar, Menzies and Windey delivered the judgment.
- 148** Schizophrenia is a mental disorder characterised by systematised delusions.
- 149** 14th Amendment to US *Constitution* guarantees “due process of law”.
- 150** 133 S.Ct. 504 : 184 L.Ed. 2d 480 (United States Supreme Court).
- 151** Roberts, Scalia, Kennedy, Thomas, Alito and Kagan JJ. Constitute majority granted *certiorari*.
- 152** Breyer J, with whom Ginsburg and Sotomayor JJ join, dissenting from denial of *certiorari*.
- 153** *Article 14* section “... No State....shall deprive any person of life, liberty, or property without due process of law...”
- 154** Souter J, delivered the opinion of the Court, in which Roberts, CJ, and Scalia, Thomas, and Alito JJ, joined, Breyer J, filed an opinion concurring in part and dissenting in part, *Kennedy J, filed a dissenting opinion, in which Stevens and Ginsburg JJ, joined.*

[s 84] Act of a person of unsound mind.—

- 155** Amendment 5 of the US *Constitution* provides that “No person shall be held to answer for a capital, or otherwise informs crime ... without due process of law...”
- 156** Amendment 5 of the US *Constitution* provides that “No person shall be held to answer for a capital, or otherwise informs crime ... without due process of law...”
- 157** Section 13 1105(A)(3) provides that “a person commits, first degree murder if... intending or knowing that the person’s conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.
- 158** 2016 (13) SCC 205 : 2016 (3) Scale 287 [[LNINDORD 2016 SC 810](#)] : 2017 Cr LJ 1103 , V Gopala Gowda and RK Agarwal JJ.
- 159** See KD Gaur, *commentary on an Indian Penal Code*, 2nd Edn, 2013 under section 841, pp 250 to 271 for detailed discussions.
- 160** *R v Holms*, ([1953](#)) 2 All ER 324 : ([1953](#)) 1 WLR 686 .
- 161** Lord Nicholis of Birkenhead, Lord Lloyd of Berwick, Lord Hutton, Lord Hobhous of Woodborough and Lord Rodger of Earlsferry, 4 December 2002, 27 February 2003.
- 162** The defendant killed a man in a savage attack and was charged with murder. At the time of the killing, the defendant was heavily intoxicated from drinking alcohol, but was also suffering from a mental abnormality, namely an adjustment disorder which was a depressed grief reaction to bereavement. At trial, he relied on the defence of diminishes responsibility under section 2(1) of the Homicide Act, 1957 which provided that a person was not to be convicted of murder if he were suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts in doing the killing.
- 163** 1984 WL 281942 (1984) : (1985) Crimes LR 315 : (1984) 79 Cr App. R 261 Court of Appeal (Criminal Division).
- 164** *Mohamed Bin Jamal v Public Prosecutor*, (1964) Mad LJ 254. The appellant was convicted in the High Court of Singapore on 10 October 1963 on three charges of murder in contravention of section 302 of the Singapore *Penal Code*. The Court after granting leave to call certain evidence as to the state of mind of the accused and hearing the evidence of the Doctor as to the state of mind of the accused at the time of the incident set aside the three convictions and substituted for them conviction for culpable homicide not amounting to murder under *section 304 of the Penal Code*. And imposed a sentence of life imprisonment in respect of each such convictions applying the provisions of the diminished reasonability included in the *Exception* proviso.
- 165** Straits Times, 23 February 1972.
- 166** *Walter v Queen*, 1978 All ER 542 (PC).

**[s 85] Act of a person incapable of judgment by reason of intoxication
caused against his will.—**

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 85] Act of a person incapable of judgment by reason of intoxication caused against his will.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

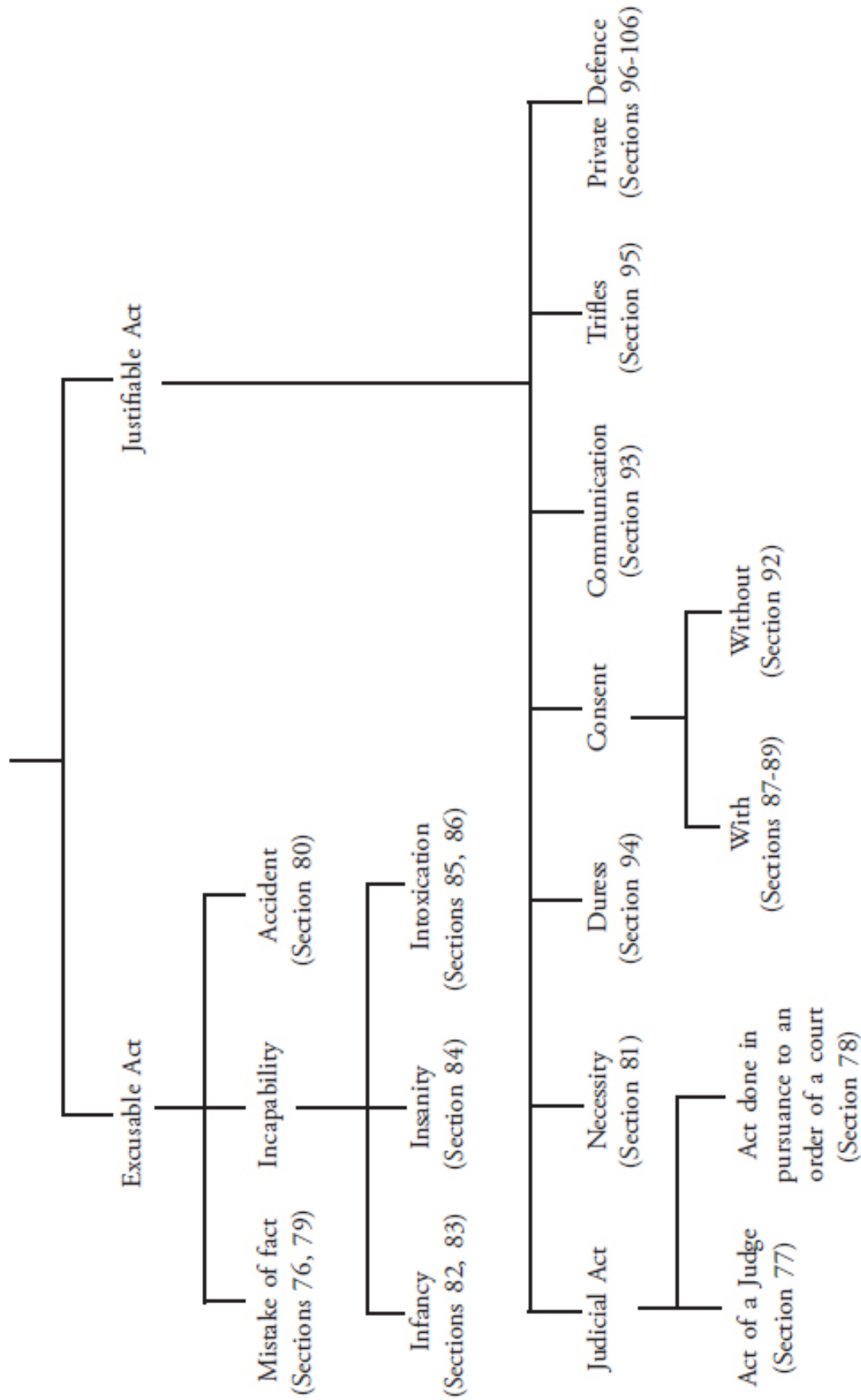
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 85] Act of a person incapable of judgment by reason of intoxication caused against his will.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 85] Act of a person incapable of judgment by reason of intoxication caused against his will.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 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.

[s 85.1] Principle

The *Penal Code* in sections 85 and 86 has crystalised in tabloid form the provisions relating to acts committed by a person by reason of intoxication in mitigating the rigours of the law. Since criminal intention is the basis of criminal liability, an inebriated (intoxicated) person, is in the same state of mental condition as an insane person. Such a state of mind has been termed *dementia affectata*—a form of lunacy in which the function of the mind is temporarily suspended. But no one can be permitted to wear the cloak of immunity by getting drunk, and so voluntary drunkenness is never an answer to a criminal charge.¹⁶⁷ But if a man is forced to drunkenness through trick or fraud, ignorance, without the accused's knowledge or against his will, the act is not a voluntary act and so he is excused from liability.

[s 85] Act of a person incapable of judgment by reason of intoxication caused against his will.—

[s 85.2] Ingredients of Involuntary Intoxication

Section 85 lays down the test to determine when a person is said to have caused an act as a result of involuntary intoxication so as to claim the benefit of exemption under this section. Section 85 gives the same immunity to a person intoxicated involuntarily as section 84 gives to a person of “unsound mind”. That is to say, a man in order to claim exemption from criminal liability on the ground of involuntary intoxication must establish that he was:

- (i) incapable of knowing the nature of the act, or
- (ii) that he was doing what was either wrong or contrary to law, and
- (iii) that the thing which intoxicated him was given to him without his knowledge or against his will.

The justification for such a provision is based on the contention that the accused had not contributed himself towards his drunkenness and which is not likely to be repeated as in the case of a voluntary act.¹⁶⁸ For instance, if a man commits an offence when made intoxicated through fraud of another or through coercion or ignorance practised by someone, he is protected under this section. Because in all such cases the person intoxicated may not be said to have acted on his own accord and therefore is not responsible for the consequences of his acts.¹⁶⁹

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 *The Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.

[s 85] Act of a person incapable of judgment by reason of intoxication caused against his will.—

- 10 The *Indian Evidence Act, 1872, section 105*.
- 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.
- 14 *Evidence Act, section 113B*.
- 15 *Evidence Act, section 113A*.
- 16 *Evidence Act, section 114A*.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 167 *Director of Public Prosecution v Beard*, (1920) AC 479 ; *Lipman*, ([1970](#)) 1 QB 152 ; *Sudhu Kumbhar v King*, AIR 1951 Ori 354 [[LNIND 1949 ORI 8](#)] ; *Mobenji Minji*, (1982) Cr LJ (NOC) 39 (Guwahati) p 14.
- 168 *Hale*, PC 32; *Mathai Mathew v State*, (1952) Cr LJ 1304 Deb. R. Principles of Criminology, Criminal Law and Investigation, 2nd Edn, pp 604-605 (1972).
- 169 *Jethuram Sukura Nagbanshi v State of Madhya Pradesh*, (1960) Cr LJ 1093 (2).

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

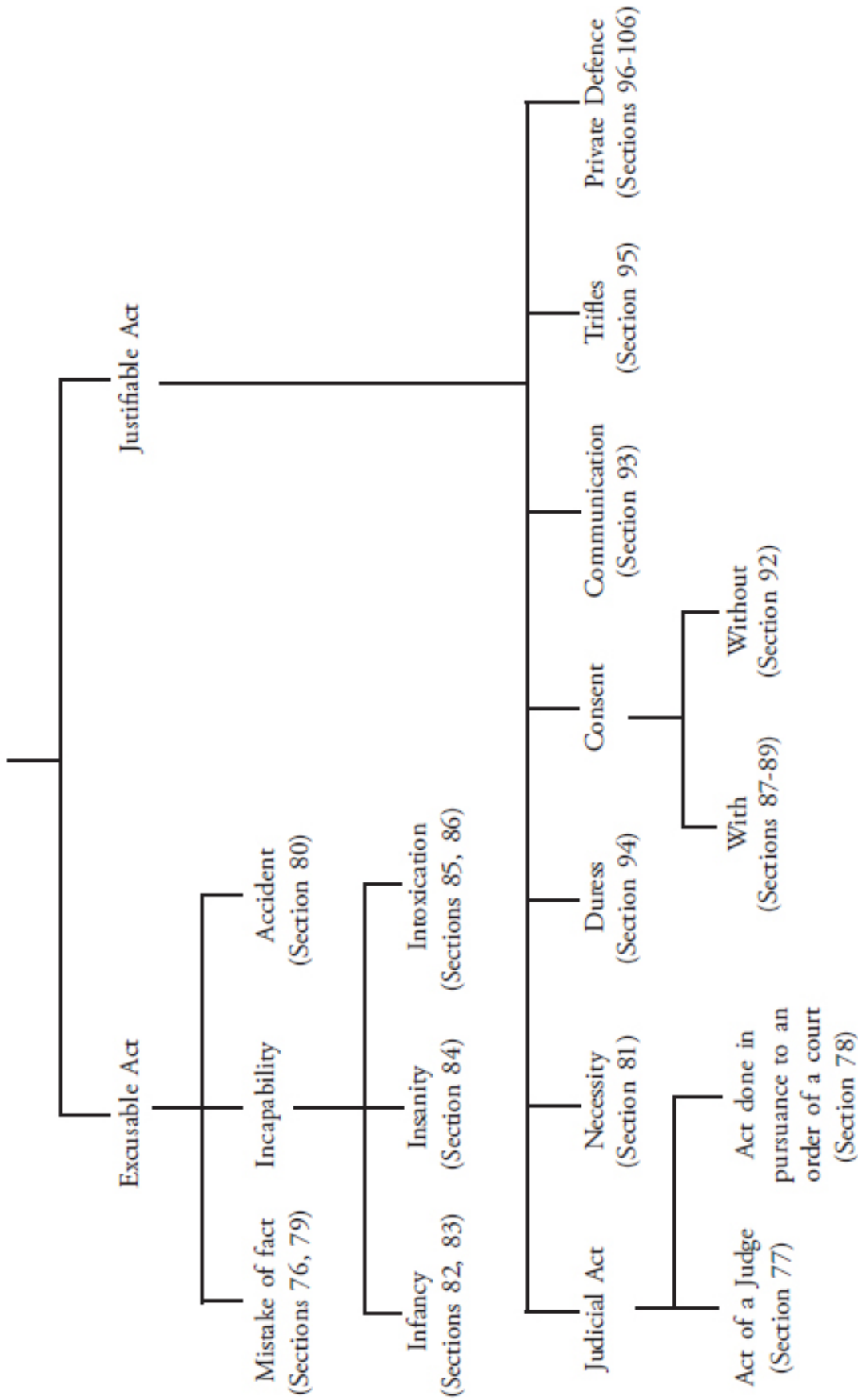
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 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 was administered to him without his knowledge or against his will.

[s 86.1] Principle

Drunkenness was never an excuse for criminal misconduct and indeed the classic authorities broadly assert that voluntary drunkenness must be considered rather an aggravation than a defence. This view was based upon the common law principle that a man who by his own voluntary act debauches¹⁷⁰ and destroys his will power shall be no better situated in regard to criminal acts than a sober man. An early statement of the law found in *Reniger v Fogossa*, (1980) 75 ER 1 (31),¹⁷¹ states that: if a person, who is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.'

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

Judicial decisions extending over a period of nearly 140 years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century. Although voluntary drunkenness cannot excuse from the commission of a crime, yet where upon a charge of murder the material question is whether an act was premeditated or done only in the stress, heat or impulse of the moment, the fact of the party being intoxicated is a circumstance proper to be taken into consideration.

It is said that one who sins when drunk, should be punished when he is sober (*qui peccat ebrius, luat sobrius*).¹⁷² The justification for punishment in such cases is based on the principle that intoxication is the result of a voluntary act of the accused and he must answer for it, although he might not have been capable of self-restraint at the time the crime was committed.

[s 86.2] Ingredients of section 86, IPC

Section 86 deals with that class of cases wherein a man enters into intoxication voluntarily. It imputes (attributes) the same knowledge to such a man as he would have had, had he not been intoxicated, i.e., the knowledge of a sober man with regard to the consequences of his acts.

For instance, if A, a man who has consumed too much liquor, takes a knife from his house and goes along the road shouting his intention to kill B, with whom he had quarrelled earlier, and kills C who tries to pacify him, A would be imputed with the same knowledge as he would have had, had he been sober and his act would amount to culpable homicide not amounting to murder punishable under section 304, IPC and not murder.¹⁷³

Basdev: In *Basdev v State of Pepsu*,¹⁷⁴ the law of drunkenness has been very nicely summarised. The appellant Basdev of the village Harigarh was a retired military *Jamadar*. He was charged with the murder of a young boy named Maghar Singh, aged about 15 or 16 years old. The two of them and others of the same village went to attend a wedding in another village. All of them went to the house of the bride to take the mid-day meal. Some had settled down in their seats and some had not. The appellant asked Maghar Singh, the young boy, to step aside a little so that he might occupy a convenient seat. But Maghar Singh did not move. The appellant whipped out a pistol and shot the boy in the abdomen. The injury proved fatal.

While rejecting the plea of the accused to allow him the benefit of section 86 and reduce the charge from murder to culpable homicide not amounting to murder, the Supreme Court laid down the following rules for guidance, viz.,

- (i) The absence of understanding of the nature and consequences of an act, whether produced by drunkenness or otherwise, is not a defence to the crime charged;
- (ii) The evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime, should be taken into consideration with other proved facts in order to determine whether or not he had this intent;
- (iii) The evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was effected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Dasa Kandha: In *Dasa Kandha v State of Orissa*, (1976) Cr LJ 2010, the plea of the accused appellant that under the influence of liquor he could not have formed the requisite intent for committing the murder of the deceased, and hence that his offence be treated as culpable homicide and not murder, was not sustained.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

The normal presumption is that a man intends the natural consequences of his act unless rebutted by the accused by giving such evidence of drunkenness as might have affected his faculty of understanding to form the requisite intent.

In the instant case the plea could not be upheld because of the clear and cogent prosecution evidence which established the guilt of the accused.

Sarathi: In *Sarathi v State of Madhya Pradesh*, (1976) Cr LJ 594 (MP), three drunken accused persons had overpowered the deceased and rendered him unconscious by rough handling. They had Thus, the specific intent to cause grievous hurt until then, but the question with regard to the intent became dubious when the accused persons hanged him from the ceiling without taking steps to ascertain whether he was dead or alive. The recklessness and gross negligence on the part of these accused, under a state of intoxication, gave the accused a benefit to be convicted for culpable homicide not amounting to murder under *section 304, IPC* instead of murder under *section 302, IPC*.

[s 86.3] Crime of Basic Intent and Crimes of Specific Intent – Distinguished

Majewski: In *Director of Public Prosecution v Majewski*, House of Lords held that it is a rule of substantive law that unless the offence charged required proof of a specific intent it is no defence that, through self-induced intoxication, the accused lacked the *mens rea* normally required for that offence or was in a state of automatism at the material time.

A disturbance occurred in a public house and Majewski was ordered to leave by the landlord. He refused and butted (hit) the landlord in the face and punched a customer. Majewski was ejected from the bar but re-entered. He punched the landlord and started swinging a piece of broken glass at the landlord and a customer, cutting the landlord's arm. The landlord managed to restrain Majewski until the police arrived, whereupon a fierce struggle took place to get him into a police car, during which Majewski kicked three police officers. Later he struck a police inspector who entered his police cell.

Majewski was charged and convicted on four counts of assault occasioning actual bodily harm and on three counts of assaulting a police constable in the execution of his duty.

His case was that at the material time he was acting under the influence of a combination of drugs (not medically prescribed) and alcohol, to such an extent that he did not know what he was doing.

Majewski's appeal to the House of Lords was dismissed.

The decision in the *Majewski* affirms the proposition in the *Beard* case that evidence of self-induced intoxication negating *mens rea* is a defence to a charge of an offence requiring proof of a specific intent; but where an accused is charged with an offence not requiring a "specific intent" (of basic intent) he can be convicted even though he did not have the *mens rea* normally required for that offence; and even though he was then in a state of automatism.

In the *Majewski*, the House of Lords recognised as a substantive rule of law that where self-induced intoxication is relied on by a person charged with an offence not requiring specific intent, the prosecution need not prove any intention or other state of mind normally required for that offence.

While the definition of specific intent is obscure, it is possible in the light of various judicial decisions to list offences which do, or do not, require "specific intent". For instance, murder, wounding or causing grievous bodily harm with intent to do grievous bodily harm, rape, etc., require "specific intent"; and manslaughter,

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

assault, battery and aggravated assaults, wounding or inflicting grievous bodily harm, do not require a specific intent', etc.

Bouchard-Lebrun: In *R v Bouchard-Lebrun*, 2011 SCC 58 (Canada) : 340 DLR (4th) 193, it was held by the Supreme Court of Canada that extreme intoxication and insanity are two different legal concepts.

While on drugs, the accused illegally entered the building where the victim lived and brutally attacked him by punching and kicking him many times. Another occupant of the building went to the victim's aid but the accused threw him down the stairs and then stomped (injured) on his head. The accused was arrested and charged with committing aggravated assault and with breaking and entering a dwelling-house with intent to commit an indictable offence and attempting to break and enter. The accused pleaded not guilty to all the charges against him.

The trial judge accepted psychiatric evidence that, at the material time, the accused was suffering from toxic psychosis caused by the voluntary consumption of drugs. The trial judge found that, because of that state of extreme intoxication, the accused had to be acquitted on the counts of breaking and entering with intent to commit a criminal offence and attempting to break and enter.

However, the accused on the counts of aggravated assault was convicted on the basis that self-induced intoxication cannot be a defence to an offence against the bodily integrity of another person and was sentenced to imprisonment for 5 years. The accused appealed against his convictions, arguing that the trial judge had confused the insanity defence with the defence of self-induced intoxication and that his psychosis should have led to a verdict of not criminally responsible on account of mental disorder, the Supreme Court of Canada, while dismissing the appeal held an accused who wishes to successfully raise the insanity defence must.

First, show that he was suffering from a mental disorder in the legal sense at the time of the alleged events; and

Second, that owing to his mental condition, the accused was incapable of knowing that the act of omission was wrong.

Intoxication and insanity are two distinct legal concepts. In order to distinguish toxic psychosis that result from mental disorders from those that do not, the Supreme Court of Canada proposed an approach structured around two analytical tools.

The internal cause factor, the first of the analytical tools, involves comparing the accused with a normal person, that is, a person suffering from no disease of the mind. Here, the Court considered that drug-taking was an external cause. Indeed, the evidence showed that the psychotic symptoms experienced by the accused began to diminish shortly after he took the drugs and continued to do so until disappearing completely. This led the Court to conclude that the accused suffered from no disease of the mind before committing the crimes and once the effects of his drug-taking had passed.

The second analytical tool, the continuing danger factor, is directly related to the need to ensure public safety. In this case, there was no evidence indicating that the accused's mental condition was inherently dangerous in any way, provided that he abstained from such drugs in the future.

The Court noted that no distinction based on the seriousness of the effects of self-induced intoxication was to be drawn in this provision. It therefore applied to any mental condition that is a direct extension of a state of intoxication, including toxic psychosis as in the present case. Therefore, the Court of Appeal did not err and the conviction confirmed.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

[s 86.3.1] Effect of intoxication on individual and upon marriage – Matrimonial Causes Act

Sweetman: Petition for dissolution of marriage and divorce by husband against wife on the ground of “intoxication” by stimulating drugs resulting in neglect of household duties was rejected owing to insufficient evidence.

In *Sweetman [Husband] v Mrs Sweetman [Wife]*, 14 FLR 409 (1969) Australia, an interesting case from Australia, the husband has brought a suit for dissolution of marriage and divorce on the ground of intoxication by wife resulting in failure to discharge her household duties and on the ground of desertion.

In his petition the petitioner (husband) asserts that since about the year 1955 the respondent has been addicted to dexadrine-type drugs and in particular to a drug known as “tenuate”. He asserts that for more than two years from December 1964 to December 1966 the respondent had habitually taken dexadrine-type drugs and tenuate in excess and that she had been habitually intoxicated by these drugs. He asserted that she received medical and hospital treatment and that she had neglected her household duties.

By section 28(f)(ii) of the Matrimonial Causes Act, 1959-1966, a petition under the Act by a party to a marriage for a decree of dissolution of marriage may be based on the ground that, since the marriage, the other party to the marriage has for a period of not less than two years, habitually been intoxicated by reason of taking or using in excess any sedative, narcotic or stimulating drugs or preparation.

Held, that “intoxication” means, in relation to stimulating drugs, a state of drunkenness involving excitement and/or depression with external symptoms. The effect of the intoxication upon an individual person and upon the marriage itself must be considered and, to establish the ground of intoxication by stimulating drugs, the effect upon the marriage of such intoxication must be shown to have been material as opposed to minimal.

The Court said with little hesitation, on the evidence, in coming to the conclusion that throughout the particular period relied upon by the petitioner, viz., December 1964 to December 1966, the respondent used to take massive doses of the drugs compared to the ordinary prescribed doses for them and that she was addicted to these drugs. The evidence supports a conclusion that during this period she was habitually intoxicated by the drug but to what degree she was intoxicated is a matter which is not easy to determine on the evidence.

The legal meaning of the “ground of intoxication by drugs” introduced into Australia by the Matrimonial Causes Act, 1959, section 28(f), described the ground as follows:

That, since the marriage, the other party to the marriage has, for a period of not less than two years ... (ii) habitually been intoxicated by reason of taking or using too excess any sedative, narcotic or stimulating drug or preparation.

The question arises as to what is meant by the section in the use of the words “intoxicated by reason of taking or using to excess” the drugs mentioned.

The word “intoxication” means, in relation to stimulating drugs, a state of drunkenness involving excitement and/or depression with external symptoms. Intoxication caused by alcoholic liquor can be of very varying degrees ranging from a condition with very minimal effects to a condition where a person can become comatose (in a state of coma). In making this a ground for dissolution of marriage, the legislature intended that before a marriage could be dissolved the effect of the intoxication upon an individual person and, indeed, upon the marriage itself, had to be considered. The ground to be established it is necessary to show that the intoxication was of such a degree that it had material effects upon the marriage as opposed to minimal effect.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

It suffices in this case to say that the vital question for consideration when the allegation is made that a man is an habitual drunkard is the condition which his addiction to drink produces and not necessarily or solely the extent to which he partakes of liquor.

There is nothing in the evidence called on behalf of the respondent to suggest that

“his drinking habits resulted habitually in drunkenness over the necessary period; on the contrary, it rather suggests that his heavy drinking habits did not habitually produce such a departure from normal standards of conduct as could fairly be classified as drunkenness.”

The words italicized apply to a consideration of the state of habitual intoxication by drugs. The *onus* of satisfying the court is upon the petitioner and, after a very careful consideration of the evidence and giving due weight to the submissions:

the court arrived at the conclusion that the petitioner has not proved the ground relied upon in the petition, that the degree of intoxication resulting from the high dosage of drugs that she was taking materially affected her conduct in the marriage nor that it materially affected her conduct and judgment in the ordinary affairs of life.

Petition dismissed

Olasiuk: In *R v Olasiuk*, 6 SASR 255 (1973) Australia. it was held that it is not necessary for drunkenness to be a defence to a criminal charge that the accused should be rendered so stupid by drink that he does not know what he is doing. It is sufficient if he is so drunk that he is incapable for forming the specific intent necessary to constitute the crime. (In this case Specific Intent to cause death).

Upon a charge of murder of woman, evidence was given that (i) the accused had resented an association between a daughter of the deceased and another man and (ii) that threats had been made by the accused to the other man.

Held: (1) Evidence of threats by a person accused of murder against the deceased is admissible, if *sufficiently proximate in time*, to prove motive and to show the relationship between the parties, but evidence of threats to some other person unconnected with the crime, proves no more than a propensity of violence and is inadmissible.

(2) That in the case under appeal when the threat was not to the deceased but to a man on account of whom ill-will was alleged to exist between the accused and deceased a sufficient nexus with the situation of tension between the accused and the deceased which led to death of the deceased has been shown to make the evidence admissible if there was sufficient proximity in time.

Bray CJ, Hogarth and Mitchell JJ.

The appellant was convicted on 15 June 1978 of the murder of a woman Praskovia Grigorieff on 28 January

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

1923. The appellant was the owner of a house at 30 Henry Street, Ottoway. For nine or ten years prior to her death the deceased and her family, consisting of her son and daughter and her father, had shared that house with the appellant. At about 1.45 pm on Sunday, 28 January 1973 an ambulance was summoned to the premises. The deceased was on the floor of the kitchen, unconscious and bleeding. She died on the same day. The cause of death was haemorrhage due to two stab wounds in the abdomen. 0.41% of alcohol was found in her blood. In his unsworn statement the accused in the trial admitted that he had stabbed her. He said that he had told her to seek other accommodation. She argued with him and narrates what happened thereafter.

I was still sitting at my chair ... I remember she came at me with a knife in her right hand. The sharp end was below her right hand. It happened very quickly. She was standing over me. I said, "What's wrong with you" and she said, "I'll kill you, you parasite". She came at me with the knife. I know I got out of the chair. I grabbed her right hand with my left hand, I think as I was getting up. She grabbed my left hand with her left hand and pulled and I think by then I was on my feet. There was no room to get away. I pulled her left hand away from my left hand. The other knife was on the sink. I grabbed the other knife with my right hand. She was still waving knife. I said, "You won't kill me". I stabbed at her. I must have stabbed her more than once. It all happened very quickly. She fell to the floor ... I still do not know what Praskovia would have done to me with the knife if I had not got out of the chair in time.

Both the deceased¹⁷⁵ and accused had been drinking fairly heavy on 27 and 28 January 1973 when murder took place.

The real question is whether through excessive drinking the accused has gone so stupid as not to know what he has been doing i.e., must be incapable of forming an intention to kill or to do grievous bodily harm.

The Court referred the statement, from the speech of Lord *Denning* in *AG for Northern Ireland v Gallagher*, (1963) AC 349 (381), wherein Lord *Denning* said:

If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter), then evidence of drunkenness, which renders him incapable of forming that intention, is an answer [See *Beard's* case¹⁷⁶]. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (*Reg. v. Moore*,¹⁷⁷) as where at a christening (conversion to Christian religion), a drunken nurse put the baby behind a large fire, taking it for a log of wood (*Gentleman's Magazine*, 1748, p. 570); and where a drunken man thought his friend (lying in his bed) was a theatrical (play) dummy placed there and stabbed him to death ('*The Times*', January 13, 1951). In each of these cases it would not be murder. But it would be manslaughter.

In the first case, the nurse must have known that she was putting a burden (wind instrument) on to the fire, and in the second case the man must have known that he was plunging a knife into something. Or the phrase may mean, as it probably does in those examples, ignorance of the relevant circumstances, though combined with knowledge of the nature of the physical act. The case cited by Lord *Denning*, *R v Moore*, 1852) 3 Car & K 319 (175) ER 571, sets out the true relation between the two propositions. There was a charge of attempted suicide and *Jervis* CJ said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" He did not say, "You cannot find she did not intend to destroy herself unless she was so drunk as not to know what she was about."

The classic definition of drunkenness as a defence to a criminal charge is contained in *Beard's* case (*Director of Public Prosecutions v Beard*, (1920) AC 479,). Lord *Birkenhead's* proposition that evidence of drunkenness which renders the accused incapable of forming the specific intent necessary to constitute the crime should be taken into consideration with the other facts provided in order to determine whether or not he had the intent to commit crime.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

Appeal allowed, sentence quashed, verdict of murder set aside, and in lieu thereof verdict of guilty of manslaughter and sentence of six years imprisonment substituted.

Williams: In *Christine Maree Williams v The Dept of Arts, Sports and Recreation*, 2010 WL 585612 (2010) it was held that reasonable step [that could have been] taken to prevent entry of intoxicated patrons during the function at the “Gold Club Day” in 2009 by the appellants exonerates them from criminal liability for an offence permitting intoxicated persons on licensed premises contrary to the provisions of section 73(1)(a) of the Liquor Act, 2007 (NSW).

English J.

The appellant appeals against her convictions by the Wagga Wagga Local Court on 17 June 2010 of five offences contrary to the provisions of section 73(1)(a) of the Liquor Act, 2007 (NSW) an offence of licensee permitting intoxicated persons on licensed premises. The offences are alleged to have taken place on 1 May 2009 at the Murrumbidgee Turf Club at Wagga.

A statutory defence is available to the appellant as provided for in section 73(4) of the Liquor Act and that is that she took all reasonable steps to prevent intoxication. The appellant is the chief executive officer of the Murrumbidgee Turf Club and she is the nominated licensee under Governor’s licence since 2 May 2000.

On 1 May 2009 was the Wagga Wagga Gold Cup event, a major regional race meeting day in the New South Wales racing calendar, on that particular day the patronage was estimated to be between 10,000 and 12,000 attendees. The offences are said to arise in relation to intoxicated persons detected at the racetrack on that day. The *first* such intoxicated person was a female, Miss Jessie Black; the *second*, a male intoxicated person, George Wood; the *third*, a male described as wearing a white shirt, black pants and black socks; the *fourth*, a male patron wearing a pink suit and a hat; and the *fifth*, female wearing a light blue dress over which was worn a male black suit jacket.

While allowing the appeal and setting aside the conviction, the appellate court said:

No matter what steps are taken it will never be possible to prevent some intoxication on licensed premises. I find myself satisfied that she (organizers) undertook all reasonable steps that could have been taken to prevent the presence of intoxicated patrons at the Gold Cup day in 2009. They were such steps as ought reasonably to have been taken by way of precaution against the occurrence of intoxication and to prevent intoxicated persons being served alcohol or remaining (an affirmation of belief) on the premises. The fact that only five persons were discovered is testament to the success of the plan and the appellant is to be commended rather than condemned for the successful outcome of the Gold Cup day.

Appeal allowed.

[s 86.3.2] Insanity arising out of excessive drink no Defence for Attempted Rape and Murder

Lucus: In *Lucus*¹⁷⁸ conviction for Attempted Rape and Attempted Murder of Seven-year-old child upheld.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

- I. The appellant was convicted in the Supreme Court of the Northern Territory of Australia on 8 August 1968 of the offences of attempted murder and attempted rape of a seven-year-old child. He was sentenced to imprisonment with hard labour for eight years for the attempted murder and for five years for the attempted rape, the sentences to be served concurrently and to commence from 23 September 1968.
- II. In an application for leave to appeal from the Supreme Court of the Northern Territory, to the High Court of Australia¹⁷⁹ the applicant relied, as establishing the defence of insanity,

first, upon a claim that he had been in a state of *delirium tremens* at the time of the commission of the offence from an excessive consumption of methylated spirits and,

secondly, upon statements attributed to him indicating a lack of comprehension of events that had been taking place.

While dismissing two appeals the Judge held:

The defence pleaded an absence of intent in the case of each charge due to the state of intoxication at the relevant time and insanity at the time of the performance of the acts constituting the offences due to alcoholic excesses. The appellant relied as establishing insanity comprised,

firstly that due to an excessive consumption of methylated spirit he was in a state of *delirium tremens* at the time of the commission of the acts constituting the offences and

secondly, some statement attributed to accused indicated a lack of comprehension of events that were taking place. No medical evidence was called as to the existence of any mental disease or disorder.

Whilst medical evidence may not always be indispensable to the establishment of a defence of insanity, its absence in this case was insufficient to found such a defence, there was nothing on which it could have been concluded that any mental disease or disorder had supervened so that by reason of that disease or disorder he was unable to know what he was “doing or to appreciate” its quality.

As regards the submission of the defence that the two sentences being excessive should be reduced, the court declined to accept the contentions of the defence and said that the sentences were well within the proper exercise of the discretion of the court in all the circumstances of the case.

Appeal dismissed.

R v Totten [Queen v Paul Francis Tatten] Canada:¹⁸⁰ Supreme Court of Canada held self-induced intoxication short of automatism cannot be relied upon as an excuse for general intent offence.

T caused a fire that destroyed the contents of his ex-girlfriend’s home. In a highly intoxicated state he placed a pan with oil on a stove, set the burner to high, and left the house to get a coffee. When he returned approximately 20 minutes later, the house was on fire. T was charged with arson contrary to section 434 of the Criminal Code. At trial T claimed that the fire was an accident. The trial judge determined that section 434 was a specific intent offence, meaning that T could rely on self-induced intoxication as a defence. T was acquitted. A majority of the Court of Appeal upheld the acquittal.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

In appeal the High Court of Australia which is the highest court of the land allowed the appeal and set aside acquittal and ordered new trial. The Court held the classification of an offence as one involving general or specific intent has important consequences for the accused because the law does not allow offenders to rely on self-induced intoxication falling short of automatism as an excuse for general intent offences. The analysis of whether an offence is one of general intent or specific intent must start with a determination of the mental element of the offence. This is an exercise in statutory interpretation and should not be turned into a factual assessment. The next question is whether the crime is one of general or specific intent. Where the jurisprudence has already determined the appropriate classification of the offence in a satisfactory manner, the task is straightforward. Otherwise, there are two main considerations – the importance of the mental element and the social policy underlying the offence.

The offence of arson in section 434¹⁸¹ of the Criminal Code is a general intent offence for which intoxication falling short of automatism is not available as a defence. The *actus reus* is the damaging of property by fire. The mental element is the intentional or reckless performance of the illegal act. No additional knowledge or purpose is needed. No complex thought or reasoning processes are required. It is difficult to see how intoxication short of automatism would prevent an accused from foreseeing the risk of causing damage to someone else's property by fire. There is no need to resort to policy considerations to determine the appropriate classification of the offence. Had it been necessary to do so, the same conclusion would have been reached. Damage to property is often associated with alcohol consumption and it would erode the policy underlying the offence of causing damage to property by fire if an accused could rely on self-induced intoxication as a defence.

The *Criminal Act* in section 434 of the Criminal Code is the causing of damage to property. The fire is simply the mechanism by which the damage must be caused. In assessing the issue of intent, the Court must consider all of the surrounding circumstances. The manner in which the fire started is likely to be an important consideration. Specifically, was the fire set accidentally, [page 577] negligently, recklessly or intentionally?

R v C McGhee and Harris: In *R v C*, *R v McGhee (Colin)* and *R v Harris (Darren)*, [2013] EWCA Crimes 223, the first appellant (C) appealed against his conviction and sentence for attempted murder, the second appellant (M) appealed against his conviction for wounding with intent, and the third appellant (H) appealed against his conviction for aggravated arson. C was 17 when one night he got up, entered his neighbours house and repeatedly stabbed his neighbours partner. C was a heavy cannabis user and had smoked a lot that evening. C had no history of violence. He did not deny responsibility for the injuries, but asserted that he had “blacked out” and had no memory of the attack, and had no idea why he did it. The psychiatric evidence was that C had no underlying mental illness or personality disorder, but that there was a real possibility that he committed the attack during a brief psychotic episode triggered by cannabis. The trial judge ruled that C's case was one of voluntary intoxication, not insanity, and he refused to leave to the jury the issues of insanity and automatism, so the issue for the jury was whether C had formed the intention to kill. It decided that he had suffered from severe tinnitus (wound). He took a prescription tranquiliser, temazepam, to help him sleep, but also resorted to drinking alcohol, despite the warning that with temazepam he should not. At about 4 a.m. one night, after drinking a lot, he went to an off-licence to buy more alcohol. He became aggressive and fought with another customer before leaving. He returned armed with a kitchen knife and stabbed one of the shop assistants in the arm while they fled.

M could not remember any of those events. An expert in the action of drugs on the brain gave evidence that temazepam combined with alcohol could reduce social restraint and lead to disinhibited behaviour. The trial judge rejected M's submission that he had no choice but to take alcohol to alleviate the symptoms of tinnitus and ruled that his intoxication was voluntary; he also ruled that there was no evidence that M was suffering from automatism. The jury found that M had intended to cause grievous bodily harm.

H had started a fire in his own house, and was charged with doing so being reckless as to whether the lives of others, namely his neighbours, would be endangered. He took medication for clinical depression, and he had a pattern of drinking heavily only during periods of leave from work. The cessation of those bouts had led to

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

episodes of alcohol psychosis or alcohol-induced hallucinosis. At the time of the fire he was suffering such an episode; he was seen acting strangely, but he removed important documents from his house before starting the fire. He accepted that he had deliberately started the fire and that he knew it was wrong but said he had given no thought to the risk to others. In light of the judge's ruling that the jury had to consider H's recklessness as if he had not been drinking, he pleaded guilty submitted that:

(1) his was not a case of intoxication but rather had passed to a recognised condition of mental illness, namely a psychotic episode, no matter how transient, and therefore the judge should have left the issues of insanity and automatism to the jury. M submitted that

(2) the judge, had been wrong to withdraw automatism from the jury.

Delivering the verdict, the Court held: (1) The law had long recognized the distinction between intoxication and a disease of the mind induced by intoxicants. Further, temporary insanity was as much insanity as that which was long-lasting or permanent.¹⁸² The possible state of mind in which C stabbed the victim could properly be called a mental abnormality. To speak of a psychotic episode was to speak of a temporary abnormality of the brain or mind and thus of a defect of reason for the purposes of the *M'Naughten* rules.

However, whether there was a "disease of the mind" for the purpose of the *M'Naughten* rules had to be a question of law, not of medical usage. Insanity called for a special verdict of acquittal, while voluntary intoxication was generally no defence at all but might be relevant to whether the defendant formed a specific intention, if the offence in question required such.

C's case fell comfortably on the voluntary intoxication side. In order to engage the law of insanity, it was not enough that there was an effect on the mind; there also had to be a disease of the mind. Direct, acute effects on the mind of intoxicants, voluntarily taken, were not so classified.

C's argument amounted to treating every defect of reason as a disease of the mind but that is not so. Automatism could be expressed as complete destruction of voluntary control. The psychiatric evidence about C was of voluntary, if irrational, action, which would preclude a defence of automatism. Further, that defence was not available to a defendant who had induced an acute state of involuntary behaviour by his own fault. In addition, the trial judge had been right to hold that the possibility of automatism ran with the question of whether C had intended to kill so a separate direction about automatism was unnecessary. That would not have been so if there had been an alternative charge which was not of specific intent. The guilty verdict had involved a clear finding that despite his state of mind C intended to kill and thus he had acted voluntarily. However, C's sentence was reduced from 18 to 15 years.

The expert's evidence was about disinhibited behaviour rather than behaviour over which M had no voluntary control. Disinhibition was exactly not automatism. Moreover, video footage of the incident made clear that M's behaviour was voluntary and automatism was simply not in question. Even if M had been in a state of automatism, that defence would have very likely failed on the grounds that he had induced it through voluntarily drinking himself into a state of intoxication. To the extent that his intoxication was worsened by the combination of the drug with alcohol, he was well aware of the dangers. His distress about his tinnitus would not alter that.

(3) H's condition was caused by past voluntary intoxication, but he was not in any sense intoxicated at the time of the offence. He had stopped drinking five or six days earlier. H was not suffering from a direct or acute reaction to the voluntary taking of intoxicants. His condition was one of mental disorder with psychotic symptoms including the hearing of voices and hallucinations, complicated by clinical depression. He was entitled to have tried the question of whether he was actually aware of the risk that he created for his neighbours. His conviction was quashed.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

(4) C's appeal against conviction was dismissed and his appeal against sentence was allowed. M's appeal against conviction was dismissed. H's appeal against conviction was allowed.

[s 86.3.3] Defence of Intoxication in the United States:¹⁸³ Harm Oriented-Doctrine

The intoxicated offenders' legal responsibility for *criminal act* in the United States differ widely according to evolving standard of maturing society and changing concept of religious, morality, philosophical, medical and social norms. During Victorian era, Common law which had its impact on American legal system used to punish intoxicated and sober offenders equally. For instance, if a person who is drunk kills another the act would be a murder and he shall be hanged to death for it, though he did it through ignorance for he had no understanding nor memory was assumed; it happened on account of his folly which he could have avoided had he not been drunk. This was based on the principle of "*harm oriented*" doctrine.¹⁸⁴

[s 86.3.4] Act Oriented Doctrine

The modern concept of *actus reus* and *mens rea* fixed liability on an "act oriented" framework as against "harm oriented" concept. It implies that where there is no *mens rea*, a man is not liable for any crime "irrespective of the harm caused. The analytical shift has shifted the law's posture towards crime committed under severe intoxication when a person cannot form a criminal intent due to severe intoxication, he is not liable. The committing of crime irrespective of any harm. Relying on this assumption the Indiana State Supreme Court in *Terry v State*, 465 NE 2d 1085 (Ind. 1984), held that:

The murder statute clearly requires an intentional act on the part of the perpetrator... In order to form intent the perpetrator must be acting *consciously* and *competently*. Any situation which renders the perpetrator incapable of forming intent frees him from the responsibility of his acts.¹⁸⁵

By the late nineteenth century, the scientific school displaced its classical concept and promoted by nation supported by the American Medical Association in 1956 that "alcoholism is a disease" and even *self-induced intoxication* could be classified as "involuntary" comparable to mental illness¹⁸⁶ and exempted from criminal liability, as in case of an insane person or an intent and favoured rehabilitation of such person instead of punishment. **Powell:** However, the US Supreme Court in *Powell v Texas* (1968), 392 US 514 (1968), by a majority of 5 to 4 held that any induced public intoxication is punishable.....if a State decides to do so by passing a law in their respective jurisdiction and is not in violation of Eighth Amendment to US *Constitution*.

[s 86.3.5] Social Contract Theory

The social contract theory forfeited the individual right to be exonerated for the intended consequences of his acts in case of intoxication as a result of alcoholism for the greater good of the community's safety. Accordingly, States began to expand the legal responsibility of intoxicated offenders in the late twentieth century. The effect of drunkenness on the mind and on men's actions is well known to everyone and it is duty of men to abstain from placing themselves in a condition from which dangers to others may be avoided, as in case of abstaining from firing into a crowd, or doing any other act likely to be attended with dangerous consequences.

[s 86.3.6] Partial Responsibility Doctrine

Majority of the States (thirty seven States and Federal Courts) in the United States adopted a compromise formula wherein a distinction between "specific" and "general" intent crime has been earmarked. In the former case, the defendant is exempted from criminal liability, whereas in the latter he is held responsible for his criminal actions performed during the effect of intoxication.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

In view of technical difficulties in applying specific intent doctrine, the ... Model *Penal Code* of the United States bifurcated culpability into four parts viz., (i) purposely¹⁸⁷ (ii) knowingly,¹⁸⁸ recklessly¹⁸⁹ and negligently¹⁹⁰ with a view to permit the defendant to take the plea of exemption from criminal liability in respect of an act that requires specific intent for commission of crime, whereas no such benefit of exemption would be admissible in case of crimes committed recklessly or negligently by an intoxicated man.

***People v Batting*:** In *People v Batting*,¹⁹¹ New York Court held that intoxication turns men into “beasts preying upon society” and drunk man is as responsible for causing harm as if he unleashed (released) a dangerous ferocious dog upon a defenseless victim (infant) whom the dog bites resulting in his death. Here the person who releases the dog is responsible for infant's death, not because he controlled the animal's action in killing a child, but because he voluntarily forfeited his control over the dog.

To hold intoxicated person liable for his criminal acts in the same way as in case of a sober man the State of Montana enacted law in 1987, providing the following provisions:

A person who is in intoxicated condition is responsible for his conduct and his intoxicated condition is not a defence to any offence unless the defendant proves that he did not know that it was an intoxicating substance, when he consumed, smoked, sniffed, or otherwise ingested the substance causing the condition.

All the fifty States of the United States stated below can be classified into seven categories on the basis of admissibility or non-admissibility of intoxication defense:

1. Ten States do not admit *intoxication* evidence as a *defense* to any crime.

Arizona,¹⁹² Arkansas,¹⁹³ Delaware,¹⁹⁴ Georgia,¹⁹⁵ Hawaii,¹⁹⁶ Mississippi,¹⁹⁷ Missouri,¹⁹⁸ Montana,¹⁹⁹ South Carolina²⁰⁰ and Texas²⁰¹

2. Two States admit intoxication evidence as a defense only to first degree murder.

Pennsylvania²⁰², and Virginia²⁰³

3. Two States admit intoxication evidence as a defense only to crimes requiring purpose.

Alaska²⁰⁴ and Colorado.²⁰⁵

4. Twelve States follow the Model Panel Code and admit intoxication evidence as a defense only to crimes requiring purpose or knowledge.

Alabama²⁰⁶; Connecticut²⁰⁷; Kentucky²⁰⁸; Maine²⁰⁹; New Hampshire²¹⁰; New Jersey²¹¹; New York²¹²; North Dakota²¹³; Oregon²¹⁴; Tennessee²¹⁵; Utah²¹⁶ and Wisconsin²¹⁷.

5. Twenty-one States admit intoxication as a defense only to crimes requiring a “specific intent.”

California²¹⁸; Florida²¹⁹; Idaho²²⁰; Illinois²²¹; Iowa²²²; Kansas²²³; Louisiana²²⁴; Maryland²²⁵; Massachusetts²²⁶; Michigan²²⁷; Minnesota²²⁸; Nebraska²²⁹; Nevada²³⁰; New Mexico²³¹; North Carolina²³²; Oklahoma²³³; Rhode Island²³⁴; South Dakota²³⁵; Vermont²³⁶; West Virginia²³⁷; Wyoming²³⁸

6. Two States admit intoxication as a defense to all crimes requiring purpose, knowledge or recklessness.

Ohio²³⁹; Washington²⁴⁰

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

7. One State admits *intoxication* evidence as a *defense* to any crime.

Indiana²⁴¹.

-
- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
 - 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
 - 3 See *IPC, section 6*.
 - 4 See *IPC, section 40*.
 - 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
 - 6 See Chart at p 97.
 - 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
 - 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
 - 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
 - 10 The *Indian Evidence Act, 1872, section 105*.
 - 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
 - 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
 - 13 *Evidence Act, section 111A*.
 - 14 *Evidence Act, section 113B*.
 - 15 *Evidence Act, section 113A*.

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

- 16 *Evidence Act, section 114A.*

- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

- 170 Debauches.—An act or occasion of going beyond socially approved limits of behaviour, especially in relation to alcohol and sex.

- 171 Holdsworth, *History of English Law*, (1937) p 441.

- 172 *Ratanlal and Dhirajlal. The Law of Crimes*, 24th Edn, (1997), 299 *Kendrick v Hopkins*, (1580) Carry's Report 133; See Nigam, *Law of Crimes in India*, (vol 1, 1965), pp 388-395. But in the case of *delinum tremens*, a form of insanity produced by habitual excessive drinking, which leads to change in the brain tissue producing such a degree of madness as to render a person incapable of distinguishing between right and wrong, the disease is looked upon as insanity *protanto* and the accused is put on the same footing as that in the case of involuntary drunkenness.

- 173 *Subbai Goundan Re*, AIR 1936 Mad 788 [[LNIND 1936 MAD 189](#)] : (1937) Mad WN 1329; *Rex v Meade*, ([1909](#)) 1 KB 895 . The presumption that a man intended the natural consequences of his acts might be rebutted in the case of drunkenness by showing that his mind was so affected by the drink that he had taken, that he was incapable of knowing that what he was doing was dangerous.

- 174 AIR 1956 SC 488 [[LNIND 1956 SC 34](#)] : 1956 SCR 363 [[LNIND 1956 SC 34](#)] : 1956 SCJ 554 .

- 175 6 SASR 255 (1973) Australia.
- 176 (1920) AC 479 (501, 504).

- 177 (1852) 3 Car & K 319.

- 178 *Lucus v The Queen*, 44 ALJR 193 : (1970) ALR 835 : 1970 WL 95747 : (1970) HCA 14 (Australia) Barwick CJ, Owean and Walsh JJ.
- 179 High Court of Australia is the Highest Court in the country and appeal goes to the High Court from the Supreme Court of every State.

- 180 (2015) 2 SCR 574 : (2015) SCJ No 33 : (2015) SCC 33 Mc Lachlin CJ and Abell, Rothstein, Crumwell, Moldover, Wogner and Gusem JJ.

- 181 Section 434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
- 182 *Beard*, (1920) 14 CAR 160 followed.
- 183 See Mitchell Ketter, *Criminal Law: Just Say No Excuse: The Rise and Fall of the Intoxication Defence*, 87 *Journal of Criminal Law and Criminology* 482 (1997).

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

- 184** See Mitchell Ketter, *Criminal Law: Just Say No Excuse: The Rise and Fall of the Intoxication Defence*, 87 *Journal of Criminal Law and Criminology* 482 (1997).
- 185** *Id.* at 1087-88.
- 186** *Faster v District of Columbia*, 361 F. 2d 50 (52).
- 187** Purposely: A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
- 188** Knowingly: A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
- 189** Recklessly: A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
- 190** Negligently: A person acts negligently with respect to a material element of an offence when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such nature and degree that the actor's failure to perceive it, considering the nature and purpose of the actor's conduct and the circumstances known to him.
- 191** *People v Botting*, 457 NE 2d 704 (707) (NY 1983)
- 192** See Ariz. Rev. Stat. Ann. 13-503 (West 1989 & Supp 1996).
- 193** See *White v State*, 717 S.W. 2d 784 (787-88) (Ark. 1986).
- 194** See Del. Code Ann. Tit. 11, 421 (1995); *Wyant v State*, 519 A 2d 649 (654) (Del 1986).
- 195** See Ga. Code Ann. 26-704(c) (1988).
- 196** See Haw Rew Stat ***(michie 1993); *State v Souza*, 813 P. 2d 1384 (1386) (Haw 1991).
- 197** See *McDaniel v State*, 356 So. 2d 1151 (1161) (Miss. 1978) (Sugg J specials concurring).
- 198** See *Mo. R v State*, 562.076.1 (West 1979 & Supp 1996); *State v Erwin*, 848 S.W. 2d 476 (482) (Mo. 1993) (En Bench).
- 199** See Mont. Code Ann 45-2-203 (1995).
- 200** See *State v Vaughn*, 232 S.E. 2d 328 (330) (SC 1977).
- 201** See Tex Penal Code Ann 8.0.1(a) (West 1977).
- 202** See 18 Pa. Cons. Stat. Ann. 308 (West 1994).
- 203** See *Chittum v Commonwealth*, 174 S.E.2d 779 (783) (Va. 1970).

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

204 See Alaska Stat, 11.81.900(a)(2) (Michie 1989 & Supp 1995).

205 See *People v Zekany*, 833 P. 2d 774 (778) (Colo. Ct. App. 1991).

206 See Ala. Code 13A-3-2(b) (1994).

207 See Conn. Gen. Stat. Ann. 53a-7 (West 1994).

208 See Ky. Rev. Stat. Ann. 501.020(3) (Michie 1990). Kentucky's term for the mental state described by the Model *Penal Code*'s definition of recklessness is "wantonness." Id. 501.020(3). Kentucky defines recklessness with the Model *Penal Code* definition of negligence. Id. 501.020(4).

209 See Me. Rev. Stat. Ann, tit. 17-A, 37(2) (West 1994).

210 See N.H. Rev. Stat. Ann. 626:2-II(c) (1996).

211 See NJ; Stat. Ann. 2C:2-8(b) (West 1995).

212 See N.Y. Penal Law 15.05[3] (McKinney 1987).

213 See N.D. Cant. Code 12.1-04-02 (1985).

214 See Or. Rev. Stat. 16.125(2) (1995).

215 See Tenn. Code Ann. 39-11-503(b) (1991).

216 See Utah Code Ann. 76-2-306 (1995).

217 See Wis. Stat Ann. 939.24(3) (West 1996).

218 See *People v Hood*, 462 R2d 370 (377-78) (Cal. 1969) (en bane).

219 See *Linehan v State*, 476 So. 2d 1262 (1264) (Fla. 1985).

220 See *State v Enno*, 807 P. 2d 610 (619-20) (Idaho 1991).

221 See *People v Mocaby*, 551 N.E. 2d. 673 (677) (Ill App. Ct. 1990).

222 See *State v Caldwell*, 385 N.W. 2d 553 (557) (Iowa 1986).

[s 86] Offence requiring a particular intent or knowledge committed by one who is intoxicated.—

223 See *State v McDaniel*, 612 P. 2d 1231 (1237) (Kan 1980).

224 See La. Rev. Stat. Ann. 14:15(2) (West 1986).

225 See *Hook v State*, 553 A. 2d. 233 (235-36) (Md. 1989).

226 See *Commonwealth v Troy*, 540 N.E. 2d 162 (166-67) (Mass. 1989).

227 See *People v Langworthy*, 331 N.W. 2d 171 (177) (Mich. 1982).

228 See *State v Kjeldahl*, 278 N.W. 2d 58 (61) (Minn. 1979).

229 See *State v Lesiak*, 449 N.W. 2d 550 (552) (Neb. 1989).

230 See *Nevins v State*, 699 P. 2d 1053 (1060) (Nev. 1985).

231 See *State v Tapia*, 466 P. 2d 551 (553) (N.M. 1970).

232 See *State v White*, 229 S.E. 2d 152 (157) (N.C. 1976).

233 See *Boyd v State*, 577 P. 2d 276 (278-79) (Okla. Crimes App. 1977).

234 See *State v Sanden*, 626 A. 2d 194 (199) (R.I. 1993).

235 See *State v Primeaux*, 328 N.W. 2d 256 (259) (S.D. 1982).

236 See *State v D'Amico*, 385 A. 2d 1082 (1084) (Vt. 1978).

237 See *State v Keeton*, 272 S.E. 2d 817 (820) (W. Va. 1980).

238 See *Crozier v State*, 723 P. 2d 42 (51) (Wyo. 1968).

239 See *State v Gates*, 462 N.E. 2d 425 (430) (Ohio Ct. App. 1983).

240 See *State v Collins*, 632 P. 2d 68 (75) (Wash. Ct. App. 18 981).

241 See *Terry v State*, 465 N.E. 2d 1085 (1088) (Ind. 1984).

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER IV GENERAL EXCEPTIONS

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

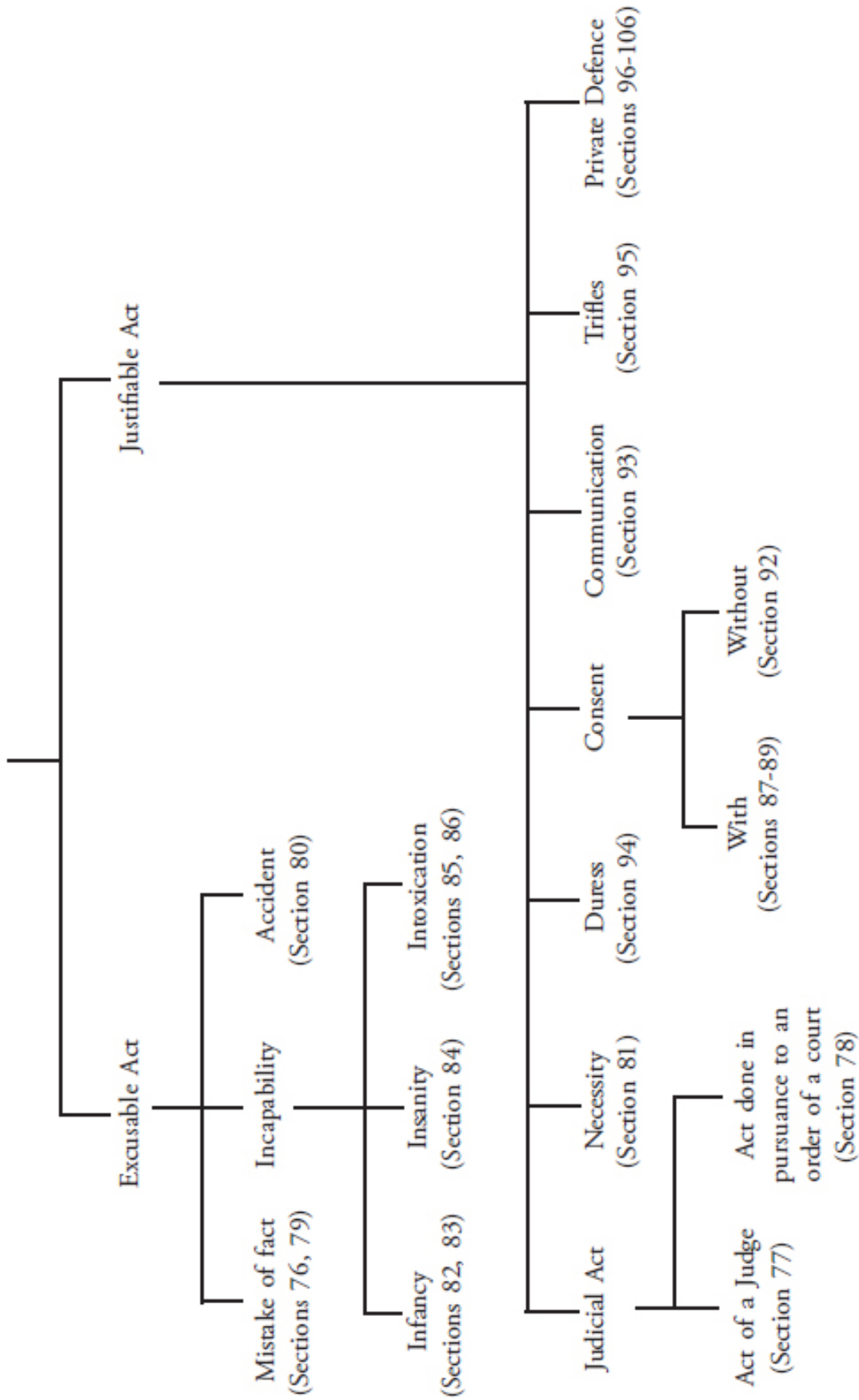
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

ILLUSTRATION

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

[s 87.1] General Principle

Sections 87 to 89 and 92 of the *Penal Code* lay down the rule for determining as to when the harm caused to the consenting individuals should not be punished in the interest of the community. That is to say, under what

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

conditions consent may be pleaded as a defence to a criminal charge. Consent plays a very important role in criminal law. It has the effect of exonerating or extenuating a *criminal act* in the following situations, viz., (a) harm short of death or grievous hurt, (b) harm resulting in death may also be caused, if it was not so intended but was intended for the benefit of the deceased.²⁴²

Section 87 gives immunity to a man from criminal prosecution on the ground of consent in general, whereas sections 88, 89 and 92 extend protection in those cases only where harm is caused in good faith during the course of doing an act for the benefit of the consenting party,²⁴³ or by the guardian or persons empowered to give consent for the purpose on behalf of such a person. Thus, the latter three sections 88, 89 and 92 have been enacted to safeguard the interests of doctors and the like, etc., against the harm caused as a result of acts done for the benefit of a man injured, with or without his consent. For instance, a doctor performing a surgical operation is not liable for causing the death of the man, if the patient dies, in spite of the best care and precaution undertaken by him.

The policy behind exemption from criminal responsibility in such cases is based on the principle that a man is the best judge of his own interest, and that no man will consent to what he considers injurious to his own interest, and if a man decides to suffer a harm voluntarily, he cannot complain of it, when it comes about. It is based on the well-known Roman maxim *volenti non fit injuria*, i.e., he who consents cannot complain of it. The authors of the Code have very aptly stated the justification for exemption from criminal liability on the ground of consent in the following words:

We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. Both the general rule and the restrictions may, we think, be easily vindicated. If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his picture(s) shall cut to rags, that his fine house shall be pulled down, that the best horses in his stables shall be shot, that his plates shall be thrown into the sea, those who obey his orders, however capricious those orders may be, however deeply Z may afterwards regret that he gave them, ought not, as it seems to us, to be punished for injuring his property.

The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions.²⁴⁴

[s 87.2] Scope of section 87

Section 87 states that consent given by a person above 18 years of age for all acts being done against him except that of causing or intended to be likely to cause his death or grievous hurt, will exonerate the actor from criminal liability, if the consenting man should suffer from any harm. For instance, if A, a grown man of 40 years, sells his teeth to a dentist for Rs 1,000 and permits the dentist to pull them out, the dentist is not liable for causing injury to A's person. It was only after A gave permission for their removal that the dentist pulled them out. A is accordingly restrained from making a complaint for the removal of his teeth.

It is important to note that immunity granted under section 87 will not justify causing of (i) death, or (b) grievous bodily injury, or any harm which is known by the doer to be likely to cause death, or grievous hurt. The restriction is absolute and unconditional. Consent may reduce the gravity of the offence and may go to mitigate the rigours of punishment. For instance, in *Poonai Fattemah*,²⁴⁵ where the accused, who professed to be a snake charmer, persuaded the deceased to allow himself to be bitten by a poisonous snake, inducing him to believe that he had the power to protect him from any harm. The accused, however, was not able to save the deceased from the effect of the snake bite. It was held that the deceased's consent did not excuse the accused from criminal liability. However, it did serve to mitigate the rigour of liability and the accused was held guilty of

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

culpable homicide not amounting to murder under section 304 read with Exception 5 to *section 300 IPC*.²⁴⁶ Similarly, in suicide pacts the survivor is held guilty for culpable homicide not amounting to murder.²⁴⁷ (*Section 304, IPC*).

Consent is a good defence to sex offences in general. But if once it is proved in a case of rape that the age of the girl in question was below 16 years, her consent becomes wholly irrelevant and the accused is liable for the offence as if no consent were obtained.²⁴⁸

As regards offences against property, consent of the owner of the property is complete defence both for civil and criminal actions.

[s 87.3] Consent – Express and Implied

Consent is defined as the concurrence of wills and its chief essential constituent is consciousness or knowledge of the act consented to.²⁴⁹ Consent may be express or implied. The question whether there was a consent in a given case is a question of fact dependent upon the circumstances of each case.

Bishambher: In the case of *Bishambher v Roomal*, (1951) 52 Cr LJ 179, the self-constituted *Panchayat* had the complainant parade through the village with blackened face and gave him a shoe-beating. It was held that the accused (members of *Panchayat*) acted *bona fide* in good faith with a view to protect the complainant from more serious consequences resulting from his indecent behaviour towards a Harijan girl, with his consent in writing to abide by the decision of the *Panchayat*. The action of the accused in enforcing the decision of the *Panchayat* is not an offence since the complainant had consented to the same, and it was done to protect him against a group of Harijans armed with weapons, who were about to inflict serious bodily injury on the complainant for indecent assault on a girl.

An implied consent may be inferred from the conduct of a man, the nature of the operation, and the like. For instance, when a man takes part in a lawful game, say football, hockey, cricket, or boxing, it is obvious that by participation in the game, he has given his implied consent to the infliction upon him of a certain amount of bodily injury implicit in the game. But if the bodily injury is inflicted in violation of the rules of the game, the man causing injury will be criminally responsible for it, and the consent is deemed to have been withdrawn *ab initio* (i.e., from the very beginning).

[s 87.4] Consent Defence in case of Tattooing

Wilson: In *R v Wilson*, (1996) 2 Cr App R 24, the accused Wilson was asked by his wife to tattoo his initials on her breasts. He refused, but she persuaded him to burn his initials with a hot knife at her buttocks. The wife was not only a willing partner, but she was the instigator of the activity. Her doctor who had discovered it during a routine examination reported the matter to the police. Wilson was charged with an assault occasioning actual bodily harm.

Dismissing the charge, the Court of Appeal held that tattooing is a perfectly lawful activity so long as it is carried out with the consent of an adult, even though actual bodily harm is deliberately inflicted. On this basis the cases can be squared with *brawn*. Branding (making), like tattooing, can be classified as one of the recognized exceptions to the rule that consent is not defence where injury is deliberately inflicted. However, Russell LJ appeared to go further. He said:

We are firmly of the opinion that it is not in the public interest that activities such as the appellant's in this appeal would amount to criminal behaviour. Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, a proper matter for criminal investigation, let alone criminal prosecution.

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

[s 87.5] Consent not a Defence to causing unlawful grievous bodily harm

Anthony Brown: The House of Lords in *R v Anthony Brown*, (1993) 2 All ER 75,²⁵⁰ held that a “victim” cannot consent to the inflicting of unlawfully and maliciously grievous bodily harm contrary to section 20²⁵¹ of the Offences Against Person Act, 1861 for public policy reasons.

In the impugned case a group of homosexual males had been discovered participating in *sado-masochistic* practices. These practices usually involved the recipient of the activity being manacled so as to be powerless while another member of the group carried out such activities as the nailing of the recipient's scrotum to a board or the burning of his penis with a candle. It is clear that all the recipients gave their full consent to what was done. The group had a series of code words, which could be used by the recipient to stop the procedures at any stage. It also appeared that younger persons had been introduced to these practices and members who had missed that evening's events made that video recording, not for sale, but for viewing.

The defendants were charged and convicted with a variety of offences under section 20 and section 47 of the Offences Against the Person Act, 1861, by the trial court. The Court of Appeal dismissed their appeals against conviction. Accordingly, they moved the House of Lords.

Rejecting the defence argument that since the injuries fell short of being serious, the prosecution could only succeed, if it could establish a lack of consent on the part of the victims; and that the law should respect the privacy of peoples' homes, the House of Lords by a majority of three to two, held that consent was irrelevant.

The majority took the view that the conduct was presumptively unlawful in that it involved violence, cruelty and abnormal and perverted homosexual activity. For example, Lord Templeman commented:

In my opinion *sado-masochism*²⁵² is not only concerned with sex. *Sado-masochism* is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.

The majority concluded that on the face of it the activities fell within the definition of the offences and that since injury was both intended and caused, consent was irrelevant unless the Court could find that there was a good reason to allow the activity. In other words, the majority considered that consent was not an integral part of the definition of these offences, but was a defence to charges where injury was either intended or caused only if the facts fell within one of the well-known exceptions, such as (i) sporting activity or (ii) medical treatment.

Their Lordships declined to create a new exception to cover the intentional infliction of bodily harm in the course of *sado-masochistic* practices. The majority held that there were several good reasons why the defence should not be extended to cover these activities. They outlined three basic reasons to reject the defense plea, viz.,

In the *first* place it was simply good luck that these men had not suffered any really serious infections or injuries. *Secondly*, there was a risk of spreading such diseases as AIDS. *Thirdly*, there was the danger that young persons might be drawn into these unnatural practices. There was therefore no public interest in permitting such practices.

The defendants unsuccessfully sought to persuade the European Court of Human Rights that their prosecutions and convictions were a contravention of Article 8 of the European convention of Human Rights, which covers the right to respect for private life. The Court, however, held that although their private life had

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

been interfered with, this was in pursuance of a legitimate aim, namely the protection of the health and morals of the community at large.²⁵³

[s 87.6] Unlawful games

A consent will not exonerate a man from criminal liability if in the course of a fight with deadly weapons, one of the participants is killed. It was apparent from the very nature of the act that it would result in death or grievous bodily injury to someone. Moreover, such types of games are prohibited by law. One cannot do by an agreement what the law says shall not be done.²⁵⁴

[s 87.7] Consent.—No Defence to Sexual Touching on Account of Mental Disorder

Croper: The House of Lords in *Regina v Croper* (2009),²⁵⁵ held that consent accorded by the complainant to sexual touching because complainant was unable to refuse due to an irrational fear of what was happening to her will not exonerate the defendant with the charge of the intentionally touching the complainant under section 30(1) of the Sexual Offences Act, 2003.²⁵⁶

The defendant was charged with intentionally touching the complainant under section 30(i) of the Sexual Offences Act, 2003 by penetrating her mouth with his penis in circumstances where the touching was sexual. The complainant was unable to refuse because of or for a reason related to a mental disorder and the defendant knew or could reasonably have been expected to know that she had a mental disorder and because of it or for a reason related to it she would be likely to be unable to refuse.

The issue in this case is as to the scope of the words “unable to communicate” in section 30(2)(b)²⁵⁷ of the Sexual Offences Act, 2003. Section 30(2)(b), read together with section 30(2)(a), provides that:

A complainant is unable to refuse if she is unable to communicate to the defendant a choice whether to agree to the touching, whether because she lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason.

Relying on psychiatrist's evidence the defendant was convicted by the trial Judge. However, the Court of Appeal allowed defendants, appeal against conviction, stating, *inter alia*, that irrational fear which prevented the exercise of choice could not be equated with lack of capacity to choose, that a lack of capacity to choose was issue—specific and not person-or situation-specific, and that inability to communicate referred to a physical inability and there was no evidence that she was physically unable to communicate any choice that she had made.

Allowing the Crown's appeal and restoring the defendant's conviction, their Lordships held that:

The words “or for any other reason” in section 30(2)(a) of the 2003 Act encompassed wide range of circumstances in which a person's mental disorder might make her unable to make an autonomous choice whether to agree to sexual touching even though she might have sufficient understanding of the information relevant to making it; that those circumstances could include an irrational fear preventing the free exercise of choice; that incapacity to choose could be person-and situation-specific; that section 30(2)(b)²⁵⁸ of the 2003 Act referred to an inability to communicate; and that, accordingly, the trial judge's directions on lack of capacity and inability to communicate would be upheld.

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act, 1872, section 105*.
- 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.
- 14 *Evidence Act, section 113B*.
- 15 *Evidence Act, section 113A*.
- 16 *Evidence Act, section 114A*.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

18 See *Miller v Minister of Pensions*, [\(1947\) 2 All ER 372](#).

242 See Hari Singh Gour, *Penal Law of India*, 11th Edn, vol 1, 2000, p 745.

243 See the *Medical Termination of Pregnancy Act* (34 of 1971) for cases in which the pregnancy may be terminated. See KD Gaur, *Abortion and the Law* (1986), Vol 28, JILI pp 348, 355-357.

244 *Draft Penal Code*, Note B, pp 107-108.

245 (1869) 12 WR (Cr) 7.

246 See Chapter XVI section 300 Exception V for commentary on Death caused by consent of persons above age of eighteen years.

247 *Dasrath Paswan v State of Bihar*, AIR 1958 SC 190 .

248 *Harpal Singh v State of Himachal Pradesh*, AIR 1981 SC 361 : (1981) 1 SCC 560 : 1981 Cr LJ 46 (SC) : 1981 CAR 29 : 1981 SCC (Cri) 208 .

249 See Commentary to *IPC section 90* for meaning of consent.

250 KD Gaur, *Criminal Law: Cases and Materials*, 5th Edn, (2008), pp 497-499 for details of case.

251 Section 20 makes wounding or causing grievous bodily harm punishable under English law. See text under section 219 commentary *infra*.

252 Enjoyment of getting sexual pleasure from watching or inflicting cruelty.

253 See *Laskey, Jaggard and Brown v UK*, (1997) 24 ECHR 34.

254 *Per Stephen, J in Coney*, 8 QBD 534 (549).

255 House of Lords (2009) UKHL 42 ; Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance.

256 Sexual Offences Act, 2003. Act provides a number of offences against persons “with a mental disorder impending choice” in sections 30 to 33, and offences involving inducements, threats or deception to procure sexual activity with a person with a mental disorder, in sections 34 to 37. The relevant section 30(1)(b) states:

“(1) A person (A) commits an offence if—(a) he intentionally touches another person (B), (b) the touching is sexual, (c) B is unable to refuse because of or for a reason related to a mental disorder, and (d) A knows or could reasonably be expected to know that B has a mental disorder and (that because of it or for a reason related to it B is likely to be unable to refuse.”

257 The offence in section 30(2)(b) states:

[s 87] Act not intended and not known to be likely to cause death or grievous hurt, done by consent.—

“(2) *B* is unable to refuse if—(a) he lacks the capacity to choose whether to agree to the touching (whether because she lacks sufficient understanding of the nature or reasonably foreseeable consequences of what is being done, or for any other reason), or (b) she is unable to communicate such a choice to *A*.”

258 Draft *Penal Code*, Note B, p 108.

End of Document

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER IV GENERAL EXCEPTIONS

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

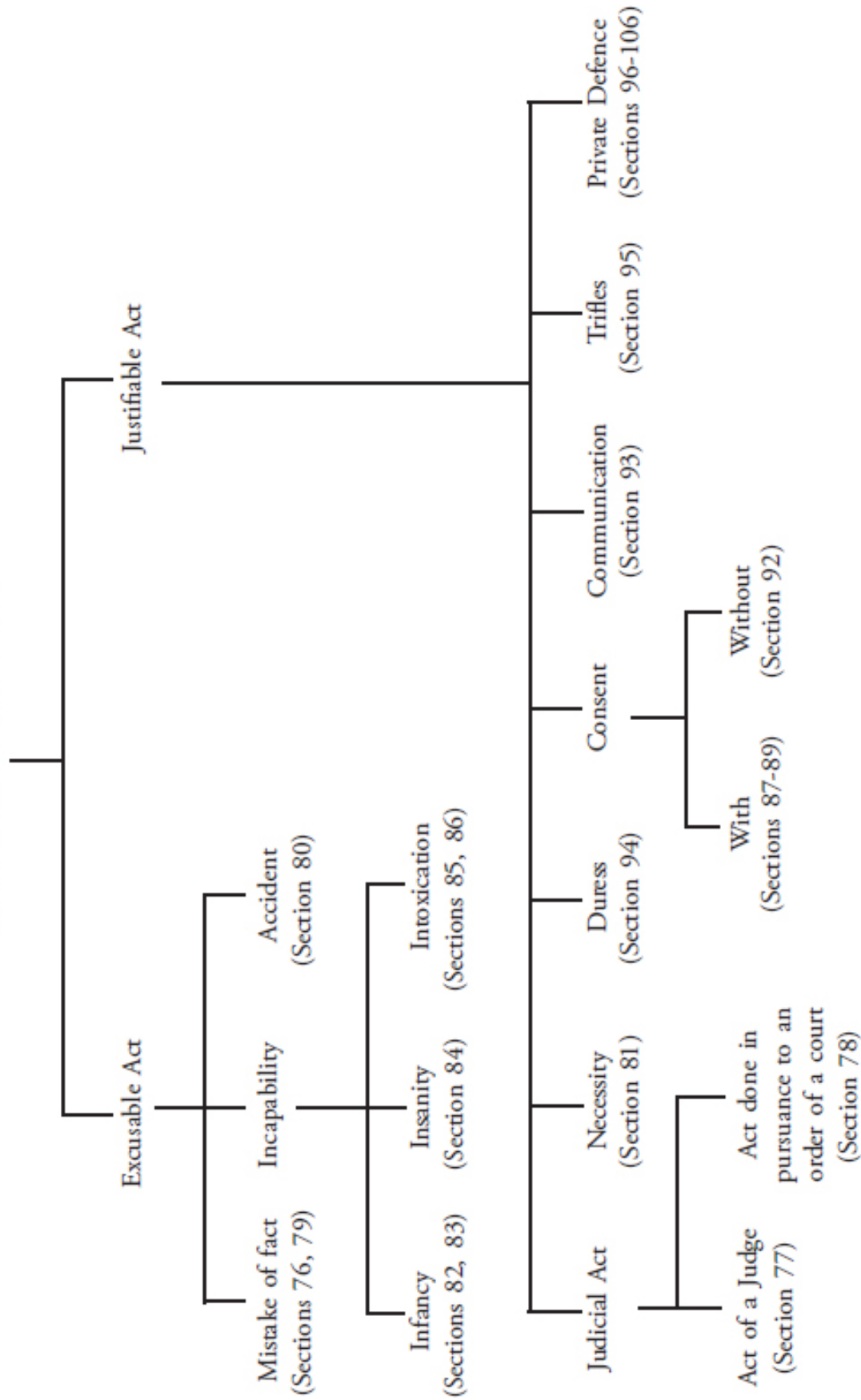
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

ILLUSTRATION

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

[s 88.1] Principle

Section 88 grants immunity to doctors against surgical operations and like persons from punishment for all acts which may cause any harm except that of causing death intentionally, provided the act is done in good faith for the benefit of the consenting party. A person acting for the benefit of another is given a greater latitude than is

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

allowed to one acting merely with consent. The authors of the Code have explained the reasons for such a rule in the following words:

In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it... But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to a great hazard. It is often the greatest service that can be rendered to him to do that may very probably cause his death. He may labour under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself... We do not conceive that it would be expedient to punish the surgeon who would perform the operation, though by performing it, he might cause death, not intending to cause death but knowing himself to be likely to cause it... ²⁵⁹

[s 88.2] Scope

In order to avail of the protection under section 88, the doer of the act must prove that he did the act in good faith for the benefit of the person with his consent, express or implied. As stated in the illustration appended to the section, the surgeon is not liable for the death of the patient, because the operation was performed in good faith for the benefit of the patient and with his consent. The surgeon neither had malice, nor was the operation performed carelessly and negligently with the intention of causing death; rather it was intended to cure the patient. Hence, the surgeon will be protected from criminal prosecution under this section. But, if the surgeon while performing the operation is found careless in his act, and leaves a needle inside the abdomen of the patient, who dies due to septicaemia (blood poisoning) that developed because the needle was left inside his body, the surgeon cannot take protection under this section. He would be held liable for causing death by negligence, ²⁶⁰ because he did not perform the operation with due care and caution.

Likewise, if a *Kabiraj* (doctor) performs an operation on a person for internal piles with an ordinary knife, which results in the man's death due to profuse bleeding, the doctor cannot plead for protection under section 88, as the act was not done in good faith. Consent will not absolve a man from criminal liability, if one is careless and negligent in performing the act. Law prescribes consent for a lawful act to be performed in a lawful manner. Hence, if one is found guilty of doing the act carelessly and negligently, the law presumes withdrawal of consent and the actor is held criminally liable for the wrong. ²⁶¹

GB Ghatge: The section also protects teachers who inflict corporal punishment on children to correct them and to maintain school discipline. In *GB Ghatge v Emperor*, AIR 1949 Bom 226, ²⁶² the Bombay High Court held that the school teacher committed no offence, when he gave 5 to 6 strokes with a cane to a boy aged 15 years as the boy was guilty of misconduct in his class. The school teacher as delegate of the parents is protected in view of the provisions of *section 88 of the Penal Code* as the punishment was to correct the boy and to maintain school discipline to which the parent (or guardian) must be held to have given an implied consent. But where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he would naturally lose the benefit of exceptions and will be liable for the act. ²⁶³

¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 259 *Draft Penal Code*, Note B, p 108.
- 260 *Juggankhan v State of Madhya Pradesh*, (1963) 1 Cr LJ 296 . See commentary to *IPC*, section 304A for liability for causing death by rash and negligent act.

[s 88] Act not intended to cause death, done by consent in good faith for person's benefit.—

261 *Sukaroo Kabiraj*, (1887) 14 Cal 566 .

262 *Ganesh Chandra Saha v Jiw Raj*, AIR 1965 Cal 32 [[LNIND 1964 CAL 67](#)] ; *Sankunni v Venkataramani*, AIR 1922 Mad 200 [[LNIND 1922 MAD 25](#)] .

263 *M Nateson v State of Madras*, AIR 1962 Mad 216 [[LNIND 1961 MAD 136](#)] .

End of Document

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER IV GENERAL EXCEPTIONS

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

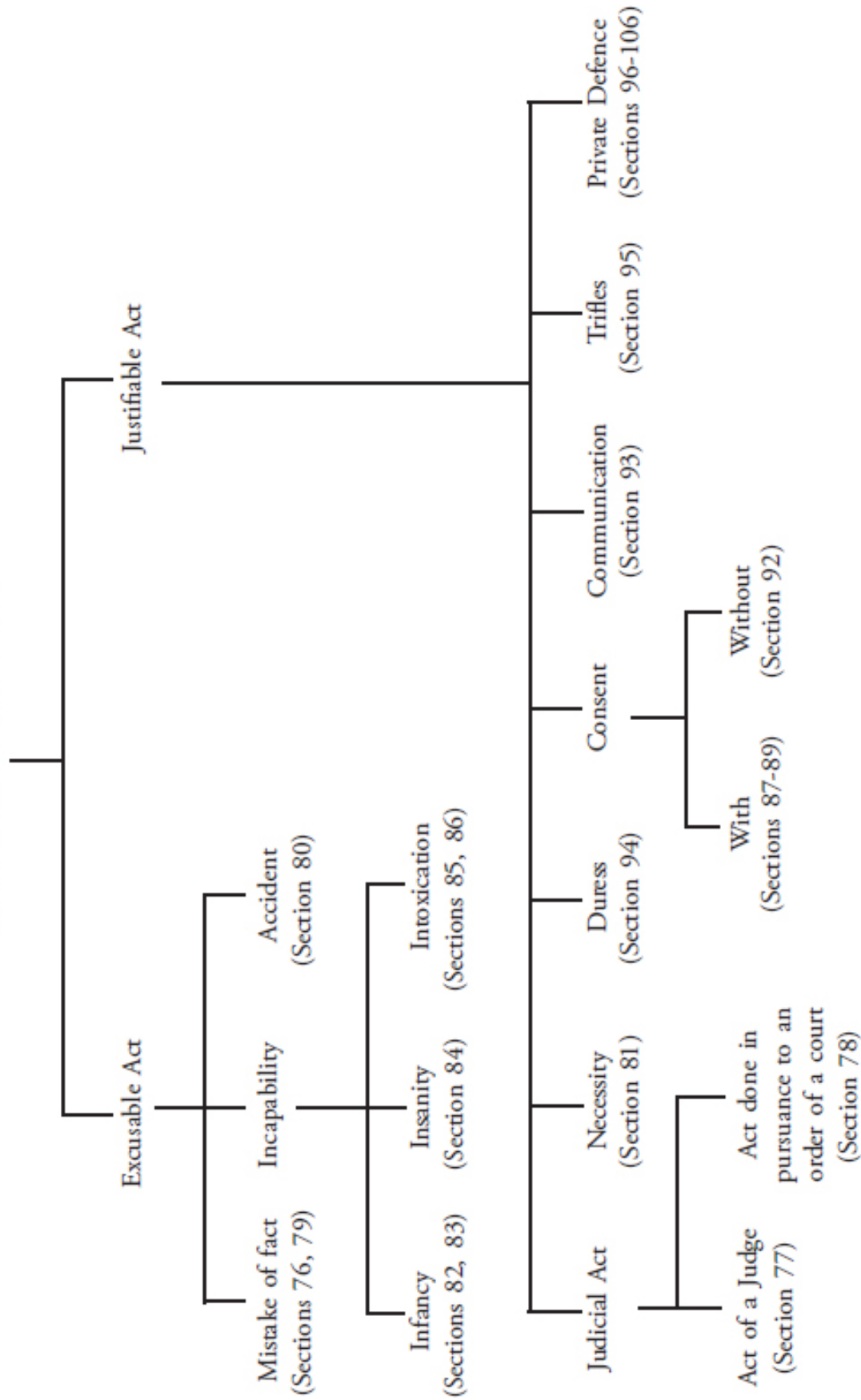
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provisos—Provided—

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

Secondly.— That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

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

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

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

ILLUSTRATION

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

[s 89.1] Object

Section 89 is a corollary to section 88 of the Code. The section authorises the guardian or other persons having lawful charge of a child below 12 years of age,²⁶⁴ or a person of unsound mind, who are not competent and capable of giving consent at law, to accord permission and consent on their behalf to inflict harm either himself or consent to its infliction by another person provided that it is done in good faith and for the benefit of the person and that the act is not immoral or illegal. Such a consent will have had the same effect, which it would have had, if the sufferer were of ripe age or of sound mind. Neither guardian nor other persons having lawful charge of that person will be liable for committing any offence, if the child or the insane person suffers any harm as a result of such consent. The authors of the Code have very aptly stated the principle underlying this section in the following words:

A lunatic may be in a state which makes it proper that he should be put into a straight-waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a straight-waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is, by our definition, voluntarily to cause grievous hurt, and as sharp instruments are used, is a very highly penal offence. We have, therefore, provided by clause 71 (i.e., section 89) that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.²⁶⁵

[s 89.2] Extent and Scope of *section 89, IPC*

A careful study of the provisions of section 89 reveals that the immunity guaranteed from prosecution under the section is not absolute. The section has four provisos attached to it whereby the benefit of the section would not be available. These provisos (exceptions) are:

- (i) Intentional causing of death, or attempting to cause death. For instance, if A in good faith for his daughter's benefit intentionally kills her to prevent her falling into the hands of dacoits, A is not within the exception since the act is intentional and illegal, *albeit* done in good faith. [Proviso first]
- (ii) Consent to the doing of anything that is likely to cause death for any purpose other than the prevention of death or the causing of any grievous disease or infirmity. See illustration attached to section 89 in which A has committed no offence, since his objective was the prevention of death or grievous hurt to the child and not to cause such injuries. [Proviso two]
- (iii) Causing or attempting to cause grievous hurt except for the purpose of preventing death or grievous hurt or the causing of any grievous hurt or infirmity. A, in good faith, for the child's pecuniary benefit emasculates his child. Here inasmuch as A has caused grievous hurt to the child for a purpose other than the prevention of death or grievous hurt to the child, he is not within the exception. [Proviso three]

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

A will be liable for causing grievous hurt to the child under *section 322 of the Penal Code*. [Proviso three]

- (iv) Abetment to the commission of any offence. A intending in good faith for the pecuniary benefit of Z, his daughter, a child under 12 years of age, abets B to commit rape on Z. Neither A nor B is within the exception. [Proviso four]

[s 89.3] For Benefit of a Child or Insane

The harm caused under section 89 shall be for the benefit of a person who is under twelve years of age²⁶⁶, or of unsound mind. However, mere pecuniary benefit will not be sufficient to excuse one from criminal liability. For instance, if a person believes that it would be for the benefit of his child to sacrifice it to a deity, he would not be protected under this section who is not justified in sacrificing the child. Were he so protected, it would not be difficult to justify the most atrocious crimes, and further this would place the life and liberty of infants too much in the hands of their guardians. Of course, if a father (mother)²⁶⁷ whips his child moderately for the child's benefit, the father (and mother) is protected under this section.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, *section 105*.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.

[s 89] Act done in good faith for benefit of child or insane person, by or by consent of guardian.—

13 *Evidence Act, section 111A.*

14 *Evidence Act, section 113B.*

15 *Evidence Act, section 113A.*

16 *Evidence Act, section 114A.*

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

264 A child above 12 years of age is considered competent to give a consent for the purpose of the *Penal Code* under section 88 of the Code, whereas a child below 18 years of age is not competent to give a valid consent for contract. See *Indian Majority Act, 1875, section 3*.

265 Draft *Penal Code*, Note B, p 109.

266 *Nanku*, AIR 1935 All 916 .

267 *Nanku*, AIR 1935 All 916 .

[s 90] Consent known to be given under fear or misconception.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 90] Consent known to be given under fear or misconception.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

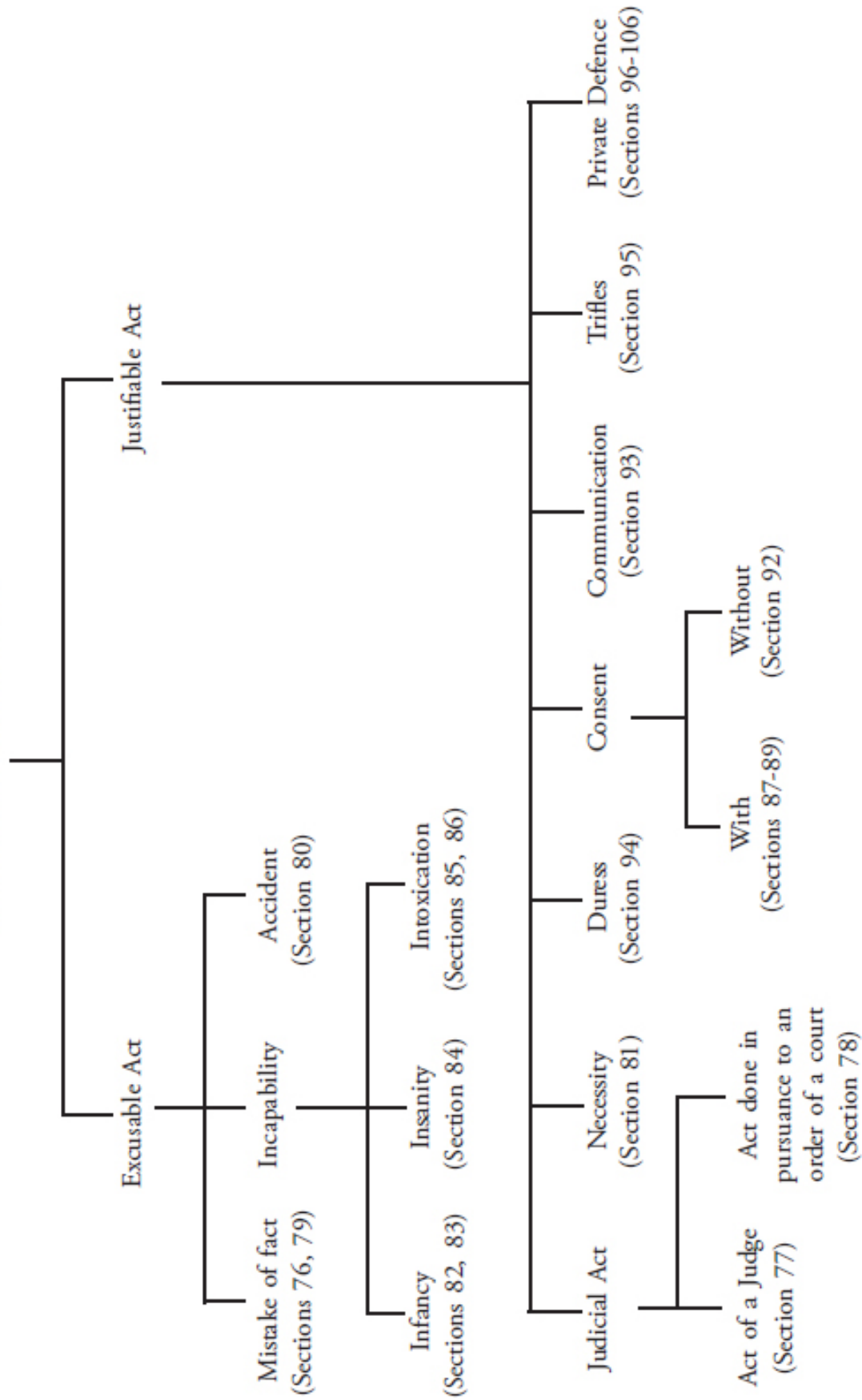
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 90] Consent known to be given under fear or misconception.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 90] Consent known to be given under fear or misconception.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 90] Consent known to be given under fear or misconception.—

A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

[s 90.1] Principle

Consent under civil law of contract has been defined as “an agreement of two or more persons upon the same thing in the same sense”.²⁶⁸ That is to say, the parties should be *ad idem*, i.e., must be of the same intention concerning the matter agreed upon. Consent is the basis of contract, and if consent is obtained by coercion, undue influence, fraud, misrepresentation or mistake, the very contract is vitiated. Likewise, consent under

[s 90] Consent known to be given under fear or misconception.—

criminal law plays a very important role inasmuch as it exempts a person from criminal liability and is a defence to a criminal charge under the *Penal Code* in three cases, viz:

- (i) Where consent has to be proved by the accused as a defence to a criminal charge, such as under sections 87, 88 and 89 of the *Indian Penal Code*.
- (ii) Where the prosecution itself has to establish that the act of the accused is without the consent of the victim. For instance, in the case of rape (section 375), kidnapping and abduction (sections 359-362), theft (section 378) and of using criminal force (section 350), the absence of consent is the basis of offence. Thus, if consent of the victim is proved the accused is not liable for the crime charged.
- (iii) Where though the expression consent is not directly used in the section, such words as “delivery” and “entrusted” used in an offence of criminal misappropriation (section 403), criminal breach of trust (section 405), and of receiving stolen property (sections 411-413) implies consent. In the absence of consent the nature of the offence changes.

[s 90.2] Consent

Section 90 of the Code instead of giving a positive definition of the word “consent”, defines it in negative terms. It states what is not considered consent in law. Consent, in order to secure the benefit of exemptions from criminal liability, must be a free consent. The section goes on to explain that a consent is not a free consent in the law and is no answer to a charge of crime, if it has been procured by putting a man under the fear of an injury, coercion, undue influence or under a misconception of fact, or the consent is given by a person who, by reason of unsoundness of mind or intoxication or immaturity of age (i.e., a child below 12 years of age), is incapable of understanding the nature and consequences of the act to which the consent was accorded. Similarly, consent given under a misconception of fact will not absolve a man from criminal liability.

Consent plays an important role in sexual offences particularly rape and absolves a person from criminal liability as discussed at length under section 375, clause (i) *infra*.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” vide clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.

[s 90] Consent known to be given under fear or misconception.—

- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 268 *R v Flattery*, ([1877](#)) 2 QBD 410 ; *Tukaram v State of Maharashtra*, AIR 1979 SC 185 [[LNIND 1978 SC 254](#)] : (1979) 2 SCC 143 [[LNIND 1978 SC 254](#)] : (1979) 1 SCR 810 : 1978 CAR 413 : 1978 Cr LJ 1864 . For details see KD Gaur, Criminal Law Cases and Materials, (3rd Edn), pp 38-43, 498 to 532, *Sidheshwar Ganguly v State of West Bengal*, AIR 1958 SC 143 [[LNIND 1957 SC 108](#)] : 1958 SCR 749 [[LNIND 1957 SC 108](#)] : 1958 SCJ 349 : 1958 Cr LJ 273 . See consent under section 376, IPC, *infra*.

[s 91] Exclusion of acts which are offences independently of harm caused.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER IV GENERAL EXCEPTIONS

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 91] Exclusion of acts which are offences independently of harm caused.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

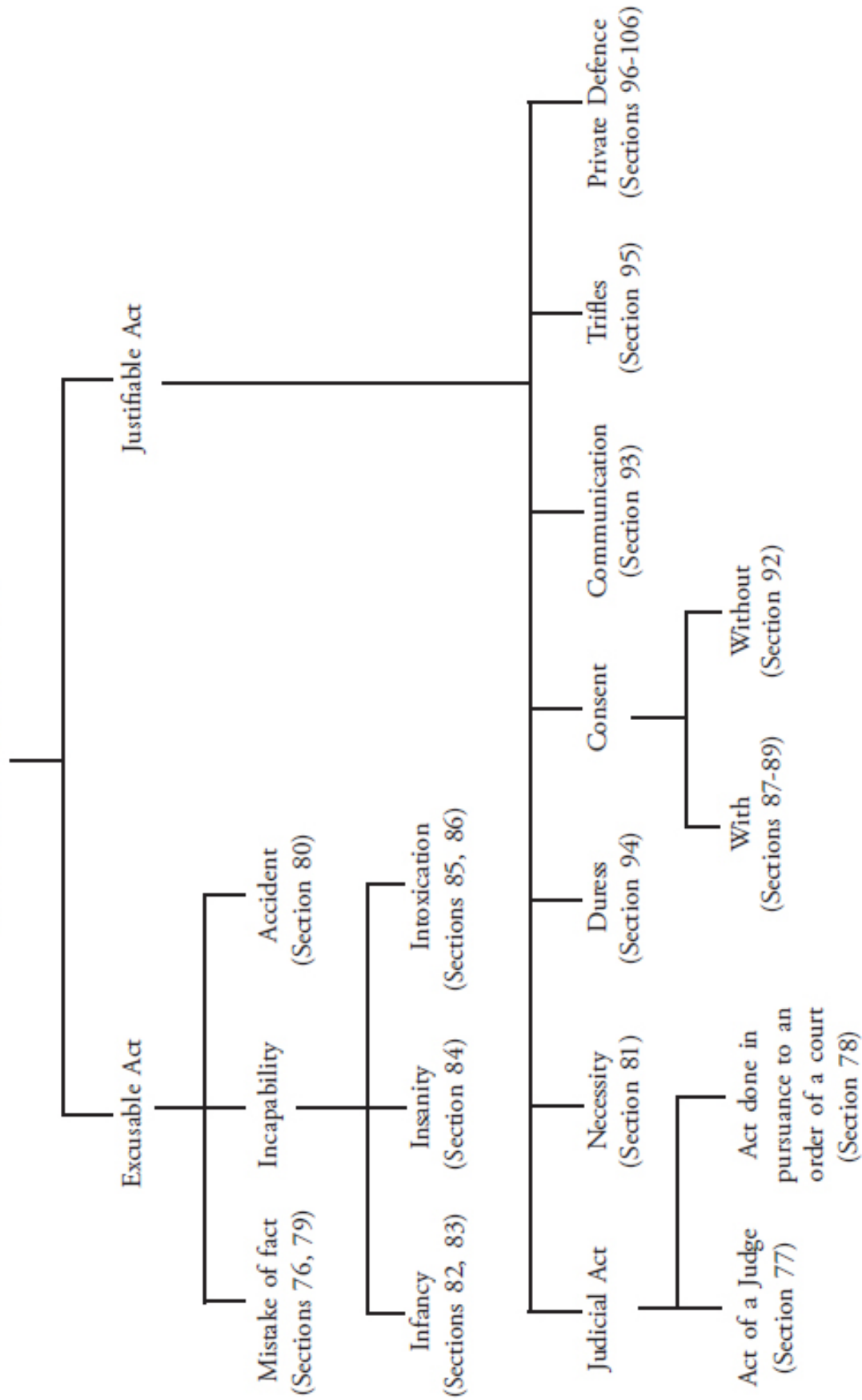
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 91] Exclusion of acts which are offences independently of harm caused.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 91] Exclusion of acts which are offences independently of harm caused.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 91] Exclusion of acts which are offences independently of harm caused.—

The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

ILLUSTRATION

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence “by reason of such harm”; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

[s 91.1] Acts which are offences independently of harm caused

Section 91 is a proviso to sections 87, 88 and 89 of the Code. Section 91 states that protection accorded under sections 87, 88 and 89 to a person on the basis of consent would not apply to acts which are offences independently of any harm caused, or intended to be caused, or known to be likely to be caused to the person giving consent, or on whose behalf consent is given. For example, causing a miscarriage is not only an injury to

[s 91] Exclusion of acts which are offences independently of harm caused.—

the woman alone, but an offence against the life of the child. Mother's consent accordingly will not be taken as the child's consent and the person causing a miscarriage will not be absolved from prosecution.

Consent may wipe off an injury to the person concerned, but not an injury caused to someone else, who never consented to it.²⁶⁹ Again, consent will not condone a man from criminal prosecution in respect of offences against the State, public health, safety, convenience, decency, morality and the like. Thus, a man will not be protected from criminal prosecution for obscene publications, indecent exhibition and public nuisance, etc., even if the act is performed with the consent of the person. Because such offences affect the State and society in general. No two individuals can agree to violate such provisions.

It is only in cases of offences against the human body and property that consent might absolve a person from criminal liability provided it is not against public policy and do not violate the provisions of law.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.

[s 91] Exclusion of acts which are offences independently of harm caused.—

14 *Evidence Act, section 113B.*

15 *Evidence Act, section 113A.*

16 *Evidence Act, section 114A.*

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

269 *Ademma*, (1886) ILR 9 Mad 369. A woman was charged for causing herself to miscarry.

[s 92] Act done in good faith for benefit of a person without consent.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 92] Act done in good faith for benefit of a person without consent.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

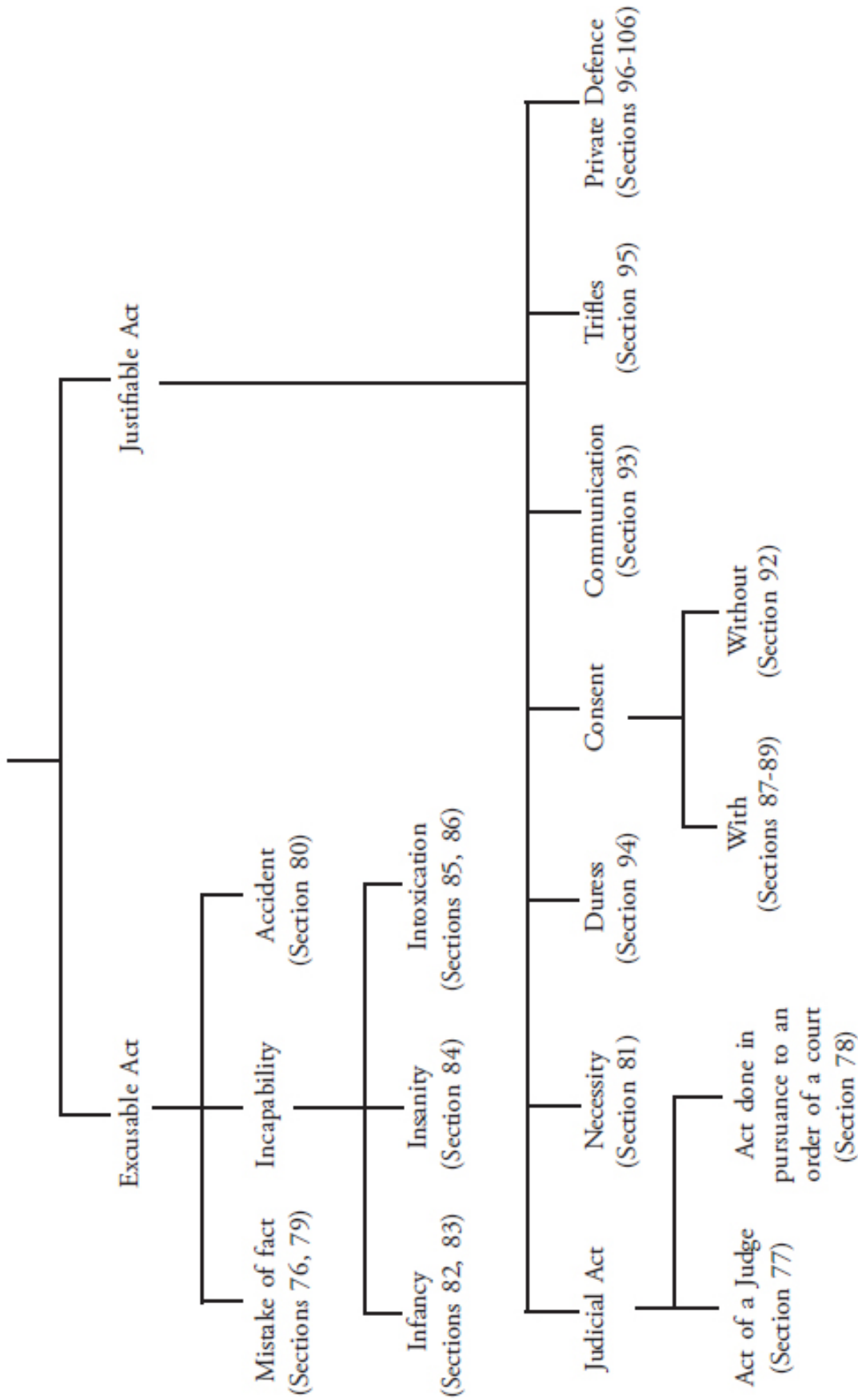
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 92] Act done in good faith for benefit of a person without consent.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 92] Act done in good faith for benefit of a person without consent.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 92] Act done in good faith for benefit of a person without consent.—

Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provisos—Provided—

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

Secondly.— That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.— That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

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

[s 92] Act done in good faith for benefit of a person without consent.—

ILLUSTRATIONS

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

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

(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

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

Explanation.—Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.

[s 92.1] Object

Section 92, deals with cases of emergency which are not covered by section 89. Consent may be absolutely dispensed with when the circumstances are such as to render consent impossible or when, in the case of a person incapable of assenting, there is no one at hand whose consent can be substituted. The protection of persons who perform a surgical operation, which ends fatally or which produces injurious consequences that were not anticipated, is made by the *Penal Code* to rest upon the principle of a consent, express or implied, having been given to the operation.²⁷⁰

[s 92.2] Implied consent

Under section 92 the law presumes implied consent of the party in question. Cases of implied consent may be of two categories namely:

first, when it is impossible to obtain consent because the person who could accord consent might not be available and the act (operation) is urgent, and

secondly, when it is not articulated or expressed.²⁷¹

[s 92.2.1] Emergency Cases

Section 92 grants immunity to that class of persons who might cause harm during the course of performing an act of surgical operation, etc., though without consent, provided the act was done in good faith and for the benefit of that very man (injured). This provision has been made to cover that class of cases wherein because of the extreme situation, neither it is possible for the man to signify his consent, nor is he in a position to accord consent, nor is there any other person to signify consent on his behalf.

For instance, if a man falls down in an epileptic fit (loss of sense and emotion usually through haemorrhage in the brain) and bleeding alone can save him, but he is unable to signify his consent to be bled because of unconsciousness, the surgeon who bleeds him commits no offence. The surgeon will be protected under this

[s 92] Act done in good faith for benefit of a person without consent.—

section, in spite of the fact that he had no authority either from the patient or his guardian, because the act was done in good faith for saving the life of the person and there was no time to wait for the consent of the guardian.

Likewise, in *Illustration* (d) appended to the section, A is not liable for killing the child, though he was neither the parent, nor the guardian of the child, nor was consent obtained from any such person, because the act was done in good faith for the benefit of the child with a faint hope that the child might be caught in the blanket below and saved.²⁷²

[s 92.2.2] Consent inferred from conduct

In the second category of cases, the consent is not articulated but is inferred from the conduct of the person or is given by implication. Silence in many cases may signify consent. For instance, a modest girl may signify her consent to her lover's proposal by a "no" uttered so as to signify a modest "yes". In such cases consent is presumed though never given or in any way signified. It depends on the circumstances of a case.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" vide clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.

[s 92] Act done in good faith for benefit of a person without consent.—

13 *Evidence Act, section 111A.*

14 *Evidence Act, section 113B.*

15 *Evidence Act, section 113A.*

16 *Evidence Act, section 114A.*

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

270 Mayne's Criminal Law of India, 4th Edn by Swaminathan, (1914), p 197.

271 RC Nigam, Law of Crimes in India, (vol I, 1965), p 415.

272 Draft *Penal Code*, Note B, p 109.

[s 93] Communication made in good faith.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 93] Communication made in good faith.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

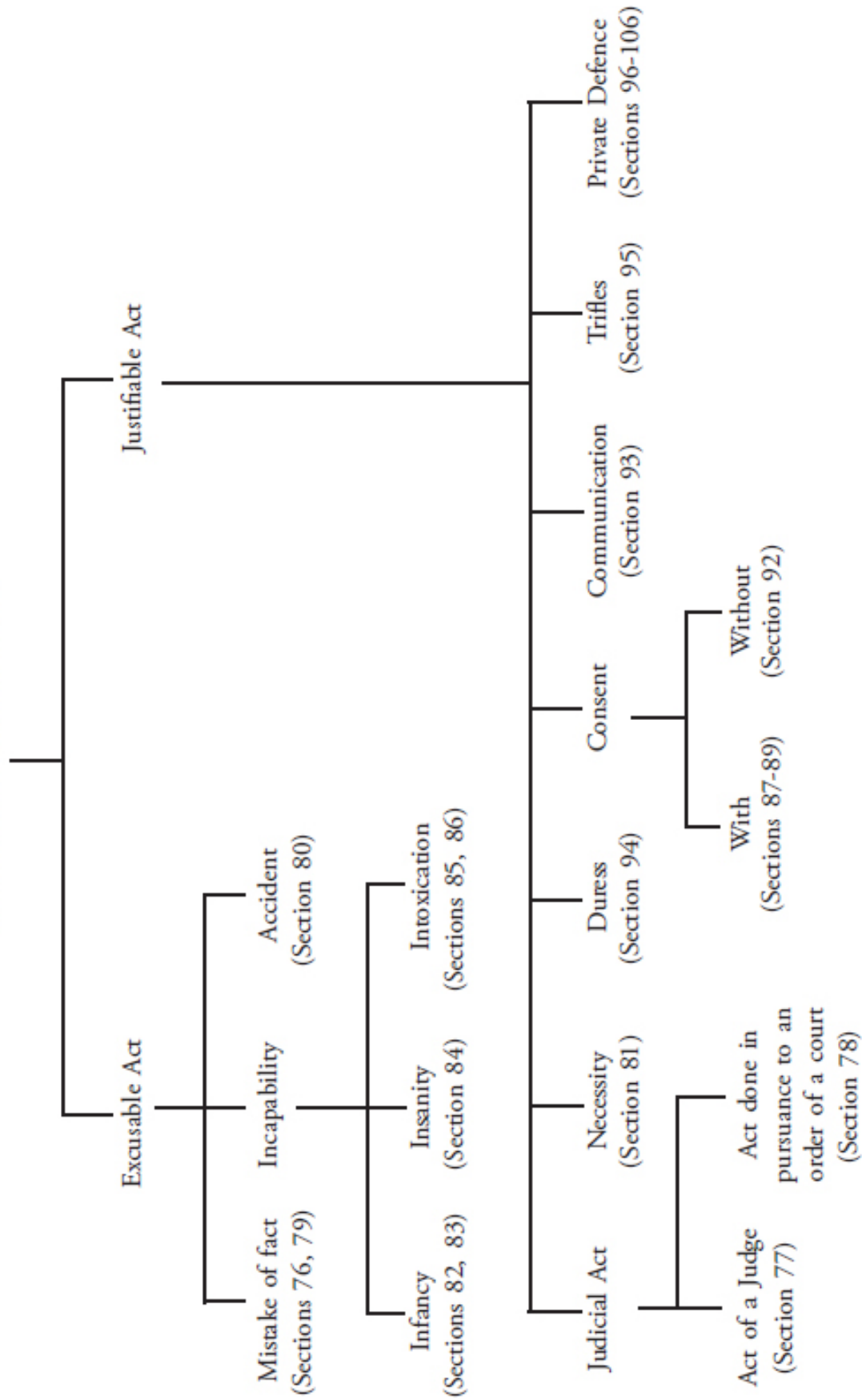
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 93] Communication made in good faith.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 93] Communication made in good faith.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 93] Communication made in good faith.—

No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

ILLUSTRATION

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

[s 93.1] Communication in good faith

Section 93 gives protection to a man against criminal prosecution for making communication to one which results in harm to him. For instance, as stated in the *Illustration* appended to the section the surgeon is not liable for causing the patient's death even though his statement to the patient, that he could not live, resulted in his death in consequence of the shock. The doctor had no ill-will against the patient. In fact, he apprised the patient about his state of health and nothing more. Perhaps, the doctor might have thought it necessary to give

[s 93] Communication made in good faith.—

the patient timely warning of his approaching end for the patient's benefit, so that he might settle his worldly affairs in time. Thus, two things are essential to protect a person under this section, namely,

(1) The communication must be made in good faith.

(2) It must be made for the benefit of the person.

X v Hospital Z: In a trend setting judgment the Supreme Court in *Mr "X" v Hospital "Z"*,²⁷³ held that the respondent – Hospital "Z" and doctors were protected under *section 93, IPC* for disclosing to the prospective bride of the fact that the appellant (would be husband) was found to be suffering from "AIDS" (HIV+), that led to the cancellation of the marriage. Held, such a disclosure is neither violative of the rule of confidentiality nor a patient's right to privacy as the lady with whom the appellant was likely to be married was saved in time by such disclosure, or else she too would have been infected by dreadful disease AIDS, if marriage would have taken place and consummated.

- ¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- ² See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- ³ See *IPC, section 6*.
- ⁴ See *IPC, section 40*.
- ⁵ Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- ⁶ See Chart at p 97.
- ⁷ *The Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- ⁸ Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- ⁹ *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- ¹⁰ *The Indian Evidence Act, 1872, section 105*.
- ¹¹ *The Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- ¹² See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.

[s 93] Communication made in good faith.—

13 Evidence Act, section 111A.

14 Evidence Act, section 113B.

15 Evidence Act, section 113A.

16 Evidence Act, section 114A.

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

273 *Mr "X" v Hospital "Z"*, AIR 1999 SC 495 [[LNIND 1998 SC 1239](#)] . For facts of the case see commentary under section 269, IPC *infra*. *Mr "X" v Hospital "Z"*, AIR 2003 SC 664 [[LNIND 2002 SC 785](#)] : 2003 (2) Andh LD 24 (SC) : 2003 (1) AWC 571 (SC) : 2003 BLJR 437 : JT 2002 (10) SC 214 : (2003) 1 SCC 500 [[LNIND 2002 SC 785](#)] : 2002 XAD (SC) 289. Earlier case partly overruled.

[s 94] Act to which a person is compelled by threats.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 94] Act to which a person is compelled by threats.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

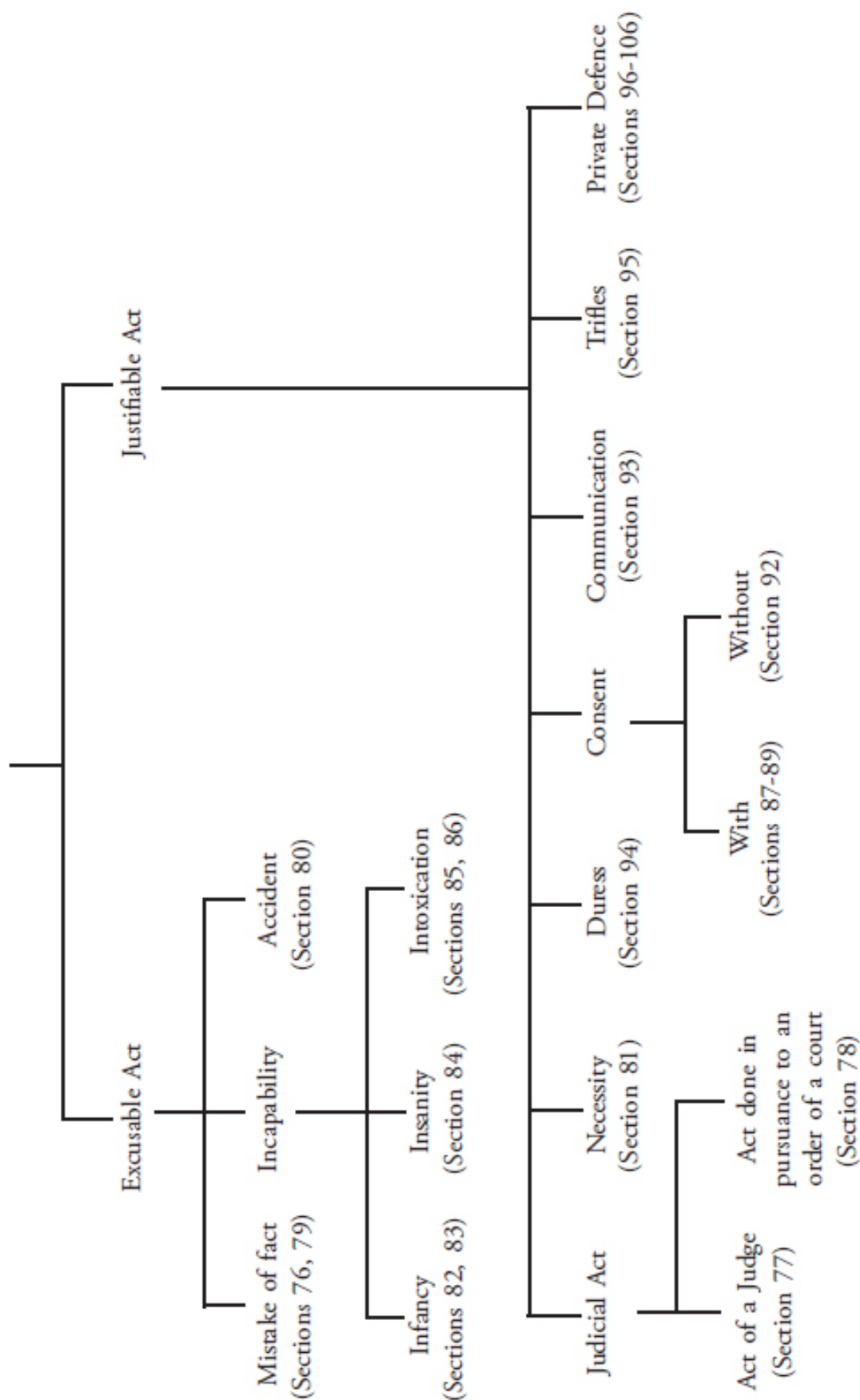
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 94] Act to which a person is compelled by threats.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 94] Act to which a person is compelled by threats.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 94] Act to which a person is compelled by threats.—

Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:

Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1 .—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2 .—A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

[s 94] Act to which a person is compelled by threats.—

Section 94 exempts a man from criminal liability in respect of an act committed by him under compulsion or duress. This is founded on the well-known maxim, *actus ne invito factus est nisi actus*, i.e., “an act which is done by me, against my will is not my act, and hence I am not responsible for it”.²⁷⁴ But, the defence is subject to two exceptions, namely: (i) murder, and (ii) waging war against the Government of India,²⁷⁵ which is punishable with death, where compulsion cannot be pleaded as a defence to a criminal charge. The exemptions are based on the ground that no one has a right to take another’s life in order to save his own,²⁷⁶ and that the State has a right to ensure its own preservation by providing deterrent punishment-pains and penalties.

The English law, on the other hand, permits a man to save his life at the expense of the State.

[s 94.2] Scope of section 94, IPC

To avail the defence of compulsion following ingredient must be proved, viz;

- (i) The apprehension of threat must be reasonable and not voluntarily sought.
- (ii) The threat must be of “instant death” at the time of doing the act, and accused was left with no option but to act against threat.
- (iii) The threat must be confined to the person himself.
- (iv) Presence of threatener.

Reasonable apprehension of threat

Derrick Gregory: The apprehension of threat of death must be reasonable under the circumstances of the case applying the test of objectivity from the standard of an ordinary reasonable man. For instance, the Supreme Court of Malaysia in *Derrick Gregory v Public Prosecutors*, (1988) 2 Mad LJ 369, refused to acknowledge the defence of compulsion under section 94 of Malaysian *Penal Code* (Similar to *IPC section 94*) to a charge of drug trafficking on the ground that the accused suffered from a personality disorder which made him extremely timid. With the result the accused perceived the threat of death directed at him to be more serious than those that of an ordinary man in the particular circumstances of the case. The Court said the standard of reasonableness is that of a mentally, healthy and sober person. Of course, age, sex or physical vulnerability of the accused will be taken into consideration, but not that the accused was intoxicated or suffered from intellectual or mental disorder.

Brown: The Court of appeal in England in *R v Brown*²⁷⁷ (1996), rejected the plea of accused's low Intellectual Quotient (IQ) that had affected his ability to understand the nature of the threat to avail the benefit of duress as a defence.

The apprehension of death must not be sought voluntarily as stated in “*Proviso*” and *Explanation 1* to *section 94, IPC* which clearly states that if a person of his own accord place himself in the situation by which he became subject to such constraint or voluntarily joins gang of dacoits he cannot claim the benefit of exception to *section 94 IPC*.²⁷⁸

[s 94.3] Ingredients

It is not every threat of injury that will excuse a man from punishment. The threat in order to attract the benefit of section 94 must be of instant death to the person compelled to commit the offence,²⁷⁹ and that the person so

[s 94] Act to which a person is compelled by threats.—

threatened should not have placed himself in that situation of his own accord. For instance, a man on the point of starvation cannot plead his hunger as an excuse for committing theft.

The accused must show that he did not of his own accord expose himself to the constraint, that the fear which prompted his action was the fear of instant death; and that the accused had no option but to die or to accomplish the act directed by the assailants.

That is to say, the accused has no means, of preventing the execution of the threat,²⁸⁰ A, a smith seized by a gang of dacoits and forced, by the threat of instant death, to take his tools and to open the door of a house for the thieves to enter and plunder it, is entitled to the benefit of this section (Explanation 2).

On the other hand, as held in *R v Hasan*, (2005) UKHL 22 . S,²⁸¹ by the House of Lords, defence of duress is not admissible, when the accused voluntarily associates with other(s) engaged in criminal activity he had foreseen or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence. The concept of voluntary association with others was that of a person who exposed himself to the risk of unlawful violence without reasonable excuse. Accordingly, his conviction was confirmed.

[s 94.4] Duress: Defence to a Charge of Perjury

Hudson and Taylor: In *R v Hudson* and *R v Taylor*, (1971) 2 All ER 244 , Miss Hudson and Miss Taylor were charged with giving false evidence (perjury) at a criminal trial. They pleaded duress successfully in defence to the charge on the ground that a man who was present at the trial at which the false evidence was given had threatened to kill them unless they gave false evidence.

The Court of Appeal set aside the conviction and held that the accused had alternative under the circumstances but to give false evidence and this was a sufficient justification for the act in question. It is a question of fact whether the threats were effective at the time the alleged crime was committed.

(i) Threat must be of “Instant Death”

The word “instant” is of significance. It is to be invoked when the life of the person is in immediate danger in consequence of a refusal to act as per the dictates of the assailant. For instance, as given in *Explanation 2* to section 94, a smith seized by a gang of dacoits, and forced by threat of instant death, to open the door of a house for the dacoits to enter and plunder is entitled to the benefit of *section 94 IPC*. Fear must be present at the time of the act.

Tan Paeng Ann: In a Malaysian case *Tan Paeng Ann v Public Prosecutor*, (1949) HLJ 87 (88) : (1949) Mad LJ Supp 10 (Malaysia),²⁸² the court of Criminal Appeal held that duress to be pleaded as a defence must be “imminent, extreme and persistent.”

Razic: The Supreme Court of Canada in *R v Razic*, (2001) 13 CCC (3d) 1,²⁸³ while interpreting section 17 of the Canadian Criminal Code²⁸⁴ that provides defence of duress on the ground of “immediate danger” while replacing the word “immediate” with “imminent danger of Life” said that the word “imminent” should be interpreted in a flexible manner to ascertain as to whether there was close connection in time, between the threat and its execution that the accused loses the freedom to act freely and independently to act in a particular manner.

It is not every threat of injury that will excuse a man from punishment. The threat in order to attract the benefit of section 94 must be of “instant death” to the person compelled to commit the offence, and that the person so threatened should not have placed himself in that situation of his own accord. For instance, a man on the point of starvation cannot plead his hunger as an excuse for committing theft.

[s 94] Act to which a person is compelled by threats.—

The accused must show that he did not of his own accord expose himself to the constraint, that the fear which prompted his action was the fear of instant death; and that the accused had no option but to die or to accomplish the act directed by the assailants. That is to say, the accused has no means, of preventing the execution of the threat, A, a smith seized by a gang of dacoits and forced, by the threat of instant death, to take his tools and to open the door of a house for the thieves to enter and plunder it, is entitled to the benefit of *section 94, IPC (Explanation 2)*.

Singapore: Singapore Parliament in 2007 has widened the scope of section 94²⁸⁵ (*Section 94, IPC*) by including the word “any other person” after “that person” in section 94 with the result a person can plead defence of duress even in case of a stranger as in case of private defence under *section 96, IPC*.

It is high that the Indian law in respect of section 94 should be amended to include “any other person” as in case of Singapore *Penal Code* after “that person”. This will help a person to protect any other person when compelled to do an act under threat. It will be in consonance with modern trends.”

(ii) Presence of the threatener

Physical presence of threatener near the accused is not required to claim the defence of duress unlike in Canada,²⁸⁶ New Zealand²⁸⁷ and Tasmania Penal Codes.²⁸⁸ Of course, it was proposed that the threatener should be in physical proximity of the accused²⁸⁹ in the original draft of the *Penal Code* but it was not included in section 94. The word “present” is a classic term and would cover the case of a person aiding and abetting the commission of crime at the time even by keeping watch and ward from a suitable distance, which can be termed as “constructive presence”. Thus, so long as a person is participating by rendering aid, assistance or even by mere encouragement to the actual perpetrators at the very time when the threat is caused, no matter how far away from the spot he might be,²⁹⁰ he will be considered constructively “physically present” at the spot. The psychological impact of the fear of “instant death” on the accused will continue so long as he or she reasonably believes that the threatener is able to carry out the threat.

[s 94.5] Duress – Partial defence to a charge of murder

Goliath: South Africa: It is strongly felt and pleaded that the law presupposes a degree of heroism of which the ordinary man is incapable and which therefore should not be expected of him. The modern conditions and concepts of humanity have rendered obsolete the rule that the actual killer cannot rely on duress as a defence. Perhaps keeping this in mind Criminal Court of South Africa in *Goliath*,²⁹¹ pleaded for a partial defence of duress to a charge of murder. The Court said:

There is... a strong argument that while duress ought not to be a complete defence to murder, persons who kill in such circumstances are clearly less blameworthy than those who kill in ‘Cold blood’ and, accordingly, a new exception to section 300 (*Penal Code* of South Africa) ought to be introduced whereby those who kill under duress are convicted of culpable homicide not amounting to murder (and not murder).

There appears to be some logic in the Court’s contention and it needs re-examination of the entire issue afresh. In this context a situation whereby A, a terrorist of a notorious organization threatens death to B and his family members, unless B obeys his instructions to put a bomb with a time fuse set in a train needs careful examination. If B, under duress obey A’s instructions hundreds of men, women and children are killed and if B does not obey he is killed.

[s 94.6] Duress – Defence to a charge of bestiality

[s 94] Act to which a person is compelled by threats.—

Bourne: An important question of law came before the Court of Appeal in *R v Bourne*, (1952) 86 Cr App R 255,²⁹² that whether a wife could successfully take the plea of duress as a defence to a charge of bestiality²⁹³ (sex with an animal).

In the impugned case the husband had compelled his wife to have carnal knowledge (sex) of a dog, which is an offence whether or not the victim consented to the act.

Accepting the plea of the wife that she was so terrorised into submission that the acts were entirely against her will, the court allowed the appeal on the footing that she had acted under duress. However the husband was convicted for aiding and abetting the offence of bestiality.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.

[s 94] Act to which a person is compelled by threats.—

14 Evidence Act, section 113B.

15 Evidence Act, section 113A.

16 Evidence Act, section 114A.

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

274 Huda, SS Principles of Law of Crimes in British India, p 169. Abbot, ([1976](#)) 3 All ER 140 (PC); In *Goliath*, (1972) 3 SA 1 (South Africa). Held, duress should be allowed as partial defence to a charge of murder when circumstances so justify.

275 IPC, sections 302, 121.

276 See *Queen v Dudley and Stephens*, (1884) 14 QBD 273 . See KD Gaur Commentary an IPC (2013) pp 296-300.

277 Russell on Crimes, vol I, 12th Edn, First Reprint 2001, pp 136, 137 Indian.

278 *Aung Hla v Emperor*, AIR 1931 Rang 235 : 25 (SB) 33 Cr LJ 205.

279 Gour, Hari Singh, Penal Law of India, (11th Edn, vol I, 2000), pp 772-777.

280 *Indian Penal Code* (Amendment) Bill 1972, clause 31 had recommended to widen the scope of the section to include “the threat of instant death or grievous bodily harm, either to that person or to any near relative of that person present when the threats are made” as a ground for exemption from criminal liability. In case of “near relative” parent, grand-parent, spouse, son, daughter, sister, son-in-law, daughter-in-law or grand-children are included.” The Bill however was not passed.

281 The defendant was charged with aggravated burglary. His defence was duress. He claimed that he has been coerced into committing the burglary by S, who had threatened that if he did not do it, he and his family would be harmed, and that he had no chance to escape and go to the police.

282 *R v Hudson*, ([1971](#)) 2 QB 202 ; *R v Abdul Hassain*, (1999) CLR 570 . See Stanley Yeo, *Duress under the Indian Penal Code: Insights from Malaysia and Singapore*, JILL. Vol 51 PP. 494-512 (2009).

283 See Stanley Yeo, Defining Duress, 46, Criminal Law Quirkily 212.

284 RSC 1985 C-45, section 17.

[s 94] Act to which a person is compelled by threats.—

285 Section 94 of Singapore *Penal Code* amended *vide Penal Code (Amendment) Act, 2007* (No. 51 of 2007) States:

“Act to which a person is compelled by threat Excepts. Except murder and offences against the State Punishable with death, nothing is an offence which is done by a person who is under comprehension that instant death to that person or any other person will otherwise be the consequence”.

286 RSC 1985 C.C-45 , 517.

287 Crimes Act (NZ), section 24.

288 Criminal Code Act, 1924 (Tos), section 20(1).

289 CH Cameron and DE Elliot, *The Indian Penal Code as originally drafted in 1937*, para 169, see Stanley Yeo, Duress under *Indian Penal Code* JILI, Vol 31 (501) (2009).

290 See Russell on Crime, vol I, 12th Edn by JW Cecil Turner, 1st Indian Reprint (2010) p 139; *Breese v The State*, (1961) 12 Ohio 146.

291 *R v Goliath*, (1972) 3 SA 1 (South Africa); *Abbot v R*, [\(1976\) 3 All ER 140](#) (PC) from Trinidad).

292 J. Lt. J. Edwards, Duress, Aiding and Abetting, (1953) 69 LQR, pp 226-232.

293 Bestiality, alternatively called buggery is felony under the Offences Against the Person Act, 1961, section 61. *Section 377, IPC* punishes ‘bestiality, for a term of imprisonment that may extend upto 10 years of imprisonment.

[s 95] Act causing slight harm.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 95] Act causing slight harm.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

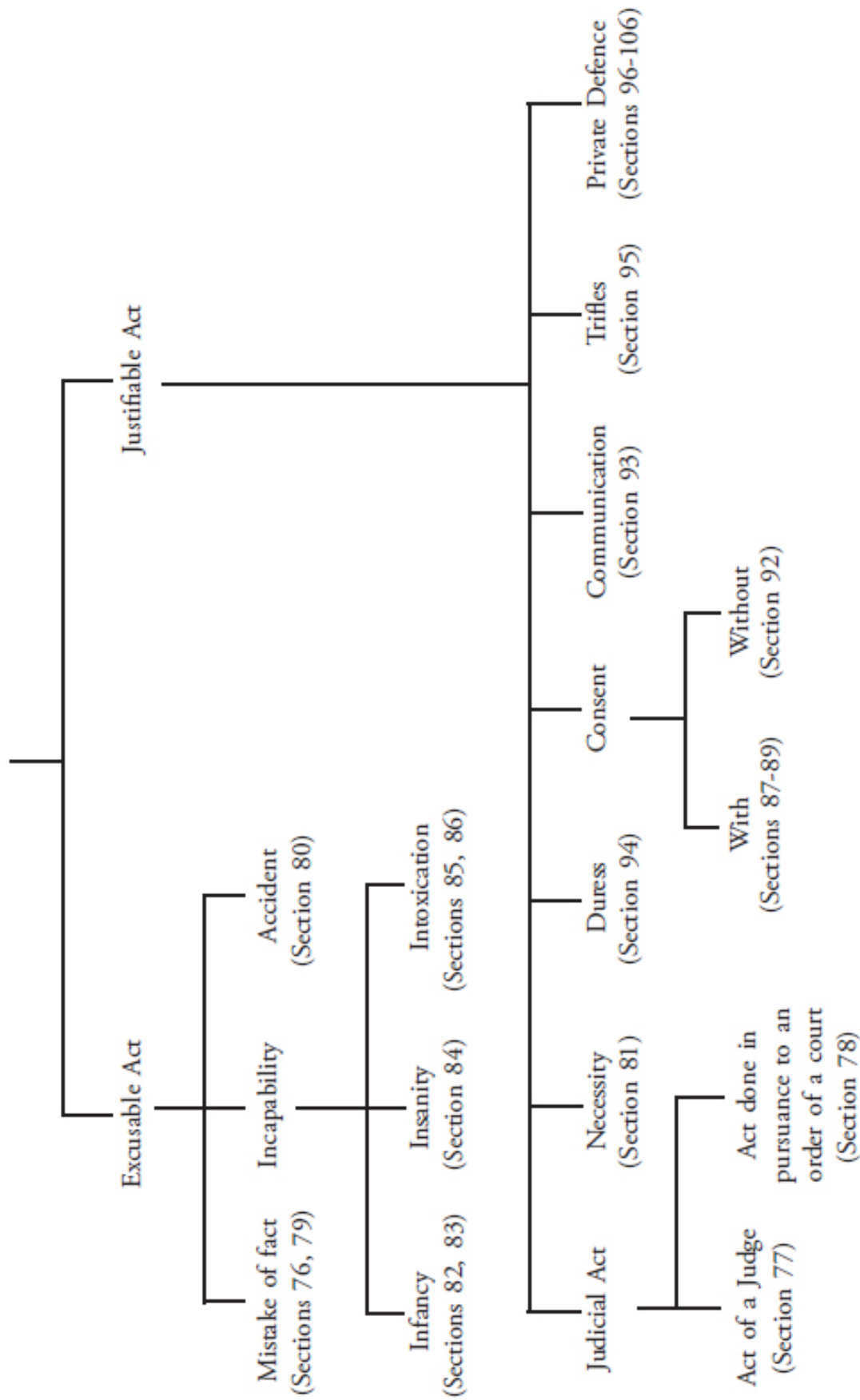
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 95] Act causing slight harm.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 95] Act causing slight harm.—

Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

[s 95.1] Object and scope

Section 95 is intended to prevent penalisation of negligible wrongs, or of offences of trivial nature. The section provides an exception from criminal liability in respect of those acts which, though they fall within the letter of the law, are yet not within its spirit, and are considered as innocent.²⁹⁴ For instance, it is theft to dip a pen in another man's ink, or to take a sheet of paper from another's drawer, causing hurt to a man by pressing against him while getting into a railway compartment, or into a theatre hall; it is defamation to call a man a liar and the like, but the law will not take notice of such acts. If such acts were punishable all free movement and intercourse in society would come to an end and men would not be able to live together freely. A man would be subjected to criminal trial for every petty act which might take place in his life and thus, he would be exposed to all the troubles and worries of criminal vagaries. Thus, the law will not take notice of trifles, i.e., *de minimis non curat lex*; the parties are allowed to settle such petty matters between themselves outside the court.

[s 95.2] Harm

The section applies when the act that causes harm, or is intended to cause harm, or is known to be likely to cause harm, is so slight that no person of ordinary sense or temper would complain of such harm. The expression “harm” has not been defined in the Code. According to the dictionary, it denotes hurt, injury, damage, imprisonment, moral wrong or evil. The expression harm has been used in different sections of the Code differently. For instance, in sections 81, 87, 88, 89, 91, 92, 100, 104 and 106 IPC “harm” connotes physical injury. In section 93 it means an injurious mental reaction. In section 415 it means injury to a person in body, mind, reputation or property. But in section 95, IPC “harm” has a wide connotation, inclusive of physical injury, financial loss, loss of reputation, mental worry or even apprehension of injury.

Veeda Menezes: In *Veeda Menezes v Yusuf Khan Hani Ibrahim Khan*,²⁹⁵ the Supreme Court held that whether an act which amounts to an offence is trivial would undoubtedly depend upon the nature of the injury, the position of the parties, the knowledge or intention with which the offending act is done, and other related circumstances. While dismissing the appeal against acquittal of the respondent for causing scratching the elbow by throwing file was so slight that a person of ordinary sense and temper placed in the circumstances in which the appellant was placed would not reasonably have complained of that harm.²⁹⁶

Kishori Mohan: In *Kishori Mohan v State of Bihar*, 1976 Cr LJ 654, the fraternity of the non-gazetted employees, who were on strike, sought to make fun of the complainant, who was a loyalist co-worker and was not participating in the strike. The fun was in the nature of having taken a photograph of the loyalist worker with a garland of shoes around his neck. The photograph was neither shown to the complainant nor published.

In a prosecution under section 504 of the Indian Penal Code against the accused for having insulted the complainant, the accused submitted that the triviality of the act with a view to befooling a member of the fraternity should operate as a bar to the wrong alleged.

Rejecting the plea, the Court held that the complainant had been subjected to indignity although a lenient view of the matter was taken by merely admonishing the accused.

Of the Right of Private Defence

¹ *Constitution of India*, Article 361, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” vide clause (2) to Article 361.

² See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).

³ See IPC, section 6.

⁴ See IPC, section 40.

⁵ Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.

[s 95] Act causing slight harm.—

- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 294 Draft *Penal Code*, Note B, pp 109, 110.
- 295 AIR 1966 SC 1773 [[LNIND 1966 SC 107](#)] : 1966 Supp SCR 1223 : 1966 Cr LJ 1489 . The appellant Mrs Menezes is the owner of a house in Bombay, and the wife of the first respondent. Yusuf Khan is a tenant of a part of the first floor in that house. On 17 January 1958, one Robert, a servant of the appellant, called the wife of the first respondent a thief and “*halkat*”. On the next day the first respondent slapped Robert on the face. This was followed by a heated exchange of abusive words between the first respondent and the appellant’s husband. The first respondent was annoyed and threw at the appellant’s husband a “file” of papers. The file did not hit the appellant’s husband, but it hit the elbow of the appellant causing a scratch.
- 296 See *Bindeshwari Prasad Singh v Kali Singh*, AIR 1977 SC 2432 [[LNIND 1976 SC 253](#)] : (1977) 1 SCC 57 [[LNIND 1976 SC 253](#)] : (1977) 1 SCR 125 : 1978 Cr LJ 187 : 1976 CAR 214 .

[s 96] Things done in private defence.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 96] Things done in private defence.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

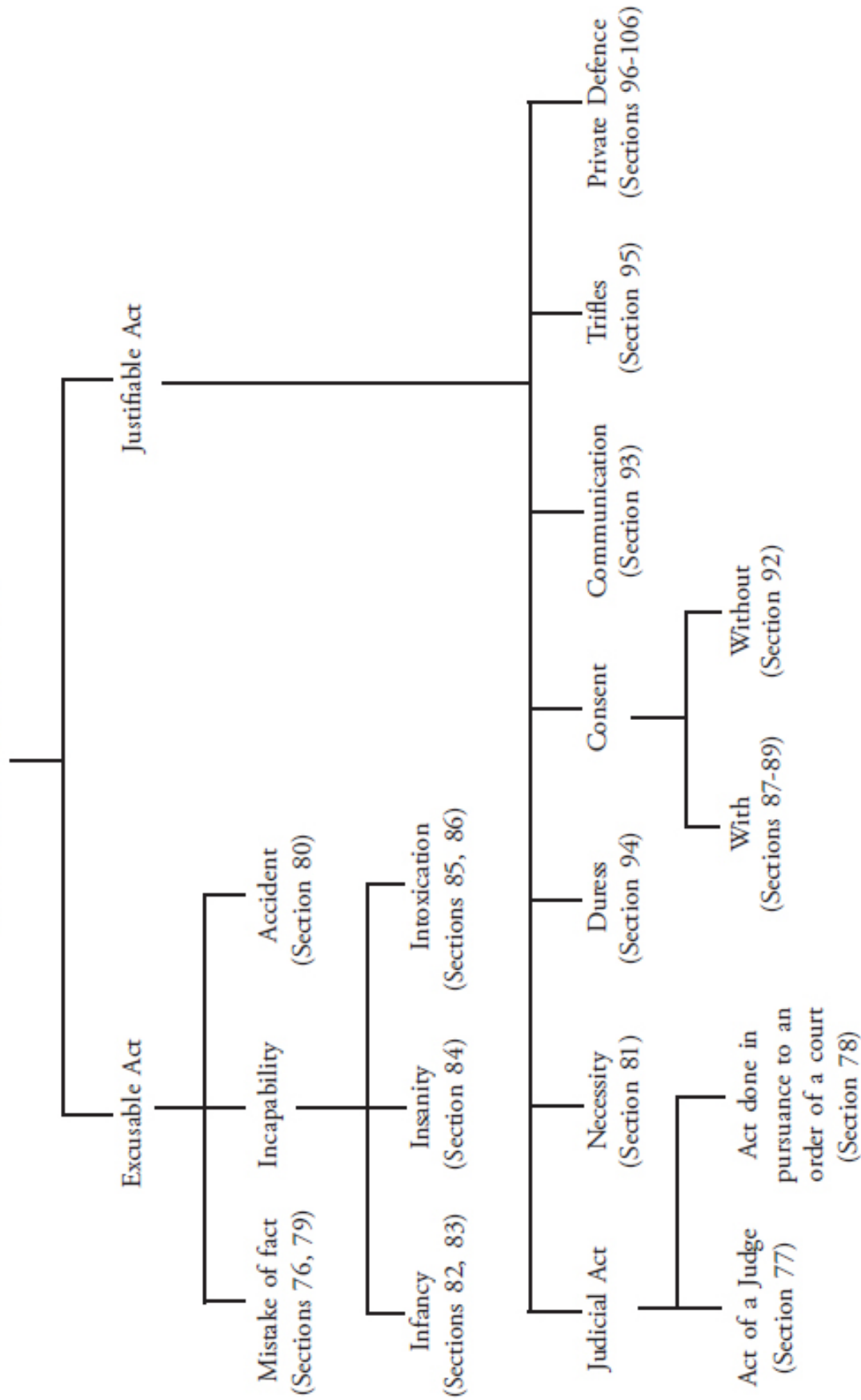
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 96] Things done in private defence.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 96] Things done in private defence.—

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

[s 96.1] Private defence – Object

Sections 96 to 106 of the Penal Code state the law relating to the right of private defence of person and property. The provisions contained in these sections give authority to a man to use necessary force against an assailant or wrong-doer for the purpose of protecting one's own body and property as also another's body and property when immediate aid from the State machinery is not readily available and in so doing he is not answerable in law for his deeds.

Self-help is the first rule of criminal law. The right of private defence is absolutely necessary for the protection of one's life, liberty and property. No doubt, it is the primary duty of the State to protect life and the property of the individuals, but no State, no matter how large its resources might be, can depute a policeman to watch the activities of each and every individual and protect them against the mischievous acts of criminals. There may be situations wherein help from the State authorities cannot be obtained in order to repel an unlawful

[s 96] Things done in private defence.—

aggression, either because there is no time to ask for such help, or for any other reason. To meet such exigencies the law has given the right of private defence of body and property to every individual.²⁹⁷

The authors of the Code have very nicely explained the object of the provisions relating to private defence, in the following words:

It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of the opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hands, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gang robbers, and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most... discouraging symptoms which the state of society in India present to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence.²⁹⁸

[s 96.2] Right of private defence

The law of private defence is based on two cardinal principles, viz.,

- (i) Everyone has the right to defend his own body and property, as also another's body and property.
- (ii) The right cannot be applied as a pretence for justifying aggression for causing harm to another person, nor for causing more harm than is necessary to inflict for the purpose of defence.²⁹⁹

The right is essentially of defence not of retribution. As pointed out by Russell in *Law of Crimes*.

...A man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them he happens to kill his attacker, such killing is justifiable.³⁰⁰

[s 96.3] Scope

Section 96 states the general proposition, that "nothing is an offence which is done in the exercise of the right of private defence." However, the right is not absolute and is subject to restrictions. The subsequent sections 97 to 105 state the limits within which the right can be exercised, the extent of injury that can be inflicted and against whom these rights can be exercised. The right of private defence is a high prized gift granted to the citizens to protect themselves by effective self-resistance against unlawful aggression. No man is expected to fly away when he is attacked. He could fight back and when he apprehends death or grievous hurt he could see that his adversary is vanquished without modulating his defence step by step. Faced with a dangerous adversary, no man can possibly act with a detached reflection and under such circumstances if he travels a little beyond the limit, the law protects him and hence courts should not place more restrictions on him than the law demands.³⁰¹

[s 96] Things done in private defence.—

The right of private defence will completely absolve a person from all guilt even when he causes the death of another person in the following situations, viz.;

- (i) If the deceased was the actual assailant, and
- (ii) If the offence committed by the deceased which occasioned the cause of the exercise of right of private defence of body and property falls within anyone of the six or four categories enumerated in *sections 100 and 103 of the Penal Code* respectively, or was an assault reasonably causing the apprehension of his death, as explained in section 106 of the Code.

The right of private defence has been elaborately discussed in sections 97 to 106 from two aspects, namely, defence of the body and defence of property. Sections 97, 98 and 99 are of a general nature and deal with both aspects of right to the defence of body and property. On the other hand, (i) sections 100, 101, 102 and 106 are concerned with defence of body and (ii) sections 103, 104 and 105 with defence of property.

Jagdish: In *Jagdish v State of Rajasthan*³⁰² (1979), the Supreme Court while referring *sections 96 and 99 of IPC and section 105 of the Evidence Act* has evolved following set of principles to be observed when plea of self-defence is raised in a given case:

- (1) The right of private defence is essentially a defensive right circumscribed by the governing statute, i.e., *IPC*, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defence expected to repel unlawful aggression and not as a retaliatory measure. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived.
- (2) Under *section 105 of the Evidence Act*, the burden of proof is on the accused, who sets up the plea of self-defence. In the absence of the said proof, it is not possible for the court to presume the truth of the plea of self-defence. The Court shall presume the absence of such circumstances. It is for the accused to place necessary material either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution.
- (3) The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea-on the basis of the material on record.
- (4) It is not necessary for the accused to plead in so many words that he acted in self-defence. A different plea adopted by the accused does not foreclose the judicial consideration on the exercise of the right of private defence. The crucial factor is not whether the accused pleaded right of private defence but whether the accused had the cause to reasonably apprehend such a danger. If the circumstances show that the right of private defence was legitimately exercised, then it is open to the court to consider such a plea.
- (5) A plea of right of private defence cannot be based on surmises and speculation.
- (6) Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused.

[s 96] Things done in private defence.—

- (7) Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. In determining this question of fact, the court must consider all the surrounding circumstances.
- (8) In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed on its proper setting. Before accepting the plea of right of private defence, it is necessary to consider whether there was reasonable apprehension in the mind of the accused. That an offence is likely to commit and there was no sufficient time to have recourse to the protection of public authority.
- (9) While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor.
- (10) To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death.
- (11) The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence.

Due Process under the Fourteenth Amendment.

Kingsley: In *Kingsley v Henderson*, 135 S.Ct. 2466 (22 June 2015),³⁰³ it was held that pretrial detainee need show only that force used against him was “objectively unreasonable;” subjective intent to use excessive force is not required.

Facts: Kingsley was a pretrial detainee in a State of Wisconsin jail on a drug charge. He declined to remove a piece of paper covering a light in his cell, or to leave his cell while deputies removed it, so they forcibly removed him in handcuffs. The parties disagree about an alleged physical altercation then between Kingsley and deputies, but they agree that Officer Hendrickson directed another officer to “tase” Kingsley, which he did. Kingsley sued for “excessive force,” and at trial the district judge instructed the jury (among other things) that “*force used recklessly*” was required and one factor would be “whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances” to use the force that was used. The jury found for the officers. On appeal, Kingsley argued that “objective reasonableness” was required and that the instruction did not meet this standard. But the Seventh Circuit ruled (2-1) that subjective intent was required: “there must be an actual intent to violate the plaintiff’s rights or reckless disregard for his rights.” This furthered a Circuit split.

Breyer for 5: US Supreme Court by a majority 5 to 4 speaking through Justice said, “The Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment”. The standards may be process, [which is] a judicially created doctrine lacking any basis in the *Constitution*.” Because the residual clause has “an unmistakable core of forbidden conduct,” it does not violate the Due Process Clause.

PRFN: In *R v PRFN*, (2000) NSWCCA 230 New South Wales (Australia),³⁰⁴ it was held that appellant’s belief on reasonable grounds that the deceased intended to sexually assault appellant again and was likely to sexually assault the appellant’s nephew or some other young person is sufficient justification for killing provided it is not planned and well calculated to take revenge.

The appellant was charged with the murder on 1 November 1997 of Barry Walter Coulter (“the deceased”), but

[s 96] Things done in private defence.—

found guilty of manslaughter, and was sentenced to imprisonment for a minimum term of three years commencing on 16 April 1999 with an additional term of three years thereafter. He appealed in relation to conviction and sentence.

In April 1996, the appellant visited the deceased's property on a weekend, staying overnight on the Saturday. During the overnight stay the deceased anally raped the appellant. The appellant was then fourteen years old. "[T]he effects of that episode had devastating psychological effects upon [the appellant]". His school work deteriorated: He was withdrawn from the school and suffered from recollection of the sexual assault, and was lethargic and subject to stomach cramps to the extent that it was suspected that he might have glandular fever. He carried out acts of self-harm including cutting himself with a razor and placing his hand on the hot plate of the family's combustion (burning) stove, and he entertained thoughts of suicide.

The effects on the appellant could only have been exacerbated by the deceased's subsequent conduct towards the appellant. On the day following the sexual assault the deceased drove the appellant home, indicating during the journey that he wanted to repeat the episode. From time to time the deceased would ring the appellant, making sexual overtures to him during the conversation, and on chance meetings he did the same. In fact there was no repetition.

The appellant decided to kill the deceased explaining the reasons he stated to the police after the killing of the deceased that:

I'd become basically scared of everything, heavy breathing where you, doing a long distance run at school and I had heavy breathing and, and threw up ... a simple embrace made me feel sick. I'd break out in a cold sweat, started shaking, couldn't breathe, stomach twist up in knots. I'd lost all my friends from one. I started off fairly popular at school, but through becoming more and more aggressive, frustrated.

The appellant's decision to kill the deceased was carefully implemented.

On 1 November 1997 the appellant's family was staying at one of the family's properties attending to lambing, and the appellant said that he wanted to obtain a book and would do the night shift in attending to lambing at their properties. He went to the latter's property, from where he rang the deceased and invited him to the property. He said that his parents were away, and asked the deceased "if he would like to come over and fool around".

In preparation for the deceased's attendance the accused loaded a rifle and placed it in a cupboard. After the deceased had arrived he went forward with his arms up as if to embrace the appellant. The appellant asked the deceased to remove his jumper, in order that the deceased would have his vision impaired and his arm movements restricted. As the deceased did so the appellant retrieved the rifle. According to the appellant's evidence he shot the deceased five times.

I turned around and Barry was just getting the jumper off and he said how sorry he was. And I said, "Yes, I bet you are" and he said it would never happen again, and I said "No, no it won't". He then said, you know, in a challenging way, you are going to do it, you know "You are not going to do it" and things like that. I pulled the trigger but I put the safety on. When I flicked the safety off he took a dive for the door. I pivoted and followed. I am not sure where I hit him. I think I hit him in the ribs. I don't remember going forward, but I must have done because he reached up just to snatch at the barrel of the rifle. I kicked him off and I fired. I am not sure how many times I fired. We ended up in the doorway between the bedroom and the lounge.

As regards the plea of grave and sudden provocation resulting in loss of self-control it was submitted on behalf of the accused that, although the shooting of the deceased was planned, in the light of the appellant's evidence of the persistence of thoughts of the sexual assault and his inability to avoid them, and in the light of the psychiatric evidence, the act of shooting "can be seen to be the ultimate loss of control upon the accumulation of the stresses upon [the appellant] over time"; even if provocation could not be established in law, the killing of the deceased could only be understood as an ultimate reaction to the acts of the deceased, and "significant weight should have been attached to this factor".

The court came to the conclusion that provocation could arise on sentencing that the sexual assault and subsequent sexual suggestions made by the deceased to the appellant were provocative. But, while there was substantially diminished mental responsibility, there was no relevant loss of self-control, such as was necessary to a finding of provocation and the careful planning and execution of the shooting made that conclusion all but inevitable. Even if the lapse of time itself did not exclude a finding of provocation, it told against loss of self-control. Declining to find provocation is a defence if court accepted the provocative nature of those events and sentenced the accused for manslaughter instead of murder.

Acknowledging the appellant's youth the court gave weight to the effect on the appellant's rehabilitation of a custodial sentence, in particular its impact on continuation of the appellant's psychiatric treatment.

Appeal dismissed.

-
- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
 - 2 *See Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
 - 3 *See IPC, section 6*.
 - 4 *See IPC, section 40*.
 - 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
 - 6 *See Chart* at p 97.
 - 7 *The Indian Evidence Act (1 of 1872)*, sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
 - 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.

[s 96] Things done in private defence.—

- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947 2 All ER 372](#)).
- 297 Bentham's Principles of Penal Law, p 269; Bentham said:
The vigilance of magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men as the fear of some total of individual resistance. Take away this right and you can become in so doing the accomplice, of all bad men. See Gour Hari Singh, Penal Law of India, (11th Edn, vol I, 2000), pp 797-825.
- 298 Draft *Penal Code*, Note p 110.
- 299 Gour Hari Singh, Penal Law of India, (11th Edn, vol II, 2000), p 797.
- 300 Russell on Crimes (11th Edn by JWC Turner 1958, vol I) p 491.
- 301 *Chacko Mathai v State of Kerala*, AIR 1964 Ker 222 [[LNIND 1963 KER 43](#)] (225).
- 302 *Jagdish v State of Rajasthan*, AIR 1979 SC 1010 [[LNIND 1979 SC 158](#)] : (1979) 2 SCC 178 [[LNIND 1979 SC 158](#)] : 1979 Cr LJ 888 : 1979 SCC (Cri) 436 [[LNIND 1979 SC 158](#)] ; *Vijayee Singh v State of Uttar Pradesh*, AIR 1990 SC 1459 [[LNIND 1990 SC 256](#)] : (1990) 3 SCC 190 [[LNIND 1990 SC 256](#)] : 1990 Cr LJ 1510 : JT 1989 (3) SC 341 ; *Moti Singh v State of Maharashtra*, (2002) 9 SCC 494 ; *Mohd Khalid v State of West Bengal*, (2002) 7 SCC 334 [[LNIND 2002 SC 538](#)] : JT 2002 (6) SC 486 [[LNIND 2002 SC 538](#)] : (2002) 4 SCJ 101 [[LNIND 2002 SC 538](#)] ; *Rizan v State of Chhattisgarh*, AIR 2003 SC 976 [[LNIND 2003 SC 72](#)] : (2003) Cr LJ 1226 (SC); *Sekar alias Rajasekharan v State of Tamil Nadu (Represented by Inspector of Police)*, 2003 Cr LJ 53 (SC) : AIR 2002 SC 3667 [[LNIND 2002 SC 628](#)] : 2002 AIR SCW 4315 : 2002 (4) SCJ 633 ; *V Subramani v State of Tamil Nadu*, (2005) Cr LJ 1727 (SC) : (2005) 10 SCC 358 [[LNIND 2005 SC 224](#)] AIR 2005 SC 1983 [[LNIND 2005 SC 224](#)] : 2005 AIR SCW 1311; *Babulal Bhagwan Khandare v State of Maharashtra*, (2005) 10 SCC 404 [[LNIND 2004 SC 1203](#)] : AIR 2005 SC 1460 [[LNIND 2004 SC 1203](#)] : 2004 AIR SCW 7376 : 2005 (1) SCJ 213 .

[s 96] Things done in private defence.—

303 135 S.Ct. 2466 (June 2015), 5-4 (**Breyer**; *Scalia* dissenting; *Alito* dissenting), *vacating* 744 F.3d 443 (CA7 2014).

304 (2000) NSWCCA 230 New South Wales (Australia).

End of Document

[s 97] Right of private defence of the body and of property.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 97] Right of private defence of the body and of property.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

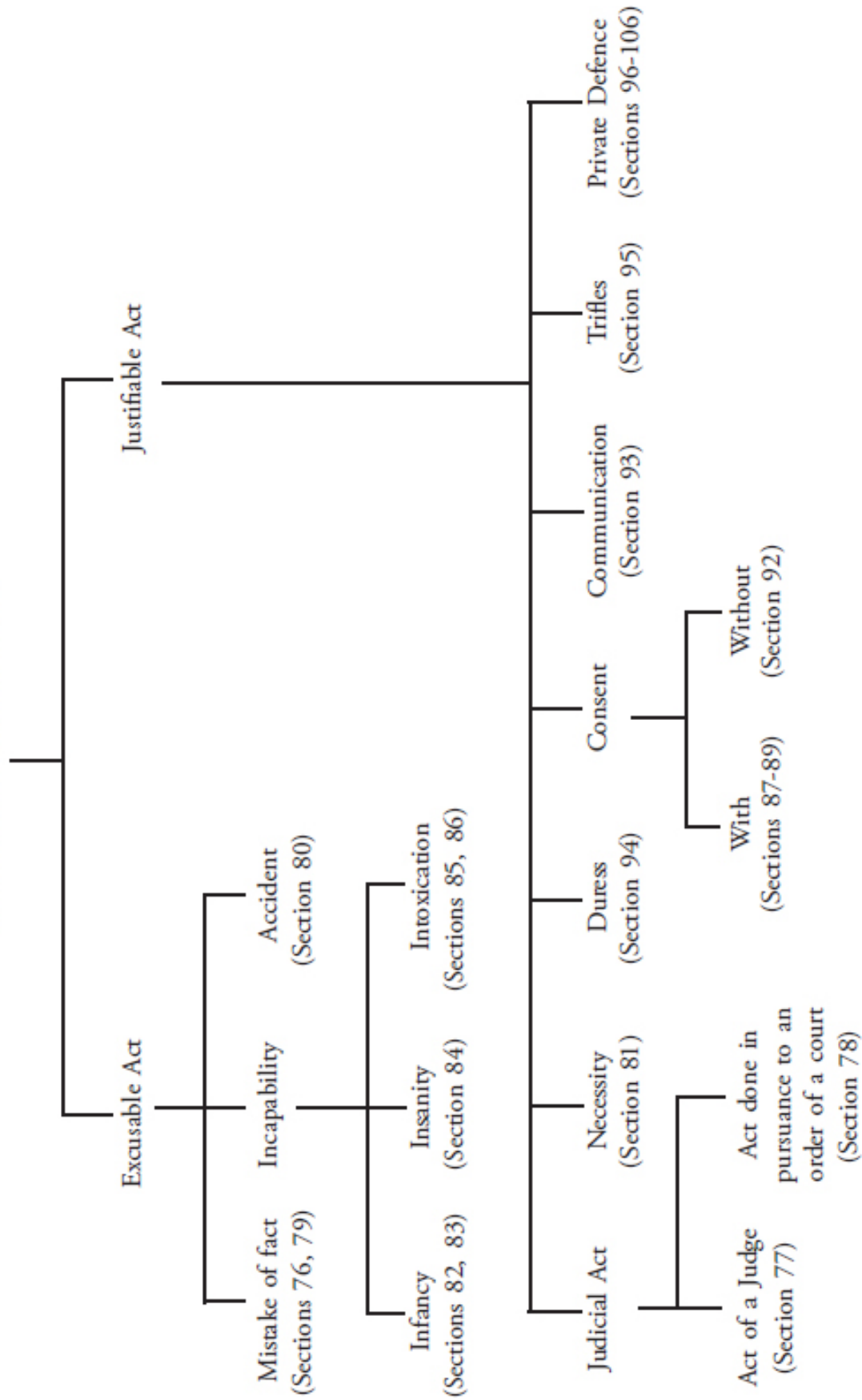
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 97] Right of private defence of the body and of property.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 97] Right of private defence of the body and of property.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 97] Right of private defence of the body and of property.—

Every person has a right, subject to the restrictions contained in section 99, to defend—

First.— His own body, and the body of any other person, against any offence affecting the human body;

Secondly.— The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

[s 97.1] Defence of body and property – Scope

Section 97 provides that subject to the restrictions contained in section 99, every man has a right to defend his own body and the body of any other person, against any offence affecting the human body, and to defend his property, and the property of any other person, whether movable or immovable against theft, robbery, mischief, or criminal trespass or an attempt to commit any one of these offences. The section divides the right of private defence into two parts. The first part deals with the right of private defence of person, and the second part with the right of private defence of property.

[s 97] Right of private defence of the body and of property.—

To invoke the plea of right of private defence there must be an offence committed or attempted to be committed against the person himself exercising such a right, or any other person. The question of the accrual of the right of private defence, however, does not depend upon an injury being caused to the man in question. The right could be exercised if a reasonable apprehension of causing grievous injury can be established. If the threat to person or property of the person is real and immediate, he is not required to weigh in a golden scale the kind of instrument and the force which he exerts on the spur of the moment.³⁰⁵

In order to ascertain whether the right of private defence is available to a person, the entire incident must be examined with care and viewed in its proper setting. The injuries received by the person, the imminence of threat to his safety, the injuries caused by the accused and the circumstances of whether the person had time to have recourse to public authorities are all relevant factors to be considered on a plea of private defence.

In *Biran Singh v State of Bihar*,³⁰⁶ two of the accused, having received simple injuries, ran back to their house, fetched a sword and inflicted fatal blows on the head of the deceased with that sword. The court held that even assuming that the deceased had inflicted simple injuries on the accused, there could be no justification for any of the accused to hit the deceased with a sword on a vital part of the body such as the head. The severity of the injuries could not be said either to have been a matter of chance. The way the accused murdered the deceased was by no means a matter of chance. Their acts bore a stamp of design. The right of private defence, therefore, could not be availed by the accused.

[s 97.2] Defence of body and property of others

The right of private defence extends not only to the defence of one's own body and property, as under the English law, but also extends to defending the body and property of any other person. Thus, under section 97 even a stranger can defend the person or property of another person and *vice versa*, whereas under the English law there must be some kind of relationship existing, such as father and son, husband and wife, guardian and ward, master and servant, etc., before this right may be successfully exercised.

Rose: For instance, in *Reg. v Rose*, (1884) 15 Cox CC 540, the accused, a boy of 21, who was charged for committing murder of his father, was held entitled to the right of private defence. The accused was living with his mother and father. The relations between father and mother were strained, and his father frequently used to quarrel with his mother, whom he believed to be unfaithful. On the night of the fatal incident there was a quarrel between the accused's father and mother. The accused's mother called out "murder" – "murder" as the father forced her to the top of the stairs and threatened to knife her. The accused shot and killed his father. There was no evidence that the father had a knife. The jury gave a verdict of not guilty. Lopes J, summed up the law in the following words:

...If you think, having regard to the evidence,...that the prisoner.... acted without vindictive feeling towards his father when he fired the shot, if you think that at the time he fired the shot he honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life, then he ought to be excused, and the law will excuse him, from the consequences of homicide....

[s 97.3] Right of private defence of trespasser against true owner

A true owner has every right to dispossess or throw out a trespasser, while the trespasser is in the act or process of trespassing but has not accomplished his mission; but this right is not available to the true owner if the trespasser has been successful in accomplishing possession and his success is known by the true owner. In such circumstances the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies available under the law.

[s 97] Right of private defence of the body and of property.—

On facts, where the complainant even after encroachment had established his possession over the land in dispute for two to three weeks before the occurrence, for the purpose of criminal law, the complainant must be treated to be in actual physical possession of the land so as to have a right of private defence to defend his possession even against the true owner. The complaint, therefore, was fully justified in protesting to the accused when he tried to pass through his field and caused damage to his paddy crop by forcibly taking bullocks through that field. In these circumstances the appellants, who were undoubtedly the aggressors and had opened the assault, could claim no right of private defence either of person or property.³⁰⁷

[s 97.4] Aggressor cannot take the plea of self-defence

In *Jaipal v State of Haryana*,³⁰⁸ the Apex Court held that an aggressor cannot claim the right of private defence. In the instant case the fact that the accused persons were armed with the dangerous weapons and no one from complainant party was armed with any dangerous weapons shows that the accused party alone had the intention to attack but not the complainant party. It is clear from the evidence that Accused No. 1 gave *gandasa* blow to the deceased, which landed on head and the second blow cut his finger and then Accused Nos. A-2 and A-3 dealt blows with their lathis on vital parts. Under the circumstances, the Apex Court while approving of the High Court's verdict held that the complainant was not the aggressor but the appellants were aggressors. The appeal was accordingly dismissed. Burden of proof of establishing self defence always lies on accused.

[s 97.5] Number of Injuries not safe criterion for determining Aggressor

Subramani: In *Subramani v State of Tamil Nadu* (2005),³⁰⁹ the Apex Court held that in case of the right of private defence the number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence.

The defence has to further establish that the injuries so caused on the accused justify (probabilise) the version of the right of private defence.

The right of private defence is essentially a defensive right and is available only when the circumstances clearly justify it. It could not be allowed to be availed of as a pretext for a vindictive, aggressive or retributive purpose of offence.

Though it cannot be laid down as a rule of universal application that whenever death occurs on account of a single blow, *section 302, IPC* is ruled out, the fact-situation has to be considered in each case. It appears from the records, that a single blow was given on the head of the deceased by a small wooden yoke (bar). Considering the facts as noted above, the Court altered the conviction from *section 302, IPC* to *section 304, Pt I, IPC* and said custodial sentence of 10 years would meet the ends of justice.

[s 97.6] Onus of establishing defence

The onus of establishing plea of right of private defence is on the accused though he is entitled to show that this right is established or can be sustained on the prosecution evidence itself. The right of private defence is purely preventive and not punitive or retributive.

Once it is held that the party of the accused were the aggressors, then merely because a gun was used after some of the partymen had received several injuries at the hands of those who were protecting their paddy crop and resisting the aggression of the party of the accused, there can be no ground for taking the case out of *section 302, IPC*, if otherwise the injuries caused bring the case within the definition of murder.

Ishwar Singh: In *Ishwar Singh v State of Rajasthan*, 1973 Cr LJ 811, the Apex Court held that in order to invoke the right of defence to person or property, the accused must prove that he was placed in such a

[s 97] Right of private defence of the body and of property.—

dangerous situation that to protect himself he had to use reasonable force. In the impugned case the field was in possession of the accused and the other party went there to take possession of it. There was a fight between the two parties which resulted in the death of one and caused injuries to several members of both the parties.

The question was as to whether the accused had used reasonable force as necessary to protect their possession over the field and also to protect their persons.

The High Court presumed that since the accused were in possession of the field and the complainants' party had come to take possession of the same, the initiative of beating must have been taken by them, and they were justified in using reasonable force as necessary to protect their possession over the field and also to protect their persons.³¹⁰

Gottipulla: An accused person taking the plea of the right of private defence is not required to call evidence but can establish that plea by reference to circumstances. And the accused is entitled to the benefit of doubt, if the court is in doubt whether or not the accused has been able to substantiate completely to its satisfaction the plea set up by law. The fact that the plea of self-defence is not raised by an accused and that he on the contrary pleads an *alibi*, does not preclude the court from giving to him the benefit of the right of private defence, if, on proper appraisal of the evidence and other relevant material on the record, the court concludes that the circumstances in which the accused finds himself at the relevant time gives him the right to use a gun in exercise of this right.³¹¹

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.

[s 97] Right of private defence of the body and of property.—

- 11** The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12** See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13** *Evidence Act, section 111A*.
- 14** *Evidence Act, section 113B*.
- 15** *Evidence Act, section 113A*.
- 16** *Evidence Act, section 114A*.
- 17** *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18** See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 305** *Parichhat v State of Madhya Pradesh*, (1972) 4 SCC 694 : AIR 1972 SC 535 : 1972 Cr LJ 322 (SC).
- 306** 1975 SCC (Cri) 454 : AIR 1975 SC 87 : (1975) 4 SCC 161 : 1975 Cr LJ 44 .
- 307** *Ram Rattan v State of Uttar Pradesh*, (1977) SCC (Cri) 85 [[LNIND 1976 SC 454](#)] : AIR 1977 SC 619 [[LNIND 1976 SC 454](#)] : (1977) 1 SCC 188 [[LNIND 1976 SC 454](#)] : (1977) 2 SCR 232 : 1977 Cr LJ 433 : 1977 CAR 63 .
- 308** AIR 2000 SC 1271 [[LNIND 2000 SC 448](#)] : 2000 Cr LJ 778 : JT 2000 (3) SC 49 [[LNIND 2000 SC 448](#)] : (2000) 3 SCC 436 [[LNIND 2000 SC 448](#)] .
- 309** AIR 2005 SC 1983 [[LNIND 2005 SC 224](#)] : 2005 Cr LJ 1727 : JT 2005 (3) SC 82 [[LNIND 2005 SC 224](#)] : (2005) 10 SCC 358 [[LNIND 2005 SC 224](#)] : 2005 (2) UJ 1004 (SC).
- 310** 1973 Cr LJ 811 (816).
- 311** *Gottipulla Venkatasiva Subrayanam v State of Andhra Pradesh*, AIR 1970 SC 1079 [[LNIND 1970 SC 10](#)] : (1970) 1 SCC 235 [[LNIND 1970 SC 10](#)] : (1970) 3 SCR 423 : (1970) 2 SCJ 560 : 1970 CAR 105 : 1970 Cr LJ 1004 .

[s 98] Right of private defence against the act of a person of unsound mind, etc.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER IV GENERAL EXCEPTIONS

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 98] Right of private defence against the act of a person of unsound mind, etc.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

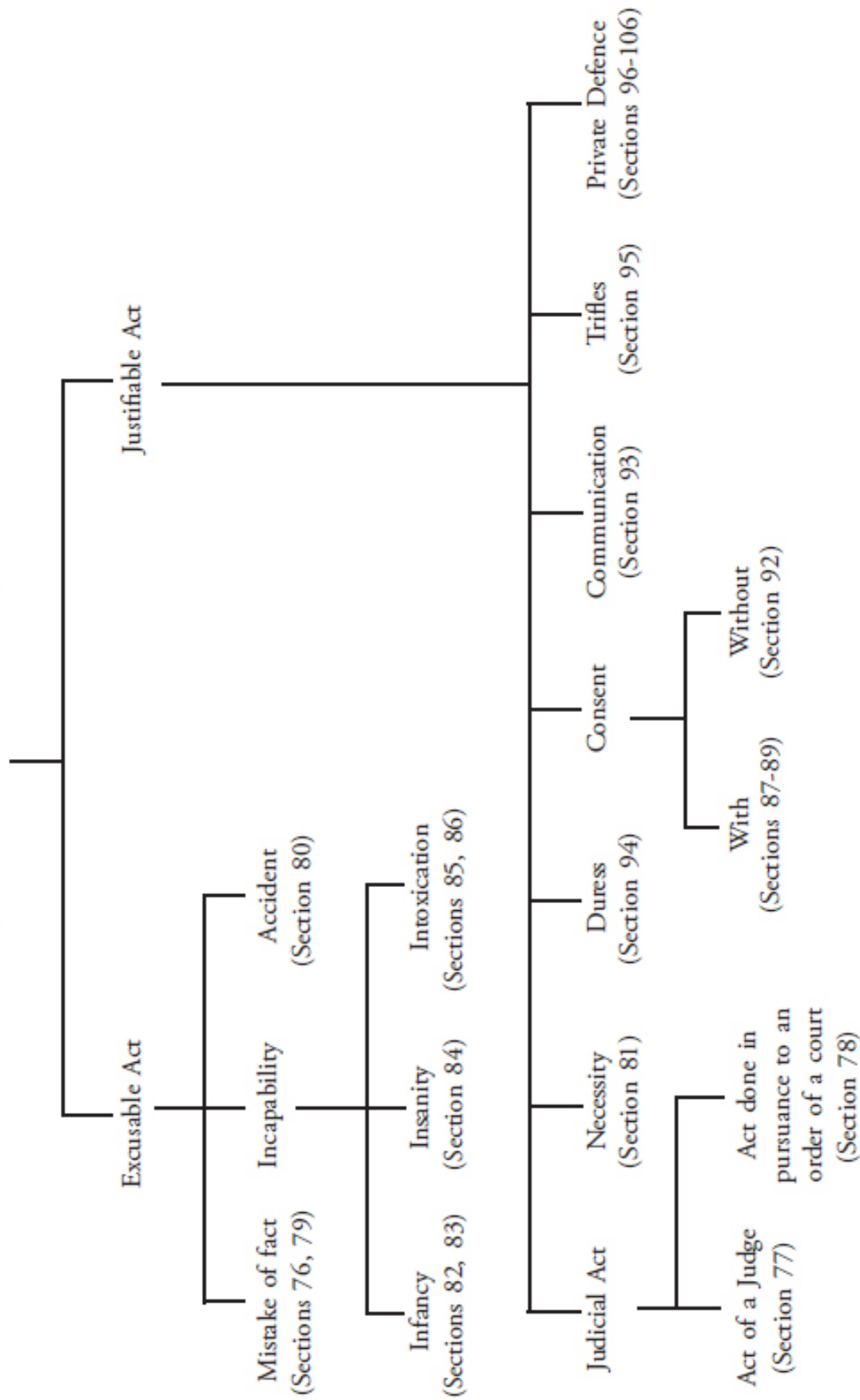
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 98] Right of private defence against the act of a person of unsound mind, etc.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 98] Right of private defence against the act of a person of unsound mind, etc.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 98] Right of private defence against the act of a person of unsound mind, etc.—

When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

ILLUSTRATIONS

(a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

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

[s 98] Right of private defence against the act of a person of unsound mind, etc.—

Section 98 assumes that the right to private defence from its very nature admits of no exception since it is the right of preservation of one's life and property as also of another's life and property against the world at large. This section provides that the right of private defence extends even against an offence committed by a person who might not be responsible in law for his deeds by reason of the doer being a man of unsound mind (section 84), or because of want of maturity of understanding (sections 82, 83), or by reason of any misconception on the part of that person (sections 76, 79). For instance, if A, an insane person, attempts to kill B, A is not guilty of any offence (section 84).

But B will have the same right of private defence against A which he would have, were B sane. Likewise, a tree, after its severance from the ground, becomes the property of the landlord, giving him the right of ingress on the tenant's land to remove it, and if the tenant resists such removal, the landlord becomes entitled to a right of private defence of property under section 98, *Indian Penal Code*.³¹²

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.

[s 98] Right of private defence against the act of a person of unsound mind, etc.—

14 *Evidence Act, section 113B.*

15 *Evidence Act, section 113A.*

16 *Evidence Act, section 114A.*

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

312 *Pusu v Emperor*, AIR 1914 Ngp 7 .

End of Document

[s 99] Acts against which there is no right of private defence.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 99] Acts against which there is no right of private defence.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

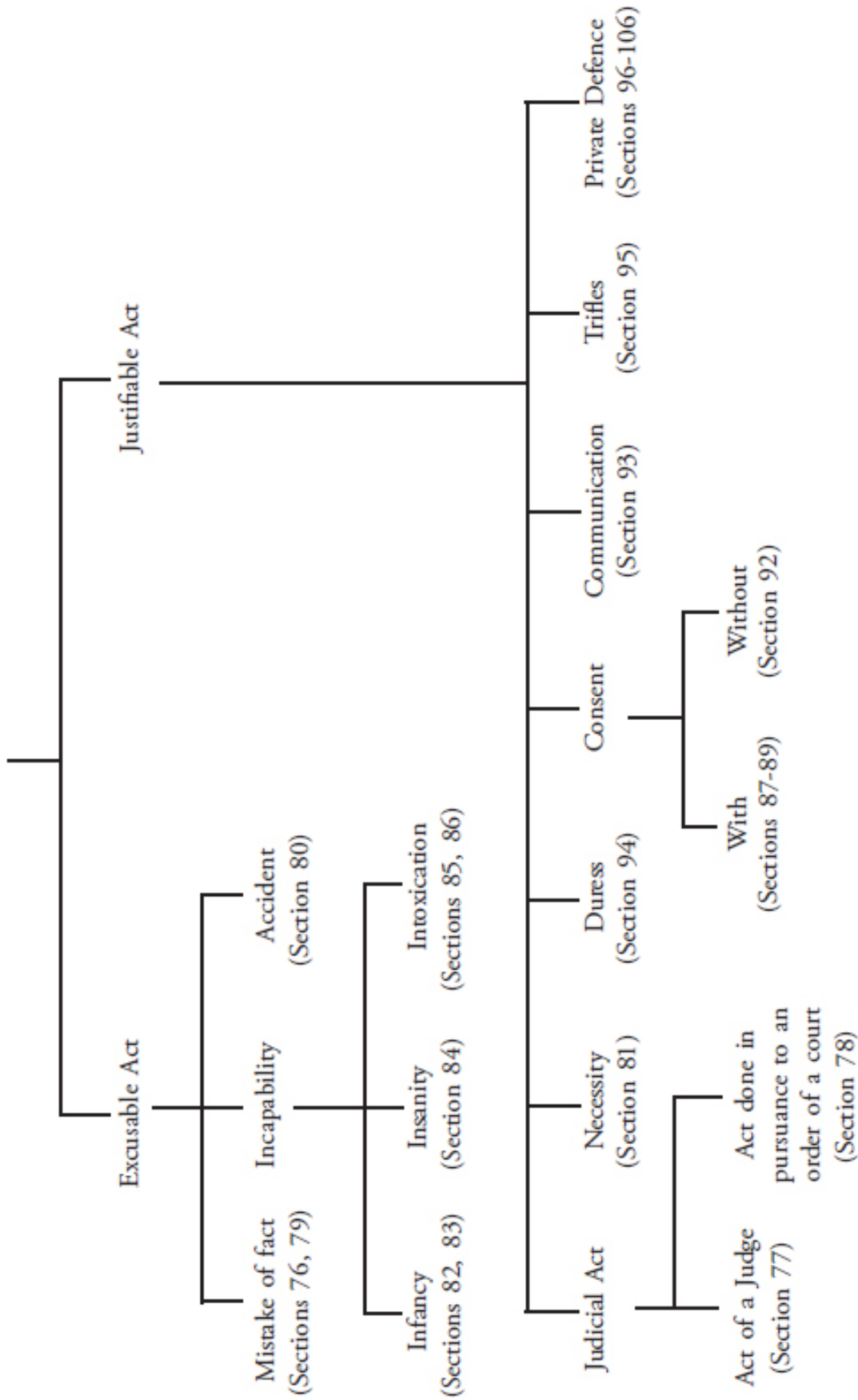
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 99] Acts against which there is no right of private defence.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 99] Acts against which there is no right of private defence.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 99] Acts against which there is no right of private defence.—

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1 .—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2 .—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe,

[s 99] Acts against which there is no right of private defence.—

that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

[s 99.1] Principle

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

- (1) that the same right is claimed by all other members of the society; and
- (2) that it is the State which generally undertakes the responsibility for the maintenance of law and order.

The citizens, as a general rule, are neither expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression, nor are they expected, by use of force, to right the wrongs done to them or to punish the wrong doer for commission of offences. The right of private defence serves a social purpose and as observed by the courts more than once there is nothing more degrading to the human spirit than to run away in face of peril. But this right is basically preventive and not punitive.

[s 99.2] Scope

Section 99 lays down the conditions and limits within which the right of private defence can be exercised. The section gives a defensive right to a man and not an offensive right. That is to say, it does not arm a man with fire and ammunition, but encourages him to help himself and others, if there is a reasonable apprehension of danger to life and property. The first two clauses provide that the right of private defence cannot be invoked against a public servant or a person acting in good faith in the exercise of his legal duty provided that the act is not illegal. Similarly, clause three restricts the right of private defence, if there is time to seek help of public authorities. And the right must be exercised in proportion to the harm to be inflicted. In other words, there is no right of private defence:

- (i) Against the acts of a public servant acting in good faith; and
- (ii) Against the acts of those acting under their authority or direction;
- (iii) Where there is sufficient time for recourse to public authorities; and
- (iv) The quantum of harm that may be caused shall in no case be in excess of harm that may be necessary for the purpose of defence.

[s 99.3] Acts of public servant

As explained earlier, the first clause refers to the acts of a public servant, while the second clause refers to acts done under the authority or direction of a public servant. The object behind deprivation of the right of private defence in such cases is that the public servants act in accordance with law for the benefit of the public in general and so protection of public servants is necessary in the public interest. However, the protection to public servants is not absolute. It is subject to restrictions. The acts in either of these clauses (first and second) must not be of serious consequences resulting in apprehension of causing death or of grievous hurt which would deprive one of his rights of private defence.

[s 99] Acts against which there is no right of private defence.—

To avail the benefit of those clauses (i) the act done or attempted to be done by a public servant must be done in good faith; (ii) the act must be done under the colour of his office; and (iii) there must be reasonable grounds for believing that the acts were done by a public servant as such or under his authority in the exercise of his legal duty and that the act is not illegal (*Explanations I and II*). Thus, in brief, the law with regard to public servants may be summarised as stated below:

- (a) So long as a public servant acts legally in the exercise of his official powers, there is no right of private defence against him, for the simple reason that his act is not an offence (it follows from *sections 96 and 99* of the *Penal Code*).
- (b) If his acts are wholly illegal, he is in the same position as any private individual and is not entitled to any special protection.
- (c) But protection is extended even to those acts of public servants or of persons acting under their authority for direction which are not strictly justifiable and yet are not wholly authorised provided the following conditions are satisfied:
 - (1) that the act does not cause reasonable apprehension of death or of grievous hurt;
 - (2) that the act is done in good faith;
 - (3) that the act is done under colour of his office;
 - (4) that it is known at the time that the act is being done by a public servant as such or under his authority; and
 - (5) that the irregularity does not transgress the limit of being 'strictly justifiable by law',³¹³

Williams: However, as held by a New Zealand Court in *Williams v Police*, (1981) 1 NZLR 108, if the act of the public servant is not lawful, the right of private defence does not extend to the causing of necessary harm. Two uniformed constables, who had been directed to investigate a complaint of assault, stopped a vehicle corresponding to the complainant's description of his assailant's car. Two of the occupants, Williams and Bluegum, got out. "Williams denied of any knowledge of the assault and was asked to wait until the complainant arrived to see if he could identify them". William refused and moved to get into the car. The constable said: "You are not going anywhere", and stepped between Williams and the car, and was pushed away, quite forcibly, though he managed to stay on his feet. The other constable also endeavoured to block the way. He too was pushed but with less force.

The first constable then purported to arrest Williams. He resisted, and Bluegum grabbed the constable. Both were arrested. Both Williams and Bluegum were charged and convicted by the trial court with assaulting both the constables and obstructing them in execution of their duty.

Allowing the appeal, the High Court of New Zealand held that the constables had no power to detain the vehicle or its occupiers. By pushing the constables as he did, Williams committed technical assaults on them, but they were not assault committed while the constables were acting in the execution of their duty. The two constables not only stood in William's way, but one of them made it clear that they were not going to let Williams get into the car. In those circumstances, he was entitled to do what he did, the force applied was not excessive, and no offence was committed.

[s 99] Acts against which there is no right of private defence.—

By his own acts the first constable had precipitated a confrontation. He wrongfully interfered with the rights of a citizen and thereby gave to an altercation. In these circumstances, he could not claim to have reasonable cause to believe that an offence had been committed. The purported arrest of Williams, although done in the best of faith was not lawful. Any show of reasonable force by Williams thereafter was justified as self-defence, and he did not exceed that limit.

[s 99.4] Good faith

Good faith plays a vital role under this section. Good faith does not require logical infallibility (accuracy) but due care and caution as defined under section 52 of the Code. Thus, a police officer acting *bona fide* under the colour of his office, should he arrest a person even though he has no authority to arrest under the particular circumstances of the case, the person so arrested has no right of private defence.

However, if the act of the public servant is *ultra vires*, the right of private defence can be exercised against him. For instance, the act of an officer of the court who acts under a time-expired warrant and attaches property, cannot be said to have done according to law and in good faith.³¹⁴ Similarly, search made in violation of the mandatory provisions of law for purpose of making an investigation into an offence as laid down in *section 165, CrPC, 1973* cannot be said to be done in good faith and with due care and attention.³¹⁵

Kesho Ram: In *Kesho Ram v Delhi Administration*,³¹⁶ the Supreme Court held that an immunity under *section 99, IPC* can be claimed by a public servant, if he acts in good faith and under the colour of his office, even though the legality of the act could not otherwise be sustained. The appellant gave a blow to an Inspector of the Delhi Municipal Corporation who, in discharge of his duty, had gone to collect the milk-tax (as provided under *section 161 of the Corporation Act*) and had seized his buffalo. The appellant was convicted for assaulting the Inspector. The appellant's plea that as there was no notice of demand sent to him (as required under *section 154*), the act of seizure of the buffalo in default of payment of tax was an act in exercise of bad faith.

Rejecting the appellant's contention, the Court held that the Inspectors were acting honestly in good faith in the exercises of the power delegated to them by the Commissioners. Their attempt to recover the tax due, by seizure of the animal did not lack good faith. In the circumstances, *section 99* did confer a protection upon the employees of the corporation who acted in good faith under the colour of their office.

[s 99.5] Reasonable apprehension of death or grievous hurt

Both clauses 1 and 2 of the *section 99* state that there will be no right of private defence against those acts of public servants or those done under the direction and authority of public servants which do not reasonably cause apprehension of death or grievous hurt which is always a question of fact to be determined from surrounding circumstances.

Paramsukh: In *Paramsukh*, AIR 1926 All 147 : (1925) 23 ALJR 1037, a Sub-Inspector of Police accompanied by a constable, on being falsely informed that certain stolen property was in the possession of one X, proceeded to his house. On arriving at X's house he found that X was not at home and so he demanded the said property from X's wife, who denied any knowledge about the property in question and asked him to wait until the arrival of her husband. The sub-inspector declined to wait and threatened the woman with a cane and laid hands on her.

On hearing her cries, the accused rushed to the spot to render help. An altercation ensued, and the accused on being assaulted by the sub-Inspector and constable, snatched a heavy stick from the latter and struck two blows on the forehead of the sub-Inspector, which proved fatal. It was held that the accused had a right of private defence against dual assault on his person.

The act of the sub-Inspector was not done in good faith and was an illegal act for there is no law to justify a

[s 99] Acts against which there is no right of private defence.—

public servant in causing death or grievous hurt or attempting to cause death or grievous hurt in discharge of his duties.

[s 99.6] No Right of defence if time to have recourse to the Public Authority

Clause 3 lays down that there is no right of private defence or the protection of one's own body or property, as also another's body or property, if there is reasonable opportunity of redress by recourse to the public authorities. No man has a right to take the law into his own hands. Romphiny J has nicely explained the law in *Kabiruddin* as stated below:

The right of self-help, when it causes or is likely to cause damage to the person or property of another person must be restricted, and recourse to public authorities must be insisted on. If a person prefers to use force in order to protect property when he could, for the protection of such property, easily have recourse to the public authorities, the use of force is made punishable by the *Indian Penal Code*. To hold otherwise would be to encourage and put a premium on offences of rioting which are so frequent in India. The country would, in the language of Holloway J, "be deluged (flooded) with blood" if an offender who could get relief by recourse to law is allowed to take the law into his own hands.³¹⁷

Puran Singh: In *Puran Singh v State of Punjab*,³¹⁸ the Supreme Court while explaining the theme of right of private defence observed:

Where there is an element of invasion or aggression on the property by a person who has no right to possession, then there is obviously no room to have recourse to the public authorities and the accused has the undoubted right to resist the attack and use even force if necessary.

[s 99.7] Harm caused must be proportionate to the injury

Clause 4 to section 99 provides that the injury to be inflicted should be proportionate to the harm caused or attempted to be caused. The right of private defence is a defensive right circumscribed by the statute, available only when the circumstances clearly justify it. It should not be allowed to be used or availed of as a gift for a vindictive, aggressive or retributive purpose. The right of private defence in no case extends to the inflicting of more harm than is necessary in the particular case.

For instance, in *Munney Khan*,³¹⁹ the accused Munney Khan after taking into custody a thief who was trying to escape, stabbed him with a knife and thereby the thief dies, the accused Munney Khan has exceeded his right of private defence. He should have used only that much force as was necessary for the purpose of taking the thief into custody.

Ramesh Chandra: Similarly, in *Ramesh Chandra v State*,³²⁰ where the accused inflicted blows on the deceased after the latter had fallen on the ground and the weapon had been taken away from him, the court held that the conduct of the accused could not justifiably be within the limits of rights of private defence.

Pannalal: In *Panna Lal v State of Madhya Pradesh*, AIR 2015 SC 3298 [[LNINDU 2015 SC 54](#)] , Apex Court held when accused party come armed with deadly weapon—and obstructed complainant party from collecting crop of soyabin and struck blows on deceased and injured persons, when complainant party was about 300 feet away from disputed land and as such no right of private defence under *section 99 IPC* arose in favour of accused. Evidence not showing any injury on person of accused. Injuries on deceased shows that skull was

[s 99] Acts against which there is no right of private defence.—

broken as a result of injuries from a sharp cutting weapon and bone matter had come out through gaping wound. Considering testimony of eye-witnesses and nature of injuries suffered by deceased, conviction of accused persons, proper.

Appellant Nos. 1 to 4 and one juvenile were alleged to have committed offences under *sections 147, 148, 302, 149 and 323/149* of the *Indian Penal Code* by causing murder of one Ramkunwarbai and for having caused hurt to Girdhari (PW-1), Satyanarayan (PW-2) and Hariram (PW-5).

Appellants were convicted for the offences with which they were charged and sentenced to suffer (i) one year's simple imprisonment under *section 147, IPC* (ii) two years' simple imprisonment under *section 148, IPC* (iii) life imprisonment for the offence punishable under *section 302/149, IPC* and to pay fine of Rs 1,000. The Judgment and order of conviction and sentence passed by the learned Additional District Judge having been affirmed by the High Court in the judgment under appeal, the same is under challenge in this appeal by special leave filed by the present appellants, before the Apex Court.

While confirming the order of conviction and sentence passed by the courts below as against Appellant Nos. 1, 2 and 3 and dismissing their appeal, the Apex Court said in the absence of any material there is no reason to differ from the view taken by the Courts below. The very fact that the incident had occurred 300 feet away from the disputed land and also on the basis of nature of injuries suffered by the deceased Ramkunwarbai. "We find no force in appellants' submissions that they were within the rights in exercising their right of private defence. The injuries show that the skull was broken as a result of injuries from a sharp cutting weapon and the bone matter had come out through the gaping wound. Considering the matter in its entire perspective we find that the present appellant Nos. 1, 2 and 3 are guilty of the offences with which they are charged. Accordingly their conviction and sentence, was confirmed.

As regards Appellant No. 4 being a juvenile on the date the offence was committed and accordingly, we deem it proper to separate his case to be dealt with by the Juvenile Court in appropriate proceedings. The order of sentence as against him is ineffective as a result of section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000.

1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.

2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).

3 See *IPC, section 6*.

4 See *IPC, section 40*.

5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.

6 See Chart at p 97.

[s 99] Acts against which there is no right of private defence.—

- 7** The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8** Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9** *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10** The *Indian Evidence Act*, 1872, section 105.
- 11** The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12** See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13** *Evidence Act*, section 111A.
- 14** *Evidence Act*, section 113B.
- 15** *Evidence Act*, section 113A.
- 16** *Evidence Act*, section 114A.
- 17** *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18** See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 313** Huda SS, Principles of Criminal Law in British India, TLL (1902), p 388.
- 314** *Shiblal*, (1933) ILR 55 All 617.
- 315** *Mithu Khan v State of Rajasthan*, AIR 1969 Raj 121 [[LNIND 1968 RAJ 20](#)] . A search party consisting of a narcotic Inspector, an informer and policemen attempted to enter the house of the accused for the recovery of contraband opium. The Inspector did not specify the grounds which had led him to believe that the contraband was stored at that place. The appellant resisted the entry and struck the members of the party when they attempted to enter the house. Held, section 99, IPC will not apply.
- 316** 1974 Cr LJ 814 (SC) : AIR 1974 SC 1158 [[LNIND 1974 SC 130](#)] : (1974) 4 SCC 509 [[LNIND 1974 SC 130](#)] : (1974) 3 SCR 827 [[LNIND 1974 SC 130](#)] .
- 317** *Kabiruddin v Emperor*, 1908 ILR 35 Cal 368 (376).
- 318** 1975 Cr LJ 1479 SC : AIR 1975 SC 1674 [[LNIND 1975 SC 174](#)] : (1975) 4 SCC 578 [[LNIND 1975 SC 562](#)] .

[s 99] Acts against which there is no right of private defence.—

319 *Munney Khan v State of Madhya Pradesh*, AIR 1971 SC 1491 [[LNIND 1970 SC 338](#)] : (1970) 2 SCC 480 [[LNIND 1970 SC 338](#)] : 1970 CAR 409 .

320 *Ramesh Chandra v State*, AIR 1969 Tripura 53 .

End of Document

[s 100] When the right of private defence of the body extends to causing death.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 100] When the right of private defence of the body extends to causing death.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

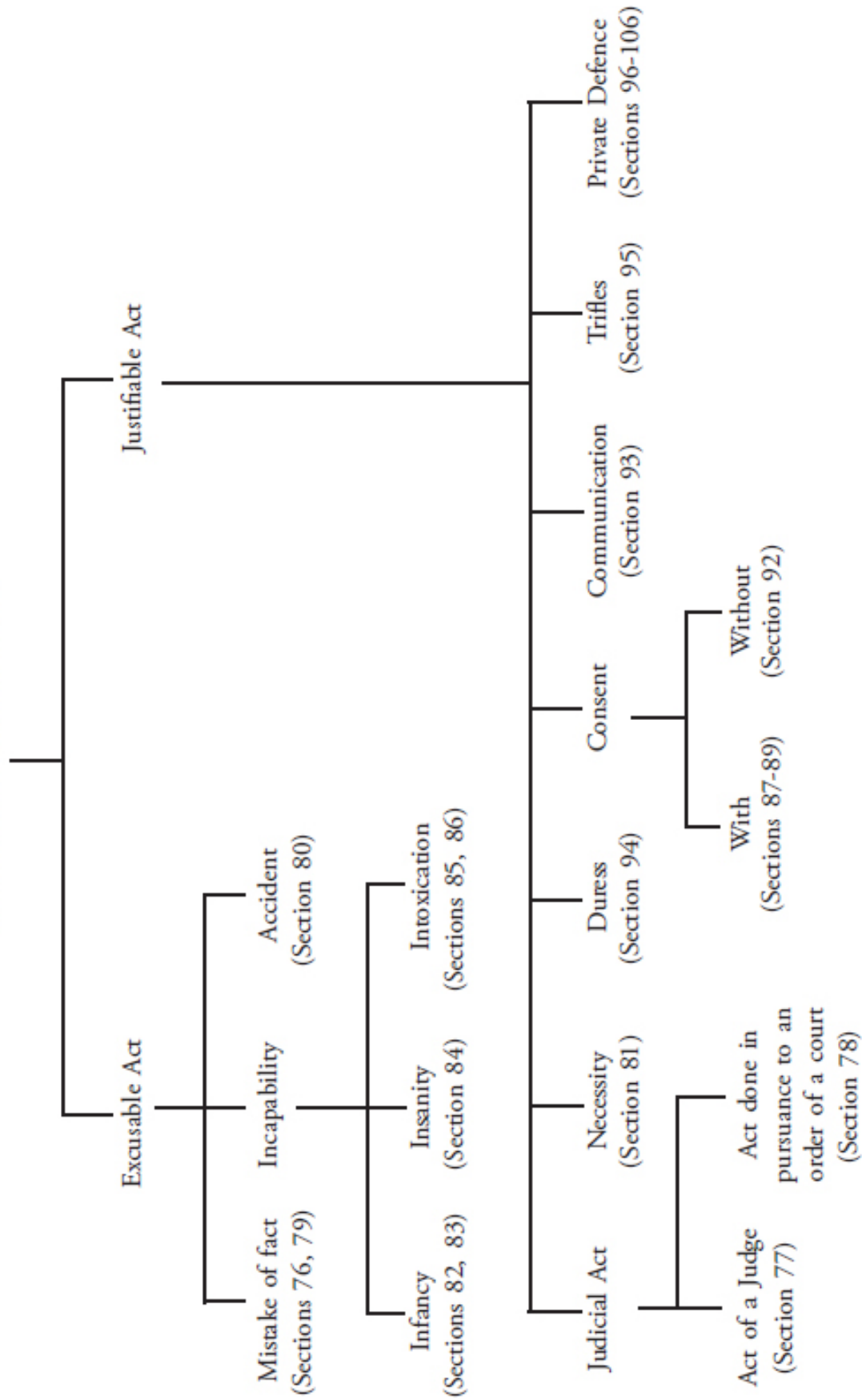
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 100] When the right of private defence of the body extends to causing death.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 100] When the right of private defence of the body extends to causing death.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 100] When the right of private defence of the body extends to causing death.—

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:—

First.— Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.— Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.— An assault with the intention of committing rape;

Fourthly.— An assault with the intention of gratifying unnatural lust;

Fifthly.— An assault with the intention of kidnapping or abducting;

Sixthly.— An assault with the intention of wrongfully confining a person, under circumstances which

[s 100] When the right of private defence of the body extends to causing death.—

may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

³²¹[Seventhly.— An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]

[s 100.1] Right of private defence of body to cause death

Section 100 justifies the killing or of causing any other harm to the assailant under the restrictions mentioned in section 99, if the offence which occasions the exercise of the right be of any description enumerated in clauses 1 to 7 of *section 100, IPC*, namely, an assault:

- (1) Causing the apprehension of death;
- (2) Causing the apprehension of grievous hurt;
- (3) With the intention of committing rape;
- (4) With the intention of gratifying unnatural lust;
- (5) With the intention of kidnapping or abducting;
- (6) With the intention of wrongfully confining a person under circumstances which may give apprehension that he will be unable to have recourse to the public authorities for his redress.
- (7) Throwing or administering acid causing reasonable apprehension that it will result in grievous hurt.

Bhaja Pradhan: In *Bhaja Pradhan*,³²² the deceased had stolen a goat from the cattleshed of the accused. The accused chased him to recover his property and, in the process of recovering it, assaulted him without knowing that he had struck vital body parts. Held, the accused exceeded the right of private defence.

Baljit Singh: Similarly in *Baljit Singh*,³²³ the Supreme Court held that the actual possession of the disputed land did permit the accused the right to defend the property from being dispossessed. But had the right exercised resulted in fatal injuries to the aggressors, the accused would have exceeded the limit of the lawful exercise of that right.

Rodriguez: In *Rodriguez v US*, 135 S.Ct. 1609 (21 April 2015),³²⁴ held a traffic stop that is prolonged beyond the time needed to complete lawful traffic-based inquiries is unreasonable, so a traffic stop cannot be extended to conduct dog-sniff (search) once the purpose of the stop has ended.

Facts: Nebraska Officer Struble stopped Rodriguez's car after observing a driving violations. Struble was a canine officer, driving alone with his dog in his car. Rodriguez and his passenger gave responses to questions that raise Struble suspicions, and Rodriguez declined to come sit in Struble police car while a ticket was written. Struble apparently decided to conduct a dog sniff (search) around Rodriguez's car, and radioed for another officer to come for safety reasons, but he did not tell Rodriguez this. After "I got all the reasons for the stop out of the way," Struble asked Rodriguez to allow Struble to walk his dog around the car. Rodriguez declined – at which point Struble ordered him out of the car, waited for the second officer, and did the dog sniff anyway. Surprise!, methamphetamine.

[s 100] When the right of private defence of the body extends to causing death.—

The District Court found that there was no probable cause to search the vehicle and that the traffic stop had ended, but ruled that extending the traffic stop for “seven to eight minutes” in order to conduct a safe dog sniff was “*de minimis* intrusion” that did violate the Fourth Amendment. The Eighth Circuit affirmed, declining to rule whether there had been additional “reasonable suspicion” to detain Rodriguez’s car (that issue will apparently now be open on remand).

Ginsburg (for six): “Authority for a [traffic stop] seizure ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” It is true that “unrelated investigations that did *not* lengthen the roadside detention” have been approved (*Caballes*, 2005 (dog sniff); *Johnson*, 2009 (questioning), and that “ordinary inquiries incident to the traffic stop” are permitted (such as checking driver’s licence, car registration, and insurance; and checking for outstanding warrants). But a dog sniff is purely a criminal investigatory measure, “not fairly characterized as part of the officer’s traffic mission.” Neither is a dog sniff a “*de minimis*” safety measure, like ordering the driver or passengers out of the car might be. “On-scene investigation into other crimes detours from the [traffic] mission” and cannot be “justified on that basis” or on safety. And we reject the argument that performing traffic stop tasks with “reasonable diligence” can “earn bonus time” to perform unrelated criminal investigation. “A traffic stop prolonged beyond” the time needed to “reasonably complete the stop’s mission” is unlawful.

Thomas, dissenting (joined by Alito and by Kennedy, except Kennedy would leave the “reasonable suspicion” point for remand: We should allow this dog sniff based on *Caballes*. Besides, the officer here clearly had additional “reasonable suspicion” to continue to detain Rodriguez and his car. Allowing unrelated warrant checks, but not dog sniffs, is an “artificial line,” and the majority does not explain why “dogs are different.” Also, officers should have “more leeway” when they have probable cause, as opposed to just reasonable suspicion.

[s 100.2] Ingredients

To invoke *section 100, IPC*, four conditions must exist, viz.,

firstly, that the person exercising the right of private defence must be free from fault in bringing about the encounter;

secondly, there must be present an impending peril to life or of great bodily harm, either real or so apparent as to create an honest belief of exceeding (great) necessity;

thirdly, there must be no safe or reasonable mode of escape by retreat; and

fourthly, there must have been a necessity for taking the life.

Ghenu: The “retreat” aspect of self-defence is open to question. As observed by the courts on a number of occasions “there is nothing more degrading to the human spirit than to run away in the face of peril”. This was once again reiterated by the Supreme Court in *State of Orissa v Ghenu*, 1978 Cr LJ 262 (264), The respondent was charged under *section 302, IPC* for murdering his brother but acquitted on the ground that the accused had caused the death while exercising the right of private defence.

On the day of occurrence both the accused and deceased were highly inebriated (drunk) and had a quarrel, in the course of which the deceased rushed towards the respondent with a *lathi* to assault him and, immediately apprehending danger to his life, the respondent dealt a tangi blow to the head of the deceased, as a consequence of which he died in hospital. The main question was:

[s 100] When the right of private defence of the body extends to causing death.—

Whether the assault by the deceased had caused to the respondent reasonable apprehension of death or grievous hurt.

Considering the evidence, the High Court held that there was imminent danger to the person of the respondent and as such he had the right of private defence of his person. While reaching this conclusion, the court also took into consideration the fact that the deceased and the respondent were *adivasis* (tribals) and that *adivasis* are of a volatile nature and their temper and sentiment cannot be judged in the framework of those of other persons.

[s 100.3] Apprehension of death or grievous hurt cases

Somnath Das: In *Somnath Das v State of Orissa*, AIR 1969 Ori 138 [[LNIND 1968 ORI 4](#)], the accused and the deceased were cousins who did not pull on well. A free fight took place between them and subsequently the accused was charged with the murder of the deceased. It was held from the facts as ascertained by the court that the deceased had done nothing as to cause a reasonable apprehension in the mind of the accused that he was threatened either with death or grievous hurt. He had merely picked up a *lathi* thrown at him by the son of the accused, whereupon the accused felled him with fatal blows. There was therefore no reasonable apprehension in the mind of the accused that either death or grievous hurt would befall (happen) upon him, had he not exercised his right of private defence.

[s 100.4] Fourth Exception to section 100 and section 99

Arjun v State of Maharashtra, AIR 2012 SC 2181 [[LNIND 2012 SC 283](#)], The Supreme Court held that right of private defence extending to voluntarily causing of death is available only if accused shows that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurts would be caused to him. Accused has to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from prosecution witnesses – Degree of proof however is not beyond reasonable doubt but mere preponderance of probability.

The appellant, a retired army service man was convicted under *section 302 IPC* and under *section 326 IPC* for murder of one Jagannath Rambhau Shirsath and, for causing grievous hurt to Muktabai-wife of deceased Jagannath. The deceased Jagannath and Muktabai (PW 8) parents of Rangnath (PW 1), his brothers Ashok Gahinninath and Rajendra were all living together at Taklimanur, Taluka Pathardi, District Ahmednagar. There were some property dispute between the first accused (appellant) and the deceased – At about 4 p.m. on that date when the deceased came in front of the appellant's shop, the appellant abused the deceased. Later, when the deceased, his wife – Muktabai and son Rangnath were going to Ambikanagar for worship of the Goddess, the appellant, his brothers Bavaasaheb (accused No. 8) Buvasaheb (accused No. 2), Suresh – son of Buvasaheb (accused No. 7) Dnyandeo (accused No. 4), Bhimrao (accused No. 5), Patilba (accused No. 3), Ramnath (accused No 6) attacked the deceased on the road near tamarind tree. The appellant was armed with larger knife, accused No. 3 was armed with an axe and others were carrying sticks. The appellant inflicted three blows on the head of the deceased with a large knife (Sura-Article No. 13) and deceased fell down. When PW 8 Muktabai intervened to rescue her husband, the appellant inflicted blows on her head, back and shoulder. Again, when PW 10 Karbhari (brother-in-law of PW 8) and his son Ambadas (PW 11) came to their rescue; the appellant assaulted both of them. Due to the injuries, the deceased died on the spot.

While altering the conviction from *section 302, IPC* for murder to *section 304 Pt I, IPC* for culpable homicide not amounting to murder, the Apex Court said:

Considering the background facts as well as the fact that there was no premeditation and the act was committed in a heat of passion and that the appellant had not taken any undue advantage or acted in a cruel manner and that there was a fight between the parties, we are of the view that this case falls under the fourth exception of *section 300, IPC*

[s 100] When the right of private defence of the body extends to causing death.—

culpable homicide not amounting to murder and hence it is just and proper to alter the conviction from *section 302, IPC* to *section 304 Part 1, IPC*.

While rejecting the plea of private defence raised by the accused, the Apex Court said:

We are of the view that in the instant case, as rightly held by the High Court and Trial Court, there is nothing to show that the deceased, his wife (PW 8), his son (PW 1) or others had attacked the appellant, nor the surrounding circumstances would indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence is therefore, has no basis and the same is rejected.

Nand Kishore Lal: In *Nand Kishore*, (1924) 25 Cr LJ 670 : AIR 1924 Pat 789 , accused, who were Sikhs, abducted a Mohammedan married woman and converted her to Sikhism. Nearly a year after the abduction, the relatives of the woman's husband came and demanded her return from the accused. The latter refused to comply and the woman herself expressly stated her unwillingness to rejoin her Muslim husband. Thereupon the husband's relatives attempted to take her away by force. The accused resisted the attempt and in so doing one of them inflicted a blow on the head of one of the woman's assailants, which resulted in the latter's death. It was held that the right of the accused to defend the woman against her assailants extended under this section to the causing of death and they had, therefore, committed no offence.³²⁵

Right of private defence extends to the extent of causing death when daughter was being sexually assaulted.—Yeshwant Rao: In *Yeshwant Rao v State of Madhya Pradesh*, AIR 1992 SC 1683 , the deceased, Lakhan Singh was engaged in a sexual intercourse with the daughter of the appellant. On witnessing the same, the appellant assaulted the deceased on the head with a spade. This resulted in his death due to the rupture of liver which could be either by falling on a hard object, or as a result of the blow given by the appellant.

The trial court convicted the appellant under *section 325, IPC* for causing hurt and the High Court confirmed the conviction. In appeal, the Supreme Court set aside the conviction and held that the right of private defence was fully applicable to the facts of the case *vide* sections 96, 97 read with section 100 clause (3) of *IPC*. Whether it was case of sexual intercourse with or without consent, the fact remains that the daughter was of fifteen years of age and, therefore the act of deceased would amount to rape within the meaning of section 375, clause (6) of the *IPC*.

Deo Narain: In *Deo Narain v State of Uttar Pradesh*,³²⁶ the Supreme Court held that when a blow is aimed at a vulnerable part of the body, such as the head, even by a *lathi*, and cases are not unknown in which such a blow by a *lathi* has actually proved instantaneously fatal, it cannot be laid down as a sound proposition of law that in such cases the victim is not justified in using even his spear in defending himself. In moments of excitation or disturbed mental equilibrium it is somewhat difficult to expect parties facing grave aggression to coolly weigh in a golden scale, or calmly determine with a composed mind, precisely the kind and severity of blow that would be legally sufficient to effectively meet the unlawful aggression.

Vishwanath: In *Vishwanath v State of Uttar Pradesh*,³²⁷ it was held by the Supreme Court that the right of private defence under clause 5 of section 100 arises against any assault made for the purpose of abduction. The defender does not have to consider whether the intention of the offender was or was not to commit an offence under one or other types of kidnapping or abduction as given in *sections 364 to 369, IPC* (See Chapter 16).

[s 100] When the right of private defence of the body extends to causing death.—

The accused was charged for murder of his brother-in-law G. He had a married sister, S, whose relations with her husband, G, being strained, had been living with the accused for some time. G had repeatedly requested the return of his wife but the accused had refused to comply. On the day in question G went to the house of the accused with some companions, and while the others remained outside, he went inside and dragged his unwilling wife by the hand outside. Seeing this the accused, who was standing outside with G's companions become agitated, pulled out a small knife from his pocket and gave one blow with it to G, which unfortunately landed on his heart. G died of the injury in the hospital. The accused was acquitted in the Sessions Court, but on appeal the High Court convicted him for culpable homicide under section 304, Pt II, *IPC*.

Allowing the appeal and setting aside the High Court's order of conviction, the Apex Court held, clause 5 of section 100 must be given its full effect according to its plain meaning. It was clearly established that at the time when the accused intervened, his sister was being forcibly compelled to go from the place of the accused "so that there was an assault on her with the intention of abduction" within the meaning of section 100, clause 5, even though it was an assault by her own husband. The accused therefore, had the right of private defence of the body of his sister, and his right could extend even to the extent of causing death, provided that the conditions of section 99 were observed and that not more harm than was necessary for the purpose of defence had been administered. He had given only one blow with knife, which he happened to have, which had unfortunately proved fatal by landing in the heart of the deceased.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.

[s 100] When the right of private defence of the body extends to causing death.—

- 12** See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13** *Evidence Act, section 111A*.
- 14** *Evidence Act, section 113B*.
- 15** *Evidence Act, section 113A*.
- 16** *Evidence Act, section 114A*.
- 17** *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18** See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 321** Ins. by Act 13 of 2013, section 2 (w.r.e.f. 3-2-2013).
- 322** *Bhaja Pradhan v State of Orissa*, 1976 Cr LJ 1347 .
- 323** *Baljit Singh v State of Uttar Pradesh*, AIR 1976 SC 2273 : (1976) 4 SCC 590 : 1976 CLR (SC) 451 : 1976 Cr LJ 1745 : 1976 CAR 396 .
- 324** 135 S.Ct. 1609 (21 April 2015), 6-3 (**Ginsburg**; *Kennedy* dissenting; *Thomas* dissenting; *Alito* dissenting), *vacating* 741 F.3d 905 (CA8 2013).
- 325** *Nand Kishore Lal*, (1924) 25 Cr LJ 670 : AIR 1924 Pat 789 .
- 326** AIR 1973 SC 473 [[LNIND 1972 SC 572](#)] : (1973) 1 SCC 347 [[LNIND 1972 SC 572](#)] : (1973) 3 SCR 57 : 1973 CAR 72 : 1973 Cr LJ 677 .
- 327** AIR 1960 SC 67 [[LNIND 1959 SC 150](#)] : (1960) 1 SCR 646 [[LNIND 1959 SC 150](#)] : 1960 SCJ 126 : 1960 Cr LJ 154 .

[s 101] When such right extends to causing any harm other than death.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 101] When such right extends to causing any harm other than death.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

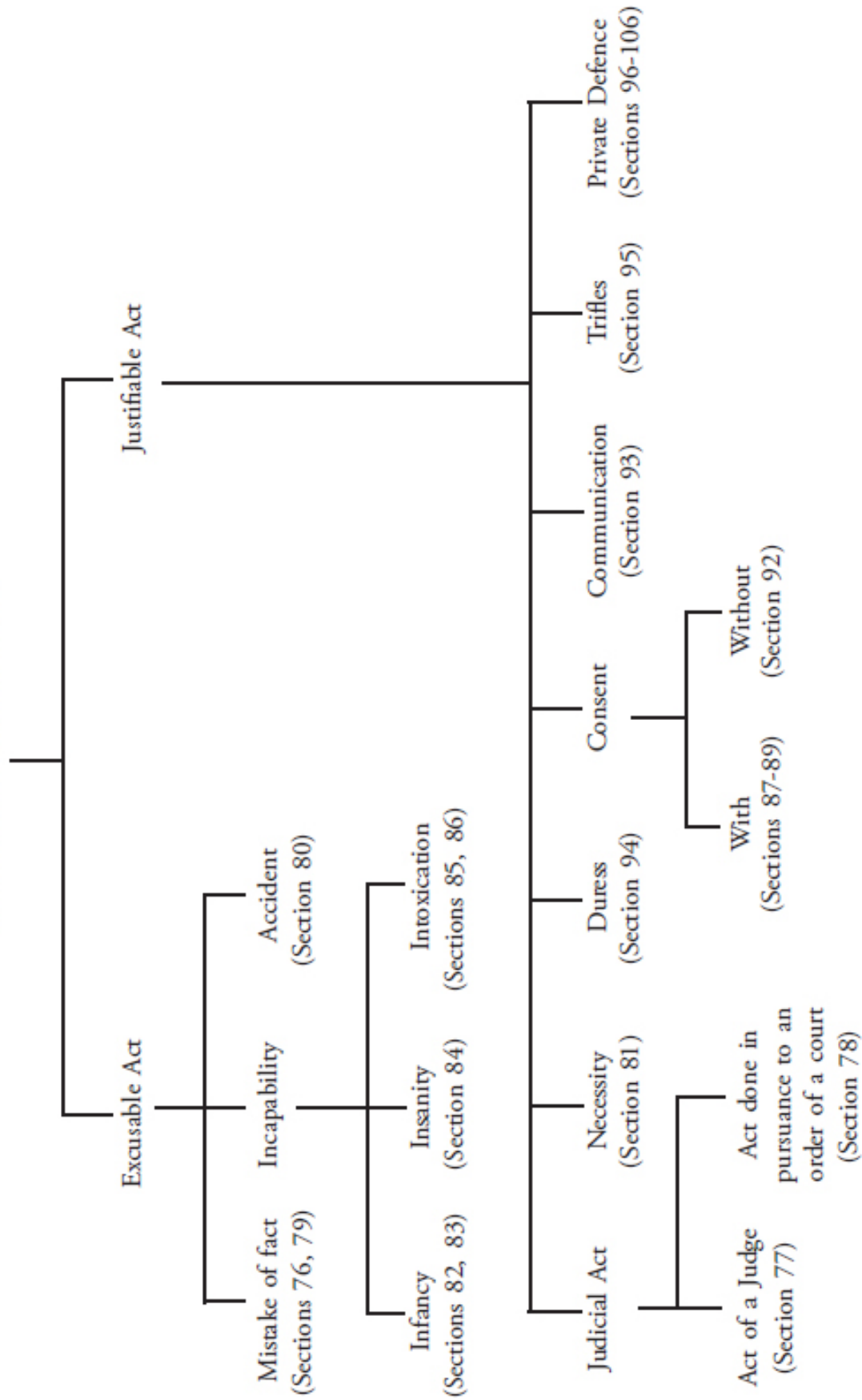
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 101] When such right extends to causing any harm other than death.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 101] When such right extends to causing any harm other than death.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 101] When such right extends to causing any harm other than death.—

If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

[s 101.1] Right of Private Defence short of causing death

Section 101, IPC provides that, if the offence which entitles a man to exercise the right of private defence be not of such serious description as specified in clauses (i) to (vi) to section 100, the right of private defence does not extend to the voluntary causing of death. That is to say, under this section any harm short of death can be successfully inflicted in exercising the right of private defence, subject to the restrictions mentioned in *section 99 of Indian Penal Code*.³²⁸

[s 101] When such right extends to causing any harm other than death.—

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act, 1872, section 105*.
- 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.
- 14 *Evidence Act, section 113B*.
- 15 *Evidence Act, section 113A*.
- 16 *Evidence Act, section 114A*.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

[s 101] When such right extends to causing any harm other than death.—

328 *Razu v Emperor*, AIR 1946 Sindh 17 (18); *Abdul Habib v State of Uttar Pradesh*, (1974) Cr LJ 248 (All); *Yogendra Morarji*, 1980 Cr LJ 459 (SC) : AIR 1980 SC 660 : (1980) 2 SCC 218 .

End of Document

[s 102] Commencement and continuance of the right of private defence of the body.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 102] Commencement and continuance of the right of private defence of the body.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

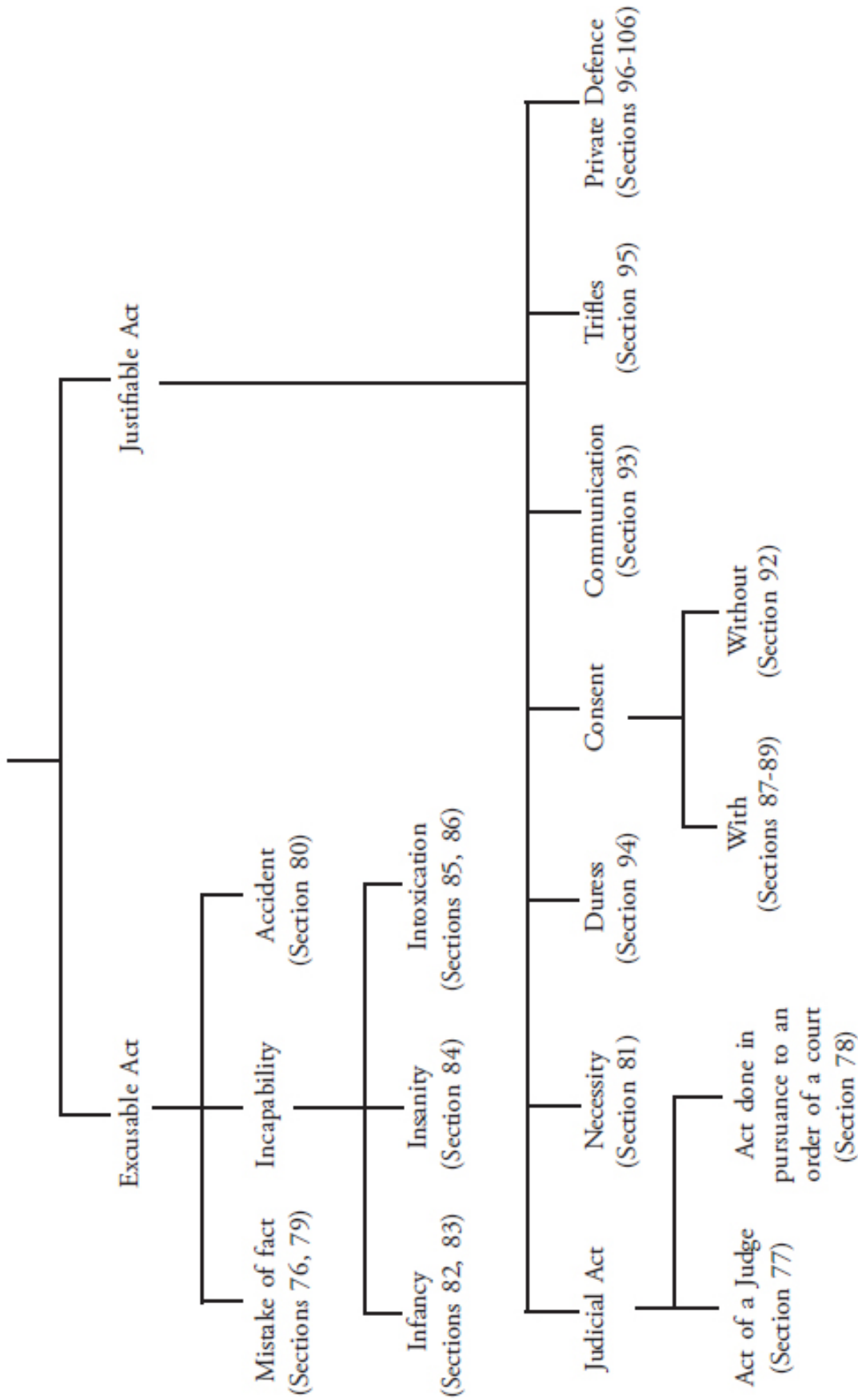
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 102] Commencement and continuance of the right of private defence of the body.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 102] Commencement and continuance of the right of private defence of the body.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 102] Commencement and continuance of the right of private defence of the body.—

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

[s 102.1] When right of defence available

Sections 102 and 105, IPC fix the time when the right of private defence commences and the time during which it continues. According to *section 102, Indian Penal Code*, the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit an offence, *albeit* the offence might not be committed, and such right continues so long as such apprehension of danger to the body continues. The threat, however, must reasonably give rise to a present and imminent, and not remote or distant danger.

Deo Narain: In *Deo Narain v State of Uttar Pradesh*,³²⁹ the Supreme Court held that the right of private defence is a “preventive and not a punitive right”. If after sustaining serious injuries there is no apprehension of further

[s 102] Commencement and continuance of the right of private defence of the body.—

danger to the body, obviously the right of private defence would not be available. But to say that the “appellant could only claim the right to use force after he had sustained assault is a complete misunderstanding of the law embodied in *section 102, IPC*.³³⁰ It depends on the circumstances of the case.

Ram Narain: In *Ram Narain v State of Uttar Pradesh*, (1973) Cr LJ 29, the parties were putting forward their claims with regard to disputed ownership over a mango tree standing on *banjar* (open) land. The accused wanted to cut the tree, whereas the deceased wanted him to prevent from doing so. A fight ensued between the members of both parties. In consequence, several members sustained injuries and the complainant's father died. The trial court accepted the plea of right of self-defence advanced by the accused and acquitted all of them.

The High Court on appeal set aside the acquittal and convicted them of the offences under *sections 302, 340, 147* read with *section 34* of the *Indian Penal Code*.

The Supreme Court did not accept the plea of self-defence because the accused had inflicted a number of wounds on the deceased and his companions, which were not in proportion to the injuries they themselves sustained. Moreover, the accused had continued the assault for more time than was necessary.

Jai Dev: In *Jai Dev v State of Punjab*,³³¹ the Supreme Court held that the right of private defence against an assault causing apprehension of death or grievous hurt comes to an end as soon as the threat of assault has ceased and the apprehension of danger has been entirely removed. If the accused fire rifle shots at the assaulters when all of them have run away, and shoot down persons standing at a long distance away, they cannot claim the right of private defence and are guilty of murder.

Santosh Singh: In *Santosh Singh v State of Punjab*,³³² (2009) the Apex Court held that *sections 102* and *105, IPC* deal with commencement and continuance of the right of private defence of body and property, respectively. The right commences, as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat to commit the offence, although the offence may not have been committed but not until there is reasonable apprehension of danger and the right lasts so long as the reasonable apprehension of the danger continues.³³³ Merely because there was a quarrel and some of the accused persons sustained injuries, that does not confer a right of private defence extending to the extent of causing death as in this case. Though such right cannot be weighted in golden scales, it has to be established that the accused persons were under such grave apprehension about the safety of their life and property that retaliation to the extent done was absolutely necessary. No evidence much less cogent and credible was adduced in this regard. The right of private defence as claimed by the accused persons have been rightly discarded.

¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.

² See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).

³ See *IPC, section 6*.

[s 102] Commencement and continuance of the right of private defence of the body.—

- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.
- 15 *Evidence Act*, section 113A.
- 16 *Evidence Act*, section 114A.
- 17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 329 AIR 1973 SC 473 [[LNIND 1972 SC 572](#)] : (1973) 1 SCC 347 : (1973) 3 SCR 57 : 1973 CAR 72 : 1973 Cr LJ 677 .
- 330 (1973) Cr LJ 29 .
- 331 AIR 1963 SC 340 [[LNIND 1962 SC 263](#)] : (1963) 3 SCR 489 [[LNIND 1962 SC 249](#)] : (1964) 2 SCJ 272 : (1963) 1 Cr LJ 495 .
- 332 AIR 2009 SC 1923 [[LNIND 2009 SC 328](#)] : 2009 AIR SCW 1532 : (2009) 1 Crimes 397 : (2009) 2 Scale 661 , Dr Arijit Pasayat and Dr Mukundakam Sharma JJ. Appellant fired shot with pistol on deceased during scuffle between appellant and deceased when deceased forbade appellant from ploughing land – in course of a sudden quarrel.

[s 102] Commencement and continuance of the right of private defence of the body.—

333 (1973) Cr LJ 29 .

End of Document

[s 103] When the right of private defence of property extends to causing death.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 103] When the right of private defence of property extends to causing death.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

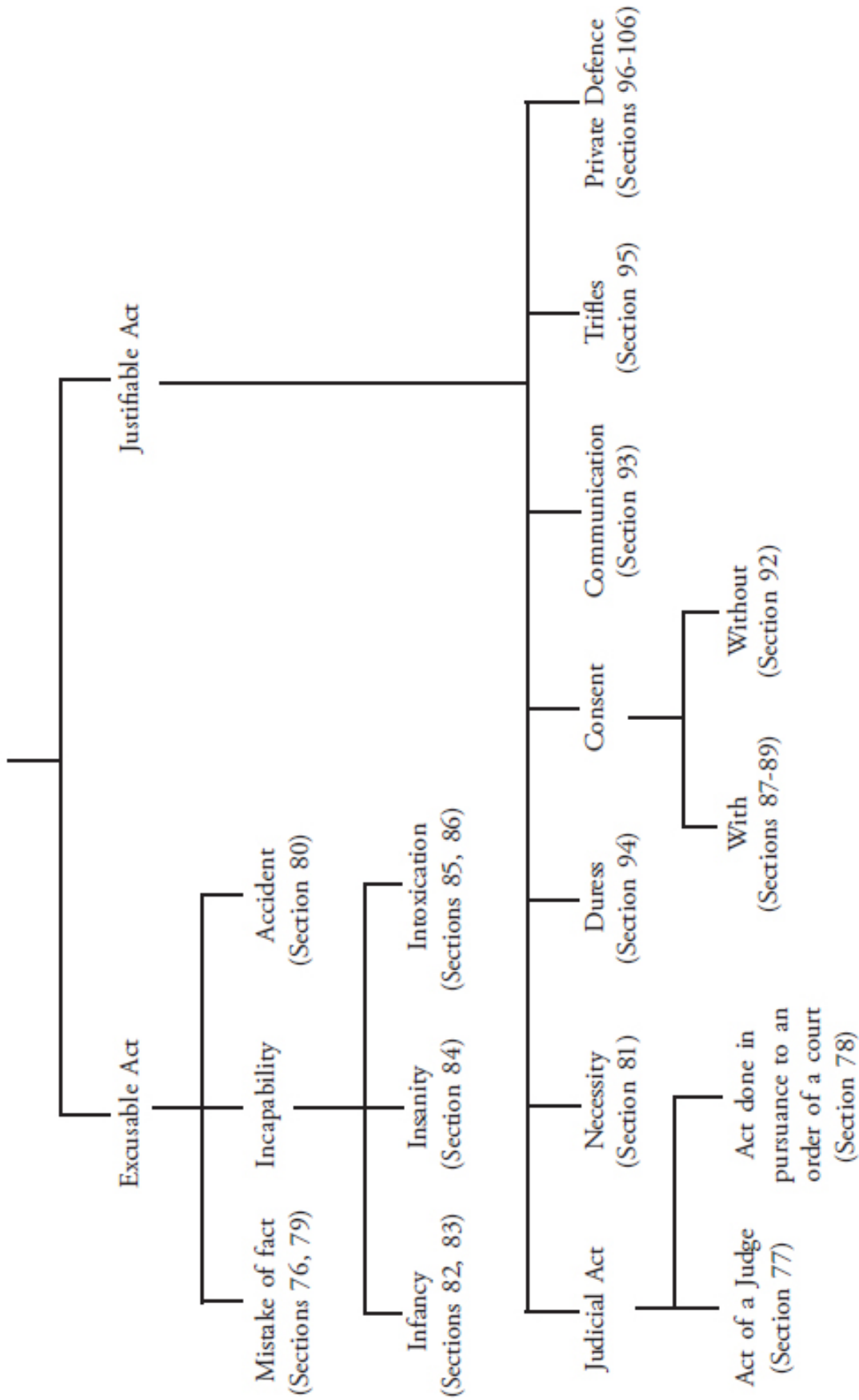
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 103] When the right of private defence of property extends to causing death.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 103] When the right of private defence of property extends to causing death.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 103] When the right of private defence of property extends to causing death.—

The right of private defence of property extends, under the restrictions mentioned in *section 99*, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:—

First.— Robbery;

Secondly.— House-breaking by night;

Thirdly.— Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property;

Fourthly.— Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

[s 103] When the right of private defence of property extends to causing death.—

[s 103.1] Right of private defence of property to the extent of causing death

Sections 103, 104 and 105, IPC provide provisions for right to private defence for the protection of one's property as also of another's property. Under section 103 the right of private defence of property extends, subject to the restrictions mentioned in section 99, to voluntary causing of death, in case of robbery, house-breaking by night, theft or mischief, when such theft or mischief is committed in such circumstances as may reasonably cause an apprehension that death or grievous hurt will result, if such right of private defence is not exercised.³³⁴ This means that if one is not able to establish that the offence was one of the descriptions enumerated in section 103, the accused have no right of private defence extending to causing of death.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" vide clause (2) to Article 361.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC*, section 6.
- 4 See *IPC*, section 40.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.

[s 103] When the right of private defence of property extends to causing death.—

15 Evidence Act, section 113A.

16 Evidence Act, section 114A.

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

334 *Ramanand Singh v State of Bihar*, AIR 1968 Pat 258 ; *Gurdatta Mal v State of Uttar Pradesh*, AIR 1965 SC 257 [[LNIND 1964 SC 30](#)] : 1965 (1) Cr LJ 5242 .

[s 104] When such right extends to causing any harm other than death.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 104] When such right extends to causing any harm other than death.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

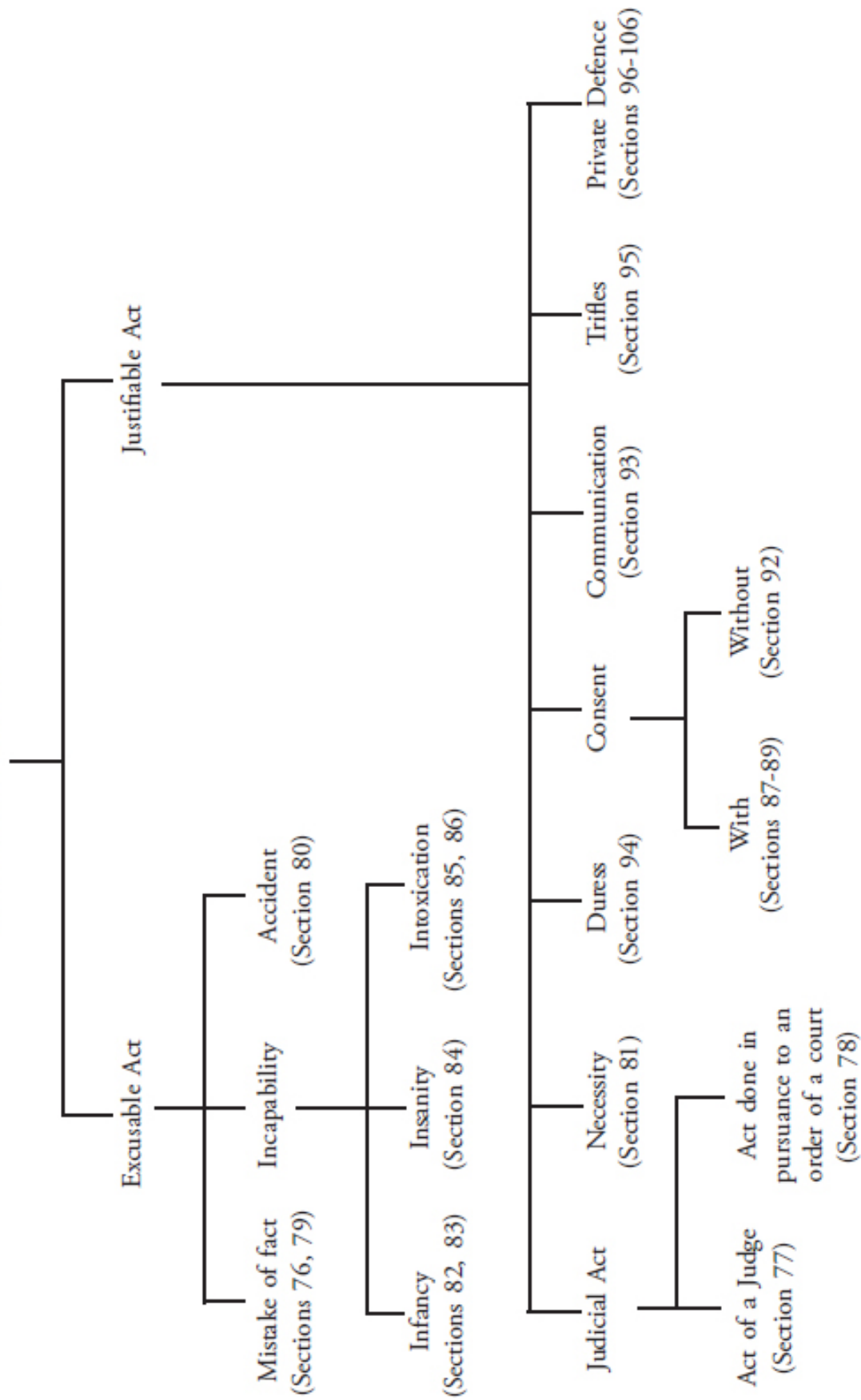
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 104] When such right extends to causing any harm other than death.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 104] When such right extends to causing any harm other than death.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 104] When such right extends to causing any harm other than death.—

If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

[s 104.1] Right of private defence short of death

Section 104 restricts the right of private defence of property, as section 101 puts a check on the right to private defence of the body, to causing any harm short of death in the exercise of the right of private defence. Section 104 accordingly provides that if the offence which occasions the exercise of the right of private defence, be theft, mischief or criminal trespass, and not of any of the descriptions enumerated in section 103, the right of defence extends only to the voluntary causing of any harm other than death.

Nathan: In *Nathan v State of Madras*,³³⁵ the Supreme Court held that since it did not appear that the harvesting party was armed with any deadly weapons and there could not have been any fear of death or grievous hurt on

[s 104] When such right extends to causing any harm other than death.—

the part of the appellant and his party, under *section 104, IPC* their right was limited to the causing of any harm other than death. The accused, though were exercising the right of private defence of property, exceeded that right when they caused the death of one of the harvesting party and hence their case fell under *Exception 2* to *section 300, IPC*, and they will be liable for culpable homicide not amounting to murder under *section 304, IPC* and not for murder.

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, Evidence, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act, 1872, section 105*.
- 11 The *Indian Evidence Act, 1872* (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act, 1872* (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act, section 111A*.
- 14 *Evidence Act, section 113B*.
- 15 *Evidence Act, section 113A*.
- 16 *Evidence Act, section 114A*.

[s 104] When such right extends to causing any harm other than death.—

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

335 AIR 1973 SC 665 : (1973) 3 SCC 803 : 1973 CLR 323 (SC) : 1973 CAR 40 : 1973 Cr LJ 608 .

[s 105] Commencement and continuance of the right of private defence of property.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 105] Commencement and continuance of the right of private defence of property.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

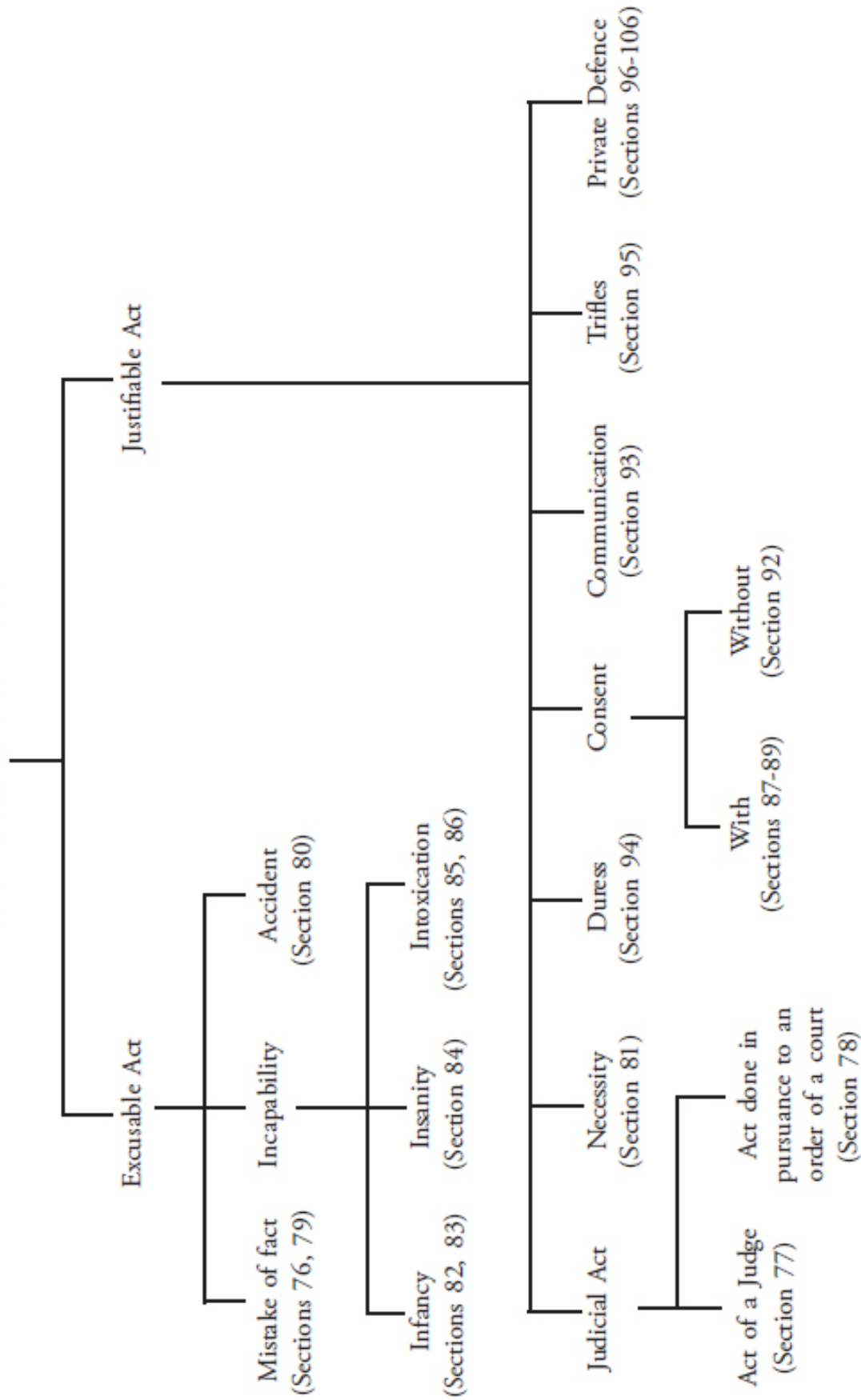
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 105] Commencement and continuance of the right of private defence of property.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 105] Commencement and continuance of the right of private defence of property.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 105] Commencement and continuance of the right of private defence of property.—

The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

[s 105] Commencement and continuance of the right of private defence of property.—

[s 105.1] Commencement and continuance of right of private defence of property

Section 105, IPC like section 102, fixes the time when the right to private defence of property commences and when it comes to an end. The right of defence of property commences as soon as a reasonable apprehension of danger to the property commences. The continuance depends upon the nature of the offence. In cases of theft, it continues until the offender has effected his retreat with the property, or the assistance of public authorities is obtained, or the property has been recovered. In cases of robbery it continues as long as the offender causes or attempts to cause any person death or hurt, or as long as instant personal restraint continues. In cases of criminal trespass or mischief the right continues so long as the offender continues in the commission of criminal trespass or mischief.

Amjad Khan: In *Amjad Khan v State*,³³⁶ the Supreme Court held that under sections 102 and 105 the right of private defence commences as soon as a reasonable apprehension of danger to the human body or the property of oneself or another person commences to arise from an attempt or threat to commit an offence, even though the offence may not be committed. While exercising the right of private defence of property, it is not at all necessary that the person exercising the right should wait until his property or another's is actually looted, or a house trespass actually occurs.

In determining whether the force employed in the exercise of the right was or was not more than what was actually necessary, and whether the circumstances in which a person was placed were or were not such as to warrant the causing of death, it is unreasonable to weigh the facts of a case in too fine a set of scales (generally referred to as "golden scales").

In the present case the facts were that a communal riot had broken out in the town of Katni in Madhya Pradesh between Sindhi refugees and local Muslims. Muslim shops were looted and some Muslim lives were lost. The mob then approached the shop of the accused and his brother, which were adjacent, and looted the brother's shop. The mob then beat upon the closed doors of the shop of the accused with *lathis*. The dwelling quarters of the accused's family were situated behind his brother's shop. Before the mob could break into the shop, the accused fired two shots from his gun, which resulted in the death of one man in the riotous crowd. Appellant was convicted both by trial court and High Court for exceeding the right of private defence of property.

Allowing the appeal the Supreme Court held that the facts of the case were sufficient to afford to the accused a right of private defence which extended to the causing of death, because the accused had reasonable ground to apprehend that death or grievous hurt would be caused to his family, if he did not act promptly. He did not have to wait until the doors were broken open and the mob had entered the shop.

The threat to break in was implicit in the conduct of the mob and, with it, the threat to kill the inmates once the doors were forced. This was evident from the fact that other Muslim shops had been looted and Muslim lives lost. Under the circumstances it had to be held that the threat to menace of death or at least grievous hurt had already commenced at the time when the accused fired two shots, and that the firing of two shots with the intent of staying a frenzied mob was not use of more force than was necessary.³³⁷

¹ *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited "to his term of office" *vide* clause (2) to *Article 361*.

[s 105] Commencement and continuance of the right of private defence of property.—

- 2** See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne Criminal Law in India, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3** See *IPC*, section 6.
- 4** See *IPC*, section 40.
- 5** Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6** See Chart at p 97.
- 7** The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8** Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9** *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10** The *Indian Evidence Act*, 1872, section 105.
- 11** The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12** See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13** *Evidence Act*, section 111A.
- 14** *Evidence Act*, section 113B.
- 15** *Evidence Act*, section 113A.
- 16** *Evidence Act*, section 114A.
- 17** *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].
- 18** See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.
- 336** AIR 1952 SC 165 [[LNIND 1952 SC 20](#)] : 1952 SCR 567 [[LNIND 1952 SC 20](#)] : 1952 SCJ 227 : 1952 Cr LJ 648 .
- 337** Soonavala, JK, *Supreme Court on Criminal Law*, 2nd Edn, vol 1, pp 221-222.

[s 105] Commencement and continuance of the right of private defence of property.—

End of Document

[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER IV GENERAL EXCEPTIONS](#)

The Indian Penal Code

CHAPTER IV GENERAL EXCEPTIONS

4.1 Introduction.—As a general principle of law man is presumed to know the nature and consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of a sovereign State, or being representative of such a State, or of the United Nations Organisations and so on. Criminal proceedings are not invoked against such personages on the principle that the exercise of criminal jurisdiction would be incompatible with their prestige, position and high status.¹

Others may be excused from the consequences of punishment by reason of the absence of the requisite *mens rea* necessary for the commission of particular offence. This is based on the well-known maxim *actus non facit reus, nisi mens sit rea*, i.e., the act itself does not make a man guilty, unless his intentions are so. Such cases have been discussed elaborately under this Chapter.

The framers of the *Penal Code* decided to put all cases of exceptions in one Chapter of the Code (Chapter IV commencing from sections 76 to 106) to obviate the necessity of repeating in every penal clause a considerable number of limitations. Every definition of an offence, every penal provision, and every illustration of a definition under the *penal code* shall be construed subject to the provisions contained in this Chapter.²

The scope of the general exceptions provided in this Chapter is very wide. It is not only limited to the offences under the *Penal Code*,³ but it extends to the offences under the special or local laws as well as specified in section 40 of Code.⁴

Chapter IV consists of 31 sections which may be grouped into eight heads, viz.,

- (i) Mistake of fact and mistake of law (sections 76 and 79);
- (ii) (Privileged Acts and Judicial Acts) (sections 77 and 78);
- (iii) Accidental acts (section 80);
- (iv) Necessity (section 81);
- (v) Incapability to commit a crime (sections 82 to 86);

[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

- (vi) Acts done with consent (sections 87-90); or without consent (section 92);
- (vii) Triviality (section 95); and
- (viii) Private defence (sections 96-106).⁵

Broadly speaking, the exceptions provided in the chapter may be grouped into two categories, namely:

- (i) Excusable exceptions, and
- (ii) Justifiable exceptions.

In the former category of cases the necessary *mens rea* for the offence would be lacking either by reason of a *bona fide* mistake as to the existence of a fact (sections 76, 79), or by reason of the act being done accidentally (section 80), or by reason of infancy (sections 82, 83), or insanity (section 84), or intoxication (sections 85-86) and so the actor is not responsible for what he has done.

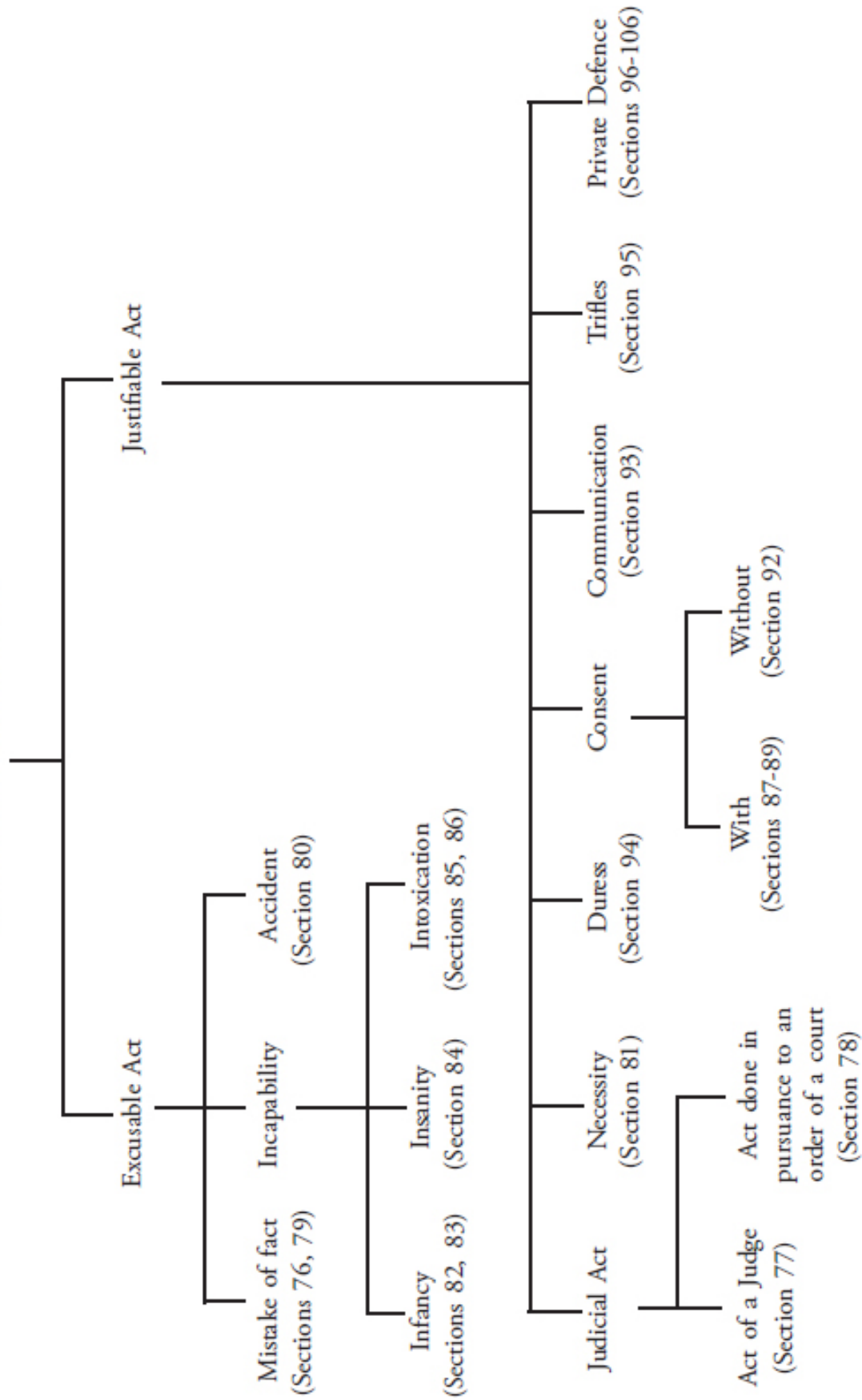
On the other hand, in the latter category of cases the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law (section 77), or in pursuance of the orders of a court (section 78), or to prevent a greater harm to a person or property in case of necessity (section 81), or an act done with the consent of the person harmed (sections 87-89, 92), when harm is short of causing death or grievous hurt, or done under coercion (section 94), or in the exercise of the right of private defence (sections 96-106), or the act being of a trivial nature (section 95), and hence the law would not take note of it. The provisions of the Chapter IV have been illustrated in the given chart.⁶

4.2 Burden of proof on Prosecution.—The burden of proof means such evidence as would induce a reasonable man, in the particular circumstances of the case in which the claim arises, to act upon the supposition that it exists.⁷ Generally, the burden of proving everything essential to the establishment of the charge against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, abatement to suicide of newly married women or rape etc.

The rule has its origin in the Roman maxim: *ei qui affirmat non ei qui negat incumbit probatio*, viz., he who seeks the aid of a court should be the first to prove that he has a case, and that in the nature of things it is more difficult to prove a negative than an affirmative.⁸ Accordingly the burden of proving that the accused not only committed the *criminal act*, but further he did so with a guilty mind, is necessary to constitute the crime charged, and rests upon the prosecution throughout the trial; it never shifts to the defence.⁹ For instance, in a criminal case where the accused is charged for murder under *section 302, IPC*, it is the duty of the prosecution to prove such intention or knowledge as is mentioned under *section 300, IPC*. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal on that charge and there is no onus on him to take or prove any special plea. That is to say, it is left to the prosecution to prove beyond reasonable doubt the existence of all the facts necessary to constitute the offence charged, and if there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it, is given to the accused.

[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

CHART DEPICTING THE SCHEME OF THE CHAPTER RELATING TO GENERAL EXCEPTIONS (IPC SECTIONS 76 TO 106)



[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

4.3 Burden of proof on the accused to prove an Exception.—The burden of establishing an Exception which will entitle a person to be exempted of the charge, is on the person who wants to bring his case within any one of such clauses. Thus, it is the accused who is required to show that his case falls within one of the exceptions provided in Chapter IV of the *Penal Code* dealing with General Exceptions, or within any special exception or proviso contained in any other part of the Code (e.g. Exceptions 1 to 5 of *section 300, IPC*, or any law defining the offence.¹⁰ However, the burden is no higher than that which rests upon a party to civil proceedings.¹¹

4.4 Burden of proof on accused in case of offences against State, Dowry death and Rape etc.—The burden of proof may, however, be shifted by action of the parties and by statutory enactments. The standard or the degree of proof also varies according to the nature and gravity of the offence.¹² For instance, in case of grave offences, such as offences against the State (*sections 121, 121A, 122, 123, IPC*)¹³ dowry death (*section 304B*)¹⁴, abetment of suicide by a married woman (*section 306, IPC*)¹⁵ rape (*section 376, IPC*)¹⁶ cruelty by husband or relatives (498A, *IPC*) and socio-economic offences, etc., burden of proof is on an accused to prove his innocence.

This onus can be discharged in two ways: *first*, it can be discharged by affirmatively establishing the plea taken up by an accused person. *Secondly*, it can also be discharged by eliciting such circumstances as would create a doubt in the mind of the court that the reasonable possibility of the accused acting within the protection of the exception pleaded is not eliminated. This can be done also by producing evidence in defence or by relying upon the facts alleged by the prosecution itself.

Oyami Ayatu: If it becomes apparent from the evidence¹⁷ led in the case, whether produced by the prosecution or the defence, that an exception would be applicable, the presumption against the accused is removed and the onus placed upon him is discharged; the court must then consider whether or not the case of the accused is covered by the exception irrespective of the stand taken or the plea advanced by him. When after consideration of the entire evidence the court is left in doubt, the benefit of the exception cannot be denied to the accused. Whenever, therefore, the prosecution case itself indicates that an exception is applicable in favour of the accused in the circumstances of the case, the accused cannot be denied the benefit of that exception, whether he pleads it or not.¹⁸

[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

ILLUSTRATION

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

[s 106.1] Risk of harm to innocent persons

Section 106 deals with a case of extreme necessity, in which a person is authorised by law to run the risk of harming even innocent persons in order to protect himself from mortal injury.

[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

The section provides that whenever an apprehension of death exists and the person is so situated that he cannot effectively exercise the right of private defence without the possibility of doing harm to an innocent person, he may take the risk of such harm resulting. For instance, as given in the *Illustration* appended to the section, if A is attacked by a mob intending to murder him and he cannot effectively exercise his right of private defence without firing on the mob, and he cannot fire without the risk of harming young children who have mingled with the mob, he commits no offence if by so firing, he injures any one of the children. A had no option under the circumstances of the case for protecting himself except to fire at the mob and so his action is justified.³³⁸

- 1 *Constitution of India, Article 361*, guarantees immunity to the President of India and Governors of the States from criminal prosecution. However, this protection is limited “to his term of office” *vide* clause (2) to *Article 361*.
- 2 See *Draft Penal Code*, Note B, p 106; Setalvad, MC, *The Common Law in India*, (2nd Edn, 1970), pp 138 to 140; Mayne *Criminal Law in India*, 4th Edn, (1970) p 9; *Kasi Raja Re*, AIR 1953 Mad 156 (158); *Daljit Singh v Emperor*, AIR 1937 Ngp 274 (279).
- 3 See *IPC, section 6*.
- 4 See *IPC, section 40*.
- 5 Hari Singh Gour, *The Penal Law of India*, vol I, 11th Edn (2000), pp 235-238.
- 6 See Chart at p 97.
- 7 The *Indian Evidence Act* (1 of 1872), sections 103, 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 8 Cross, Rupert, *Evidence*, 3rd Edn, (1967), p 87.
- 9 *Woolmington v Director of Public Prosecution*, 1935 AC 462.
- 10 The *Indian Evidence Act*, 1872, section 105.
- 11 The *Indian Evidence Act*, 1872 (1 of 1872), sections 103 and 105; Phipson on Evidence, 11th Edn, (1970), p 90.
- 12 See *Indian Evidence Act*, 1872 (1 of 1872) sections 103 and 105; *Narasing Naik Re*, (1972) Cr LJ 1150.
- 13 *Evidence Act*, section 111A.
- 14 *Evidence Act*, section 113B.

[s 106] Right of private defence against deadly assault when there is risk of harm to innocent person.—

15 Evidence Act, section 113A.

16 Evidence Act, section 114A.

17 *Oyami Ayatu v State of Madhya Pradesh*, AIR 1974 SC 216 [[LNIND 1973 SC 242](#)]: (1974) 3 SCC 299 [[LNIND 1973 SC 242](#)] : (1974) 2 SCJ 357 : 1974 Cr LJ 305; *Ratanlal v State of Madhya Pradesh*, (1971) 3 SCR 251 : AIR 1971 SC 778 [[LNIND 1970 SC 487](#)]: (1970) 3 SCC 553 : 1971 CAR 80; *State of Madhya Pradesh v Ahmadulla*, AIR 1961 SC 990 [[LNIND 1961 SC 36](#)]: (1961) 3 SCR 583 [[LNIND 1961 SC 29](#)] : (1961) 2 SCJ 197 : 1961 Cr LJ 43; *DC Thakker v State of Gujarat*, (1964) 7 SCR 361 [[LNIND 1964 SC 88](#)].

18 See *Miller v Minister of Pensions*, ([1947](#)) 2 All ER 372.

338 *Ishak v State of Madhya Pradesh*, (1976) 25 Jab LJ 351 ; *Re Maruti Hanamant*, (1974) 1 Karn LJ 130.

[s 107] Abetment of a thing.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > **CHAPTER V OF ABETMENT**

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 107] Abetment of a thing.—

A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

ILLUSTRATION

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

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

[s 107.1] Principle and scope of abetment

A crime may be committed by a single person, or two or more persons. When several persons are associated with the commission of a crime the degree of culpability of each will depend on the mode of his participation in the crime, for the law recognises gradations of guilt based on the variety of ways in which a person might be associated in the act of a crime.¹ Liability under this chapter for abetment is based on the principle that many crimes would be impossible but for the support and encouragement received from others who, though not actively cooperating in the crime, still prepare the ground and facilitate its commission. As such the Code penalises all those who may have lent their support and assistance in one form or the other to the commission of a crime.

[s 107.2] Hindu law

According to Hindu textual criminal law, when a crime, say murder, is committed, besides the actual murderer, i.e., the one who with his own hand gives the fatal blow, several others might also be liable to punishment as

[s 107] Abetment of a thing.—

accessories (helpers). For example, the following persons could be liable to half the punishment prescribed for an offence committed, viz.

- | | | |
|-----------------------------|-----------------|---|
| (1) <i>The arambhakrta,</i> | [आरम्भकर्त] | : He who commences or sets the ball rolling; |
| (2) <i>Doshbhaka,</i> | [दोषभक्] | : Participator; |
| (3) <i>Asraya,</i> | [आश्रय] | : He who harbours or gives shelter to the assassin; |
| (4) <i>Sahaya,</i> | [सहाय] | : He who aids; |
| (5) <i>Marganudesaka,</i> | [मार्गनुदेष्टक] | : He who points the way; and |
| (6) <i>Anumodaka.</i> | [अनुमोदक] | : He, who supports. |

On the other hand, the person who hires the assassin and pays him for commission of a crime is to be awarded four times the punishment prescribed for the offence.

[s 107.3] English law

English law with reference to participants in a crime gives the following classification of the criminals according to the role played by each:

[s 107.3.1] Principal in the first degree

He, who actually commits the crime (including he who gets it accomplished through an innocent agent); and

[s 107.3.2] Principal in the second degree

He, who being present at the commission of the crime aids and assists in its commission.

The distinction between the two categories of principals in the first and second degree is of little practical consequence since both are liable to be awarded with equal punishment. Those who are not present at the time of commission of the deed but are associated with it either before or after its commission are classified as:

[s 107.3.3] Accessory before the fact

He, who though absent at the time, the crime is committed, counsels, procures or commands another to commit the crime. He may be tried as though he himself had committed.

[s 107.3.4] Accessory after the fact

He, who knowing the fact that a particular person has committed a crime, harbours and assists him in escaping punishment.

[s 107.4] Indian Law

The *Indian Penal Code* makes no distinction between principals in either the first or second degree. All those, who are present at the scene and participate in the commission of a crime are liable either as the actual offender under the specific sections of the Code, or under the provisions governing joint and constructive liability (sections 34 and 149, IPC). The *Penal Code*, however, makes a broad distinction between a principal and an abettor, who correspond roughly to accessories before the fact. Such cases are dealt with in this chapter of the Code under the caption "Of Abetment" from sections 107 to 120, IPC on the other hand, when

[s 107] Abetment of a thing.—

the role played by an individual is that of an accessory after the fact, the Code provides for a substantive offence in such cases.²

[s 107.5] Essentials and meaning of abetment

Abetment means the instigation of a person to do (or not to do) an act in a certain way, or aid given by some person to another either of his own accord or under instigation in doing an act which is an offence. Thus, to constitute an offence of abetment there must be (1) an abettor, (2) he must abet, and (3) the act abetted must be an offence. According to *section 107, IPC*, a person abets the doing of a thing when he:

- (i) Instigates a person to commit an offence; or
- (ii) Engages with one or more persons in a conspiracy to commit an offence; or
- (iii) Intentionally aids a person by any act or illegal omission to commit an offence or illegally omits the doing of an act which would prevent the commission of the offence.

[s 107.5.1] Abetment by instigation

A person is said to instigate another when he incites, urges, encourages, goads, solicits or provokes him to do an act prohibited by law. Advice amounts to instigation only when intended to actively suggest or stimulate the commission of an offence. Mere acquiescence does not amount to instigation. For instance, if *A* says to *B* "I am going to kill *C*" and *B* replies "Do as you wish and take the consequences," whereupon *A* kills *C*, *B* cannot be said to have instigated *A* to stab *C*.

However, there might be occasions when the approval of an act leads to an instigation in the particular circumstances of the case. In *Queen v Mohit*, (1871) 3 NWP 316,³ the persons who followed a woman preparing herself to be a *sati* on the pyre of her husband and chanted, *Rama, Rama* were held guilty of abetment by instigation to lead that woman to commit suicide. Their approval of the woman's act by participation in the procession gave encouragement to the lady to commit suicide.

As stated in *Explanation 1 to section 107, IPC*, instigation may also take place by wilful misrepresentation or wilful concealment of a material fact which one is bound to disclose. *A*, a public officer, is authorised by a warrant from a Magistrate's court to arrest *Z*. *B* knowing that fact and also that *C* is not *Z*, wilfully represents to *A* that *C* is *Z*, and thereby intentionally causes *A* to apprehend *C*. Here *B* abets by instigation the arrest of *C*. *B* knows fully well the fact that *C* is not *Z* and deliberately misrepresents this fact to the public officer, so that he believes a thing which is false.

[s 107.5.2] Abetment by conspiracy

A person is said to abet the commission of an offence by conspiracy, if he enters into an agreement with one or more persons to do a legal act by illegal means, or to do an illegal act, and some act is done in pursuance thereof. *A*, a servant, enters into an agreement with thieves to keep the doors of his master's house open in the night so that they might commit theft. *A*, according to the agreed plan keeps the doors open and the thieves take away the master's property. *A* is guilty of abetment by conspiracy for the offence of theft. But should the thieves not come, *A* will not be liable under this section.

Coleman: Conspirator in Murder: In *Coleman v Johnson*, 132 S.Ct. 2060 (2012) : 2012 US Lexis 3943, held prison inmate convicted as accomplice and coconspirator in murder is not entitled to acquittal as there was sufficient evidence to support conclusion that inmate assisted murderer in leading victim into alley (narrow street) to facilitate murder.—US Supreme Court, 2013.

Respondent Lorenzo Johnson was convicted as an accomplice and coconspirator in the murder of Taraja Williams, who was killed by a shotgun blast in the chest in the early morning hours of 15 December 1995, in Harrisburg, Pennsylvania. After his conviction was affirmed in State Court, Johnson exhausted his state remedies and sought a writ of *habeas corpus* in Federal District Court pursuant to the Antiterrorism and Effective Death Penalty Act, 1996. The District Court denied *habeas* relief but the US Court of Appeals for the Third Circuit reversed, holding that the evidence at trial was insufficient to support Johnson's conviction.

While reversing the judgment of the Court of Appeal, the US Supreme Court held that the trial testimony revealed that Johnson and Walker "ran the streets together," and had attempted to collect a debt from Williams earlier on the day of the murder. Williams resisted the collection, managing to humiliate Walker in the process by giving him a public thrashing with a broomstick. This enraged Walker to the point that he repeatedly declared over the course of the day in Johnson's presence that he intended to kill Williams. Then, while Walker was noticeably concealing a bulky object under his trench coat, Johnson helped escort Williams into an alley, where Johnson stood at the entryway while Walker pulled out a shotgun and shot Williams in the chest. The evidence was sufficient to convict Johnson as an accomplice and a coconspirator in the murder of Taraja Williams.

Rosemond: In *Rosemond v US*,⁴ it was held that aiding and abetting a gun carrying crime requires proof that the defendant knew "in advance" that one of his cohorts "would be armed," such that the defendant has a "realistic opportunity to quit the crime."

Facts: Rosemond and two confederates drove to a park to sell a pound of marijuana to others, a plan that all three knew about. A buyer climbed into the car, but unexpectedly punched the seller and ran from the car. One of the two male sellers (witnesses disputed whether it was Rosemond or his confederate) jumped out and fired shots at the drug thieves. They were arrested as they drove to give chase. Rosemond was charged with, *inter alia*, "using or carrying" a firearm "during and in relation to any ... drug trafficking crime" [18 USC 924(c)]. Because the identity of the shooter was disputed, the government pursued alternative theories, including that Rosemond "aided or abetted" the offence (18 USC 2). While the parties agreed that "knowledge" was required, Rosemond disclaimed knowledge that anyone was armed, but his preferred jury instructions requiring more were rejected. Instead, the prosecutor argued that if Rosemond "actively participated" in the drug crime, he was guilty, because "a person cannot be present and active at a drug deal when shots are fired and not know their cohort is using a gun." Rosemond was convicted and the Tenth Circuit affirmed.

Kagan: "Section 2 reflects (the) centuries-old view of culpability" that a person can be responsible for a crime if he knowingly "helps another" to commit it. Judge Learned Hand's 1938 statement (in *Peoni*) of the principle is still used today, and all agree that "two components" are required: an affirmative act in furtherance of the crime, and an intent to facilitate the crime's commission. (Kagan J writes a treatise on aiding and abetting law.) The defendant need not participate in every element or provide "substantial" aid; rather, "every little bit helps." Thus Rosemond need not facilitate the gun carrying, so long as he facilitated the drug deal. (Kagan J notes that this is an unusual "double-barrelled" crime.) However, the law does require "a state of mind extending to the *entire* crime." Thus proof that Rosemond knew a gun would be used or carried was required; and this knowledge must be present "in advance" so that an aider and abetter has some "realistic opportunity to quit the crime." In some cases this would be present if a defendant "continued to participate in a crime after a gun was displayed." But the instructions here did not state this requirement, so Rosemond's conviction is reversed.

Alito, dissenting in part, joined by Thomas: "I largely agree with the ... first 12 pages" of the Court's opinion, but I "strongly disagree" with the requirement of a "realistic opportunity to quit the crime, which is an "important and unprecedented alteration of the law of aiding and abetting. (**Ed. Note:** there is something to this assertion of Alito's J). This transforms what previously was considered an "affirmative defence" into an element of the crime. This has "very important conceptual and practical consequences." I think it also confuses the difference between intent and motive. Normally, if a defendant claims he was unable to avoid committing a crime, he must prove an affirmative defence of necessity or duress. "The Court's rule breaks with the common law tradition and common sense."

[s 107.5.3] Abetment by aid

A person is said to abet the commission of an offence, if he intentionally renders assistance or gives aid by doing an act or omitting to do an act. Mere intention to render assistance is not sufficient. There must be some active conduct on the part of the abettor and the act must be accomplished in pursuance thereof. *A* incites *B* to kill *C* by uttering the words *maro maro* (beat beat) and *D* puts a knife in *A*'s hand. Here both *A* and *D* are guilty of abetting the offence of murder, one by instigation and the other by aiding to commit the offence.

Aid may be given both by an act of commission as well as by an act of illegal omission. For instance, if a police officer knowing that certain persons were likely to be tortured for the purposes of extorting confession, keeps himself away from the place, he is liable for abetment to the offence of extortion⁵ by an act of omission.

Explanation 2 to section 107 of IPC states that a person abets by aiding, when by act done either prior to, or at the time of the commission of an act he intends to facilitate, and does in fact facilitate, the commission thereof. For example, a priest who officiates at a bigamous marriage was held to have intentionally aided in the commission of a marriage prohibited by law.⁶

It is not necessary for the offence of abetment that the act abetted must be committed except in the case of a person abetting an offence by intentionally aiding another to commit that offence.⁷ An act done after the offence is completed does not amount to abetment.

Distinction between conspiracy in section 107, clause (2) and section 120A, IPC.—To constitute an offence under clause (2) to *section 107, IPC*—(abetment by conspiracy)—an act or illegal omission must take place in pursuance of the conspiracy, whereas under *section 120A, IPC*, a mere agreement is enough if the agreement is to commit an offence.

¹ Gour, Hari Singh, *The Penal Law of India*, 11th Edn, (2000), vol I, pp 969 to 994.

² See sections 130, 136, 157, 201, 212, 216 and 216A, *IPC*.

³ *Protima Dutta v State*, 1977 Cr LJ (NOC) 96 : (1977) 81 Cal WN 713. Husband and mother-in-law were held guilty of abetment to suicide of the deceased (lady), to whom the accused by their conduct and by direct and indirect words suggested that she committed suicide. In *State v Walden*, (1982) 53 NC App 196 : 280 SE 2d 505, the Supreme Court of Carolina (USA) held that a mother is guilty of assault by aiding and abetting on the ground that she was present when her child was assaulted, but failed to take reasonable steps to prevent the assault.

⁴ 134 S.Ct. 1240 (5 March 5, 2014), 7-2 (Kagan; Alito dissenting in part), *vacating* 695 F.3d 1151 (10th Cir. 2012).

⁵ *Faguna Kanta Nath v State of Assam*, AIR 1959 SC 673 [[LNIND 1959 SC 2](#)] : 1959 Supp (2) SCR 1 : 1959 SCJ 643 : 1959 Cr LJ 917 .

⁶ See *IPC*, section 494.

⁷ *The State Of Maharashtra vs Pandurang Ramji Sanap*, (1971) 73 Bom LR 245 .

[s 108] Abettor—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 108] Abettor—

A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

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

Explanation 2 .—To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

ILLUSTRATIONS

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

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

ILLUSTRATIONS

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

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

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

(d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and

[s 108] Abettor—

therefore does not commit theft. But *A* is guilty of abetting theft, and is liable to the same punishment as if *B* had committed theft.

Explanation 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

ILLUSTRATION

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z*, and *C* commits that offence in consequence of *B*'s instigation. *B* is liable to be punished for his offence with the punishment for murder; and, as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

ILLUSTRATION

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

[s 108.1] Abettor

Section 108, IPC defines abettor as a person who abets: (i) the commission of an offence, or (ii) the commission of an act which would be an offence, if committed by a person capable of committing an offence in law. An abettor may be either an instigator, or a conspirator, or helper in the commission of a crime as defined in *section 107 of the Penal Code*.

[s 108.2] Essentials

To constitute an offence of abetment as stated in *section 107, IPC*, three things are essential, viz.,

- (1) There must be an abettor,
- (2) He must abet, and
- (3) The abetment must be an offence or an act which would be an offence, if committed by a person capable in law of committing the offence with the same intention or knowledge as that of the abettor.⁸

But if the thing abetted is not an offence, the person abetting will not be termed abettor within the meaning of *section 108* and cannot be held liable to punishment. For instance, if *A* gives Rs 500 to *B* to kill stray dogs moving in the city in a residential locality, *A* is not abettor since the act of instigation of killing stray dogs is not an offence.

Again, it is not necessary for the offence of abetment that the person abetted should be capable in law of committing an offence, or that he should have the same guilty intention as that of the abettor. For instance, one may employ a child below 7 years of age, or a lunatic to commit an offence. In such a case, the child or lunatic

[s 108] Abettor—

is not punishable, being incapable of committing an offence in law (exempted under *sections 82 and 84, IPC* respectively) and would be treated as an innocent agent, whereas the person directing him to do an illegal act would be liable as an abettor.

Five explanatory clauses to *section 108, IPC* have been appended to elucidate when an act would amount to an abetment punishable in law. These are as given below:

Explanation 1.—Abetment of illegal omission.—The abetment of an illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act. *A*, a student instigates *B*, a police officer, to illegally abstain from duty to prevent the commission of a cognizable offence which was being committed in his presence.

A has abetted the commission of an act of which the police officer is guilty, though the student who instigated him, being a private person, might not have been guilty of that offence, as it was not his duty to interfere. However, *A* could be guilty of abetting the abetment committed by *B* by his illegal omission.

Explanation 2.—Effect of abetment is immaterial.—To constitute an offence of abetment, it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused.⁹ *A* instigates *B* to defame *C*. *A* is guilty of abetting *B* to commit the offence of defamation, even if *B* refuses to do so. Likewise, if *A* instigates *B* to murder *D*, and *B* in pursuance of the instigation stabs *D* but *D* recovers from the wound, *A* is guilty of instigating *B* to murder, in spite of the fact that the act of *B* did not produce the desired effect, i.e., the death of *D*.¹⁰

Explanation 3.—Person abetted need not be capable of committing an offence.—It is not required for abetment that the person abetted should be capable by law of committing an offence, or that he should have any guilty intention or knowledge or should commit an offence. *A* instigates *B* to set fire to a dwelling house. *B*, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or not knowing whether what he is doing is either wrong or contrary to law, sets fire to the house in pursuance of *A*'s instigation. *B* has committed no offence, being insane, and is exempted from criminal liability under *section 84, IPC*, but *A* is guilty of abetting the offence of setting fire to dwelling house and liable to the punishment provided for that offence.

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

Explanation 5.—Abettor need not concert in abetment by conspiracy.—It is not necessary in abetment by conspiracy that the abettor should plan the offence with the person abetted. (see Illustration to *Explanation 5*).

⁸ *Emperor v Parimal Chatterjee*, AIR 1932 Cal 760 (761) : (1939) 34 Cr LJ 78 . See *Nelson's Indian Penal Code*, 7th Edn, (1981), vol I, p 275.

⁹ *Labh Singh*, (1974) ILR 1 Punj 449. See Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, (1987), pp 411-414.

[s 108] Abettor—

10 . *State of Maharashtra v Pandurang Ramji*, (1971) ILR Bom 1061 .

End of Document

[[s 108A] Abetment in India of offences outside India.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

¹¹[[s 108A] Abetment in India of offences outside India.—

A person abets an offence within the meaning of this Code who, in ¹²[India], abets the commission of any act without and beyond ¹³[India] which would constitute an offence if committed in ¹⁴[India].

ILLUSTRATION

A, in ¹⁵[India], instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder.]

[s 108A.1] Abetment of offences outside India

Section 108A of IPC was added in the Penal Code in 1898¹⁶ with a view to overrule a decision of the Bombay High Court in the case of *Queen Empress v Ganapatrao Ramachandra*, (1984) ILR 19 Bom 105, in which it was held that the abetment in India by an Indian citizen of an offence committed in a foreign country was not punishable under the Code.

Section 108A is in substance, another explanation of what constitutes an abetment as explained in *section 108, IPC*. The section states that a person would be guilty of an abetment, if he abets the commission of an act outside India, which if done in India, would constitute an offence. For instance, as stated in the illustration, if A, in India, instigates B, a foreigner in Nepal, to commit murder in Nepal, A is guilty of abetting murder, since A would have been liable for abetting the offence of murder had the person abetted been in India.

¹¹ Added by Act 4 of 1898, section 3.

¹² The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.

[[s 108A] Abetment in India of offences outside India.—

- 13** The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 14** The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 15** The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 16** *Indian Penal Code* (Amendment Act 4 of 1898), section 3.

End of Document

[s 109] Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 109] Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation. —An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

ILLUSTRATIONS

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

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

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

[s 109.1] Punishment of abetment where no express provision is made

Sections 109 to 120 of IPC prescribe certain rules as to punishment for different kinds of abetment. Sections 109 and 110 prescribe punishment of abetment, if the act abetted is committed in consequence of abetment, whereas sections 115 and 116 provide for punishment where the offence is not committed in consequence of the abetment.

Section 109 is of a general nature and provides that if the act abetted is committed in consequence of abetment, and no express provision has been made for the punishment of such abetment, the abettor will be held liable for punishment to the same extent as provided for the particular offence abetted. In such cases there is no variation between the abetment and the act, i.e., both abettor and actor work with the same intention and knowledge. For instance, if A offers a bribe to B, a public servant, as a reward for showing, A some favour in

[s 109] Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.—

the exercise of his official function, and *B* accepts the bribe, *A* has abetted the offence defined in *section 7 of Prevention of Corruption Act, 1988* and will be liable to punishment which may extend to imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine. [see Illustration (a)].

[s 109.2] Ingredients

To invoke this section three things are required, namely:

- (1) there must be abetment of an offence,
- (2) the act abetted must have been committed in consequence of abetment, and
- (3) there must be no express provision in the Code for the punishment of such abetment.

[s 110] Punishment of abetment if person abetted does act with different intention from that of abettor.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 110] Punishment of abetment if person abetted does act with different intention from that of abettor.—

Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

[s 110.1] Punishment of abetment when person abetted does act with a different intention

Section 110 supplements the provisions of section 109, by enacting that variation between the intention and knowledge of the abettor and those of the person abetted is of no significance for the purpose of fixing liability so long as the act done is the same as the act abetted. In other words, variation in the intention or knowledge of the persons abetted does not effect the liability of the abettor.

Sections 110, 111, 112 and 113 define the liability of an abettor in cases when one act is abetted and a different act is done, or when a different result is achieved than that originally contemplated.

An abettor would be liable for the act abetted in the same manner and to the same extent even if the person abetted does the act with a different intention from that of the abettor. In other words, the variation between the intention and knowledge of the abettor and the person abetted is immaterial so long as the act done is the same as the act abetted. A, intending to cause a theft to be committed, instigates B to take property belonging to Z, out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession in good faith believing it to be A's property. Since B was acting under the misconception and had no dishonest intention, he is not liable for committing theft, but A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft (see *Explanation 3 to section 108, IPC*).

[s 111] Liability of abettor when one act abetted and different act done.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 111] Liability of abettor when one act abetted and different act done.—

When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Proviso.—Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

ILLUSTRATIONS

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

(b) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

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

[s 111.1] Liability of abettor when different act is done

Sections 109 and 110 provide for punishment in cases in which the act done is the act abetted, whereas section 111 holds the abettor liable when the act done is different from the act abetted. The section enunciates the principle of constructive liability. As the person abetted is working as an agent of the principal, the abettor is responsible in law for his deeds. The liability of the abettor under this section is based on the well-established principle of criminal law that "every man is presumed to intend the natural and probable consequence of his act". A natural and probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act. Section 111 extends the liability of an abettor in respect of an act done, which was not contemplated by the abettor, provided the later act was the probable consequence of the act abetted, and is committed under the influence of the abetment. But an unusual act which could not be expected to ensue as a result of abetment cannot be said to be the probable consequence of an act abetted. In other words, the abettor is liable for the act committed, if:

[s 111] Liability of abettor when one act abetted and different act done.—

- (i) it was a probable consequence of the abetment, and
- (ii) it was committed—
 - (a) under the influence of the abetment, or
 - (b) in pursuance of the conspiracy which constituted abetment.¹⁷

[s 111.2] Probable consequence

A probable consequence may be explained as an act which is likely, or which can reasonably be expected to follow from another act. No man can be allowed to say that he did not authorise an act of which he would have foreseen that consequence. That is to say, an act is said to be the probable consequence of another act, if it can reasonably be expected to take place from such an act.

A, instigates a child to put poison in the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation by mistake puts the poison in the food of Y, who is sitting next to Z. Here, since the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as though A had instigated the child to put the poison in the food of Y. [see Illustration (a)].

But, if an unusual or unexpected consequence of an act which a reasonable man cannot be expected to foresee would follow from such an act, such consequence cannot be described as a probable one. As such, the abettor would not be liable for the consequence of such improbable acts. For instance, if A instigates B to burn Z's house and B sets fire to the house and at the same time commit theft of property, though A would be guilty of abetting the burning of the house, he is not guilty of abetting the commission of theft, for the theft was a distinct act and not a probable consequence of the burning [see Illustration (b)].

¹⁷ *Nanboo Keder v State of Madhya Pradesh*, AIR 1962 MP 91 [[LNIND 1961 MP 109](#)] .

[s 112] Abettor when liable to cumulative punishment for act abetted and for act done.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 112] Abettor when liable to cumulative punishment for act abetted and for act done.—

If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

ILLUSTRATION

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

[s 112.1] Abettor liable to cumulative punishment

Section 112 extends the doctrine of constructive criminality and makes provisions for cumulative punishment in cases covered under section 111. The section states that the abettor would be liable to punishment both for the offence abetted as well as for the offence that was the probable consequence of the abetment, provided cumulative sentence could be passed in that particular case. For instance, when *A* by putting *B* in fear of death induces *B* to burn a stock of corn belonging to *Z*, kept inside the house where *Z* is sleeping, *A* is liable both for abetting *B* to burn the stock of corn and also for putting *B* under fear of death.¹⁸ The illustration attached to the section clearly explains the principle underlying this section.

But if the act committed is not the probable consequence of the act abetted, the abettor will not be responsible to the cumulative punishment. For instance, *A* abets *B* to assault *C* and *B* kills *C*. *A* is not only liable for abetment of murder, but also for abetment of hurt,¹⁹ because the later act cannot be stipulated as the probable consequence of the abetment of assault in the particular situation.

[s 112] Abettor when liable to cumulative punishment for act abetted and for act done.—

18 *Nawabali v Emperor*, 1928 Cal 752 ; *Ghanshyam Singh v Emperor*, AIR 1928 Pat 100 .

19 *Queen v Goluck Chand*, (1866) 5 WR (Cr) 75 (76); *Queen v Doorgessur Surnnah*, (1867) 7 WR (Cr) 61.

End of Document

[s 113] Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 113] Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.—

When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, caused a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

ILLUSTRATION

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

[s 113.1] Liability of abettor for a different act caused

Section 113 is complementary to section 111. Section 113 extends the liability of an abettor to a situation wherein the act done causes a different effect from that intended by the abettor. In such a case the abettor would be liable for the effect caused, in the same manner and to the same extent, as if he had abetted the act with the intention of causing that effect, provided he knew that the act was likely to cause that effect. B, in consequence of A's instigation, causes grievous hurt to Z, who dies. Here if A knew that the grievous hurt abetted was likely to cause Z's death, A is liable for the offence of abetment to murder.

[s 114] Abettor present when offence is committed.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 114] Abettor present when offence is committed.—

Whenever any person, who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

[s 114.1] Liability of abettor when offence is committed

Section 114 says that if an abettor is present at the time when the offence abetted is committed “he shall be deemed to have himself committed such offence”. In such cases, an abettor is liable to the same punishment as that accorded to a principal offender. The actual presence, coupled with the prior abetment amounts to the commission of the offence.²⁰

Section 114 deals with a case wherein the crime of abetment has occurred, but wherein also there has been actual commission of the crime of abetment, and the abettor has been present thereat. Then the abettor shall be deemed to have committed the very crime abetted. A presumption of participation by presence may be construed as when the abettor is near enough to afford assistance, should occasion arise.

Thus, if the abettor is present when the offence abetted is committed, he is deemed to have committed such act or offence. But mere presence will not render a person liable. He must be sufficiently near to give assistance, and he must participate in the act no matter whether he is an eye witness to the transaction or not. Of course, his presence is not necessary during the entire transaction.

This section is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition.

The participation in the commission of the crime is established by the presumption *juris et de jure*, that actual presence plus prior abetment can mean nothing else but participation. Thus, the meaning of the section is that, if the nature of the act done constitutes abetment, then if present, the abettor is deemed to have committed the offence, though in point of fact another person actually committed it.

[s 114] Abettor present when offence is committed.—

20 *Mathurala Adi Reddy v State of Hyderabad*, AIR 1956 SC 177 : 1956 Cr LJ 341 .

End of Document

[s 115] Abetment of offence punishable with death or imprisonment for life—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 115] Abetment of offence punishable with death or imprisonment for life—

if offence not committed.—Whoever abets the commission of an offence punishable with death or ²¹[imprisonment for life], shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

If act causing harm be done in consequence.—and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

ILLUSTRATION

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or ²²[imprisonment for life]. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

[s 115.1] Abetment of offences punishable with death or life imprisonment

Sections 109, 115 and 116 state the quantum of penalty to be accorded in different cases of abetment. As stated earlier, section 109 prescribes punishment of abetment of an offence when the act abetted is committed in consequence of the abetment, whereas sections 115 and 116 provide for punishment when the offence is not committed in consequence of abetment.

Section 115 provides that in case of offences punishable with death or life imprisonment, where no express provision is made for punishment, if the act abetted has not taken place, the abettor may be liable to imprisonment of either description for a term which may extend to seven years and fine, and if harm is caused in pursuance thereof, up to 14 years of imprisonment and fine. For instance, if A instigates B to murder Z, three possibilities may arise.

[s 115] Abetment of offence punishable with death or imprisonment for life—

first, if *B* murders *Z*, both *A* and *B* would be subject to the punishment of death or imprisonment for life under *section 302* read with *section 109*, *IPC*.

second, if the offence is not committed, *A* would be liable to imprisonment for a term which may extend to 7 years and also to fine;

third, if hurt is caused to *Z* in pursuance of the abetment, *A* could be liable to imprisonment for a term which may extend to 14 years and to fine.

21 Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

22 Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

[s 116] Abetment of offence punishable with imprisonment—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 116] Abetment of offence punishable with imprisonment—

if offence be not committed.—Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence, or with both;

If abettor or person abetted be a public servant whose duty it is to prevent offence.—

and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

ILLUSTRATIONS

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

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

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

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

[s 116.1] Abetment of offences punishable with imprisonment

Section 116 provides for punishment in cases of abetment of offences punishable with imprisonment when the offence is not committed. The section makes a distinction in respect to punishment in the case of a private person and for a police officer involved in the abetment of a crime.

The section imposes greater responsibility in the case of public servants whose duty is to prevent crime, as compared to ordinary individuals. For instance, when a police constable instead of preventing a dacoity of which he has information, aids, and abets a gang of dacoits deserves more severe punishment than an ordinary individual in a similar situation. Accordingly, the section provides that (1) if the abettor happens to be a private individual, he would be liable to one-fourth the term of imprisonment prescribed for the offence abetted, or with fine, or with both; and (2) if the abettor is a public servant whose duty is to prevent the commission of an offence, the abettor is liable to one-half of the longest term of imprisonment, or with such fine as is prescribed for the offence, or with both. The Law Commission of India in its 42nd Report on the *Indian Penal Code* suggested the enhancement of punishment in the case of public servants whose duty it is to prevent offences, equal to that of the punishment prescribed for the offence abetted, and in the case of private individuals to one-half of the prescribed punishment.²³ However, the recommendations did not find favour with the Government.

²³ See *Law Commission of India*, 42nd Report, (1971), pp 122, 123.

[s 117] Abetting commission of offence by the public or by more than ten persons.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 117] Abetting commission of offence by the public or by more than ten persons.—

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

ILLUSTRATION

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

[s 117.1] Abetting public or more than 10 persons

The offence under section 117 is an aggravated form of abetment and refers to offences abetted by the public generally. It provides punishment for abetment of an offence by the public or by any member or class of persons exceeding ten.²⁴ The section was applicable when an accused instigated workers to form an unlawful association and to collect funds.²⁵ In such a case an abettor is liable to punishment which may extend to three years of imprisonment, or with fine, or with both. A affixes in a public place a poster instigating a sect consisting of more than 10 members to meet at a certain time for the purposes of attacking the members of an adverse sect while they are engaged in a procession. A has committed the offence defined in section 117 and he may be punished with imprisonment which may extend up to three years, or with fine, or with both.

²⁴ *Santa Singh Kamal v Emperor*, AIR 1933 Lah 660 .

²⁵ *Kripal Singh v Emperor*, AIR 1926 Lah 115 .

[s 117] Abetting commission of offence by the public or by more than ten persons.—

End of Document

[s 118] Concealing design to commit offence punishable with death or imprisonment for life.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 118] Concealing design to commit offence punishable with death or imprisonment for life.—

Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or ²⁶[imprisonment for life];

²⁷[voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design] to commit such offence or makes any representation which he knows to be false respecting such design,

If offence be committed—if offence be not committed.—shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description, for a term which may extend to three years; and in either case shall also be liable to fine.

ILLUSTRATION

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

[s 118.1] Concealing design to commit capital offences etc. – Principle

Sections 118 to 120 deal with a special form of abetment by way of aid in concealment of a design to commit a crime. The essence of the crime consists in the facility thereby given to offenders for the commission of a crime. It involves participation of two or more persons, i.e., the concealment by one person of the existence of a criminal design on the part of another.²⁸ These sections (118 to 120) deal with the concealment prior to the commission of an offence, whereas sections 202 and 203, IPC²⁹ deal with subsequent concealment.

[s 118.2] Concealment

Concealment in order to be punishable must be the result of an active conduct distinguished from passive nondisclosure. Mere denial, of the existence of a design to commit an offence does not constitute concealment in law. Concealment may be either by misrepresentation or by non-disclosure. There must be an obligation on the part of the person concealing the offence to disclose it.³⁰ The act of concealment in order to be punishable

[s 118] Concealing design to commit offence punishable with death or imprisonment for life.—

must be an intentional act or at least with the knowledge that it will help in the commission of a crime. For instance, A knowing of a design to commit a dacoity voluntarily conceals the existence of the design with the knowledge that such concealment would facilitate its commission, A is guilty of an abetment of dacoity.³¹ Likewise, if A knowing that dacoity is about to be committed at B, falsely informs the Magistrate that it is to be committed at C, a place in the opposite direction, A is guilty of misleading the Magistrate to facilitate in the commission of the offence of dacoity (see illustration appended to the section).

[s 118.3] Punishment

This section prescribes punishment in the case of concealment of design to commit offence punishable with death or imprisonment for life. In case the offence is committed in pursuance of concealment, the accused is liable to punishment with imprisonment of either description which may extend to 7 years and fine, and if the offence is not committed, with 3 years of imprisonment and fine respectively.

²⁶ Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

²⁷ Subs. by Act 10 of 2009, section 51(c), for “voluntarily conceals, by any act or illegal omission, the existence of a design” (w.e.f. 27-10-2009).

²⁸ Nelson's *Indian Penal Code*, 7th Edn, (1981), vol I, pp 302, 303.

²⁹ See Chapter XI for discussion on *sections 202 and 203, IPC*.

³⁰ See *CrPC* (1973) (Act 2 of 1974), sections 39 and 40 fix obligation on person every and an officer employed in connection with the affairs of a village, to inform the public authorities about certain facts which might lead to the commission of an offence.

³¹ *Queen v Jhugroo*, (1865) 4 WR (Cr) 2.

[s 119] Public servant concealing design to commit offence which it is his duty to prevent.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 119] Public servant concealing design to commit offence which it is his duty to prevent.—

Whoever, being a public servant, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent;

³²[voluntarily conceals by any act or omission or by the use of encryption or any other information hiding tool, the existence of a design] to commit such offence, or makes any representation which he knows to be false respecting such design;

If offence be committed.—shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

If offence be punishable with death, etc.—or, if the offence be punishable with death or ³³[imprisonment for life], with imprisonment of either description for a term which may extend to ten years;

If offence be not committed.—or if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment or with such fine as is provided for the offence, or with both.

ILLUSTRATION

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

[s 119.1] Public servant concealing design to commit offences

Section 119 is the adaptation of *section 118, IPC* and applicable to public servants. The section prescribes enhanced penalty to public servants whose duty as such is to prevent the commission of crime and the offence is committed by him. For instance, a police officer, whose job is to protect the commission of an offence will be liable under this section for the offence. This section is based on the principle and assumption that, "if the law protectors themselves break the law, they should be dealt with more severely than others". However, a public

[s 119] Public servant concealing design to commit offence which it is his duty to prevent.—

servant would be liable to more punishment only if he conceals a design to commit an offence which he is under an obligation to prevent.

The section makes a distinction between cases when an offence is committed and when the offence is not committed, for the purposes of punishment. When the offence abetted is committed and the offence is punishable with death or imprisonment for life, the punishment may extend to ten years, while in other cases to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both.

But when the offence is not committed, the accused is liable to one-fourth part of the longest term of imprisonment, or with such fine as is provided for the offence, or with both.

32 Subs. by Act 10 of 2009, section 51(d), for “voluntarily conceals, by any act or illegal omission, the existence of a design” (w.e.f. 27-10-2009).

33 Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

End of Document

[s 120] Concealing design to commit offence punishable with imprisonment.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER V OF ABETMENT](#)

The Indian Penal Code

CHAPTER V OF ABETMENT

[s 120] Concealing design to commit offence punishable with imprisonment.—

Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design,

If offence be committed—if offence be not committed.—shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

[s 120.1] Concealing design to commit offences punishable with imprisonment

Section 120 is complementary to section 118. While section 118 prescribes punishment in the case of abetment by concealment of offence punishable with death or imprisonment for the life, section 120 applies to offences punishable with imprisonment only. The offences punishable with fine only, being considered too trivial, have been excluded from the purview of sections 118 to 120 of the Code.

According to section 120, when an offence is committed in pursuance of abetment, the accused may be punished with one-fourth of the longest term of imprisonment, and if not committed, to one-eighth of the punishment prescribed for that offence.

Section 8 of the English Accessories and Abettors Act, 1861 as amended by Criminal Law Act, 1977 fixes criminal liability on accomplices under English law. The section reads:

Whoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.³⁴

[s 120] Concealing design to commit offence punishable with imprisonment.—

-
- 34** Smith and Hogan, *Criminal Law*, 5th Edn, (1983) 118; Attorney-General's Reference (No. 1 of 1975), [\(1975\) 2 All ER 684](#); *Lynch v DPP for Northern Ireland*, [\(1975\) 1 All ER 913](#).

End of Document

[s 120A] Definition of criminal conspiracy.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VA CRIMINAL CONSPIRACY]

The Indian Penal Code

¹[CHAPTER VA CRIMINAL CONSPIRACY]

[s 120A] Definition of criminal conspiracy.—

When two or more persons agree to do, or cause to be done,—

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation. —It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

[s 120A.1] Development of law of conspiracy

Chapter VA was inserted in the *Penal Code* in 1913. Conspiracy, at Common law, had its origin primarily as a civil wrong,² but was lately made punishable as a criminal wrong.³ Conspiracy was originally used to explain the acts of agreement of those who combined to carry on legal proceedings in a vexatious or improper way.⁴ The Star Chamber gave it a more concrete form⁵ and such an agreement was made a substantive offence even when no act was done in pursuance of it. The gradual evolution of the law of conspiracy, its widened scope and general application can also be traced in close association with the law of principal and accessory.⁶

According to the English law, if two or more persons agree together to do something contrary to law, or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the crime of conspiracy.⁷

The House of Lords in the famous case of *Mulcahy v R* stated:

A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two persons agree to carry it into effect, the very plot is an act in itself and the act of each of the parties promise against promise *actus contra actum* capable of being enforced it lawfully, punishable if for a criminal object or for the use of criminal means.⁸

[s 120A.2] Conspiracy under the Code

Conspiracy under the *Indian Penal Code* originally was punishable only in two forms, viz., (i) conspiracy by way of abetment⁹ and (ii) conspiracy involved in certain offence.¹⁰ In the former, an act or illegal omission must take place in pursuance of conspiracy in order to be punishable while in the latter membership suffices to establish the charge of conspiracy.

In 1870, the law of conspiracy was widened by the insertion of *section 121A, IPC vide Act XXVII of 1870*, section 4 in Chapter VI. Under section 121A of the Code, it is an offence to conspire to commit any of the offences punishable by *section 121 of the Indian Penal Code*, or to conspire (to deprive the Government or any part thereof) to overawe, by means of criminal force, or the show of criminal force, the Government of India, or any local Government. Under this section it is not necessary that any act or illegal omission should take place in pursuance thereof, whereas under section 107 abetment includes the engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.

In other words, except in respect of the offences particularised in section 121A, conspiracy *per se* was not an offence under the *Indian Penal Code* until the *Criminal Law Amendment Act* of 1913 was passed. In 1913, the *Indian Criminal Law Amendment Act* was passed as an emergent piece of legislation which gave an extended effect to the law of conspiracy in India, by adding Chapter VA (*sections 120A and 120B IPC*) to the *Penal Code*. The necessity to widen the scope of the law of conspiracy has been explained in the Statement of Objects and Reasons thus:

Experience has shown that dangerous conspiracies are entered into India, which have for their object aims other than the commission of the offences specified in *section 121A, IPC* and that the existing law is inadequate to deal with modern conditions. The present Bill is designed to assimilate the provisions of the *Indian Penal Code* to those of the English law with the additional safeguard that, in the case of a conspiracy other than a conspiracy to commit an offence, some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence.¹¹

Thus, the *Indian Penal Code* deals with the law relating to criminal conspiracy:

- (i) as a substantive offence;¹²
- (ii) as a form of abetment (Chapter V, section 107);¹³
- (iii) to wage, attempt or abet waging of war against the Government of India (Chapter VI, section 121A);¹⁴
- (iv) involvement in certain offences, such as assembling for purposes of committing dacoity.¹⁵

[s 120A.3] Conspiracy—Meaning

A criminal conspiracy under the English law, and also under the Indian law as it now stands, is the agreement of two or more persons to do an illegal act, to do a legal act by illegal means. In other words, a joint evil intent is necessary to constitute crimes. No physical action need take place. No consummation of the crime need be achieved or even attempted.¹⁶ It is only when two agree to carry a plot into effect, that the very plot becomes an act in itself and punishable in law. For instance, A and B made a plan to murder C; letters passed between them as to the movement of C. Here both A and B are liable for indictment to a charge of criminal conspiracy

[s 120A] Definition of criminal conspiracy.—

under this section since there was an agreement between A and B to do an illegal act, i.e., to commit the murder of C.

Before the passing of the *Criminal Law Amendment Act* of 1913, a conspiracy to do an illegal act was punishable only when such act amounted to an offence. It was also essential in the words of section 107(2) of the Code that an act or illegal omission should have taken place in pursuance of the conspiracy and in order to the doing of the act which was the object of the conspiracy.

The *Criminal Law Amendment Act*, 1913 has, however, introduced two rather drastic changes in this respect. By section 120B, punishment is provided for criminal conspiracies of all kinds viz.,

- (i) whether, according to the requirement of section 107, an overt act has or has not taken place in pursuance of such conspiracy, and;
- (ii) whether, as required by sections 109 and 115 or section 116, the object of conspiracy is or is not the commission of an offence.

Nalini: In *State (CBI/SIT) v Nalini*, (1999) 5 Supreme 60 ,¹⁷ (Rajiv Gandhi murder case) the Apex Court held that an agreement between two or more persons to do an illegal act amounts to criminal conspiracy. The illegal act may or may not be done in pursuance of agreement but the very agreement is an offence and is punishable. Every one of the conspirator need not have taken active part in the commission of each and every one of the conspiratorial acts for the offence of conspiracy to be made out. The prosecution need not necessarily prove that the perpetrators expressly agreed to do and/or caused to be done the illegal act the agreement may be proved by necessary implication, under section 120B, IPC. In the impugned case the accused were charged and convicted under section 120B read with section 302, IPC by the designated court. The accused appealed to the Apex Court to set aside the conviction.

The prosecution case is that Prabhakaran, Pottu Amman, Akila and Sivarasan master minded and put into operation the plan to kill Rajiv Gandhi which was executed by Sivarasan, and Dhanu of the two assassins (other being Subha), with the backup of other accused, who conspired and abetted them in the commission of the crime which included providing them safe haven before and after the crime.

Charge of conspiracy is quite complex and when analysed it states that 26 accused and those absconding, deceased and others, were charged with having entered into criminal conspiracy between July, 1987 and May, 1992 at various places in Sri Lanka and in India to do or cause to be done illegal acts, viz.:

1. to infiltrate into India clandestinely;
2. to carry and use unauthorised arms, ammunition and explosives;
3. to set up and operate unauthorised wireless sets to communicate with LTTE leaders in Sri Lanka from time to time;
4. to cause and carry out acts of terrorism and disruptive activities in Tamil Nadu and other places in India by use of bombs, explosives and lethal weapons so as to scare and create panic by such acts in the minds of the people and thereby to strike terror in the people;

[s 120A] Definition of criminal conspiracy.—

5. in the course of such acts to assassinate Rajiv Gandhi, former Prime Minister of India and others, who were likely to be with him, etc., and in pursuance of the said criminal conspiracy and in furtherance of the same to carry out the object of the said criminal conspiracy;
6. to cause disappearance of evidence thereof and to escape;
7. to screen themselves from being apprehended;
8. to harbour the accused and escape from the clutches of law, and
9. to do such other acts as may be necessary to carry out the object of the criminal conspiracy as per the needs of situation and in pursuance of the said criminal conspiracy and in furtherance of the same to carry out the object of the said criminal conspiracy.

Sanichar Sahani: The Supreme Court in *Sanichar Sahani v State of Bihar*, AIR 2010 SC 3786 [[LNIND 2009 SC 1350](#)], held that framing of charge for criminal conspiracy and murder under *sections 120B/300 IPC* is not prejudicial against the appellant when he allegedly conspired with his father and brother to commit murder for non-fulfilment of “*Rangdar*” (Money) for deceased on telephone.

Dismissing the appeal, the Apex Court held that in the absence of any prejudice, caused in framing of charge against the appellant under *section 120B, IPC* or during the course of the trial and having not raised any objection for quashing the charge by filing any petitions, it cannot be held even by any stretch of imagination that any prejudice has been caused to the appellant.

[s 120A.4] Ingredients

The ingredients of *section 120A, IPC* are as stated below:

- (1) There should be an agreement between two or more persons who are alleged to conspire;
- (2) The agreement should be to do or cause to be done:
 - (i) an illegal act,¹⁸ or
 - (ii) an act which may not itself be illegal by illegal means.

The section also provides that an agreement, except an agreement to commit an offence, shall not amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such an agreement in pursuance thereof, which act is illegal. The first part of the definition of conspiracy under *section 120A* brings the English and Indian law at par in so far as they differed regarding the nature of the act with reference to which the conspiracy was formed, the Indian law confining the conspiracies to agreements to commit punishable wrongs, the English law only insisting on such wrongs being merely illegal.

The Indian law had insisted on some overt act, the English law did not, but an overt act was necessary in an act of tort for conspiracy. But now an overt act is necessary only when the object of conspiracy is the commission of an illegal act not amounting to an offence.

[s 120A] Definition of criminal conspiracy.—

Conspiracies now fall into two classes not wholly exclusive of one another, viz.,

- (i) Conspiracies falling within the definition of abetment in *section 107 of the Indian Penal Code*, and
- (ii) Conspiracies outside the definition of abetment, but falling within the words of section 120A.

[s 120A.5] An illegal act—Ram Narain Poply

The word illegal has been given comprehensive meaning under this section and may even include a case of civil trespass, punishable as a criminal conspiracy.¹⁹ In *Ram Narain Poply v CBI*, (2003)²⁰ the Supreme Court held that to convict the parties for conspiracy under section 120B mere proof of agreement between two or more to do an unlawful act or an act by unlawful means is enough. When two agree to carry it into effect, the very plot is an act by itself and an act of each of the parties, promise against promise, *actus contractum*, capable of being enforced.

The word “illegal” is defined in section 43 of the Code as “applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action”; and a person is said to be “legally bound to do whatever it is illegal in him to omit.”

Reading sections 43 and 120A together it would appear that two or more persons would be guilty of a criminal conspiracy whenever they agree to do or cause to be done acts, which are an offence punishable under the *Indian Penal Code* or any special or local law, or which are prohibited by law, or which furnish ground for civil action. Leaving the case of punishable offences or other acts prohibited by law aside, acts which might furnish ground for a civil action may be either (a) breaches of contract, or (b) wrongs independent of contract committed by an individual acting alone or by two or more persons acting in combination. A wrongful act must necessarily be so in two or more acting in concert.

The question is whether there are any acts which would not be tortious when done by one alone but which would be wrongful and therefore actionable when done by two or more acting in combination. A correct answer to this question is of paramount importance because in India such acts, if any, would not only give rise to civil liability, but would also lay the members of the combination open to a charge of criminal conspiracy. Here, in such cases the very existence of the offence of criminal conspiracy is made to depend upon the existence of a civil cause of action.

[s 120A.6] Requirement of two or more persons

A conspiracy being an agreement, it necessarily follows that there must be at least two persons. One person alone cannot conspire. However, a person may be indicted alone for conspiring with persons who are unknown, dead, uncaught and incapable of committing the crime or immune or have been pardoned.²¹

The rule apparently does not apply unless one is actually acquitted. As was held in the famous case of *Duguid*, 1906 WN 100 (CCR),²² if *D* is charged with conspiring with *E*, and *D* only is prosecuted because *E* had a claim of right of personal exemption by virtue of being the head of a State which gave him a defence, *D* may still be convicted of conspiracy, though if *D* and *E* had been tried together, the acquittal of *E* would necessarily have resulted in the acquittal of *D*.

The rationale of the law of conspiracy as an inchoate crime is this, that the act of agreeing with another person to commit a crime is a sufficiently conclusive act along the road of criminality to make a person subject to discipline by the law. Conspiracy and incitement are acts that are deemed by law to be sufficiently proximate to the crime intended, without going into the nebulous doctrine of proximity in the law of attempt. If this be so, it

[s 120A] Definition of criminal conspiracy.—

makes no difference that the conspiracy transpired with some person who is himself not a subject to prosecution. The accused person is still guilty of agreeing with another to do what for him is a crime.

Topandas: In *Topandas v State of Bombay*,²³ the Supreme Court held that it is a principle of common sense that one person alone can never be held guilty of criminal conspiracy for the simple reason that he cannot conspire. The appellant along with the other three named accused (acquitted) were charged under section 120B read with sections 471 and 420, IPC for conspiring to use forged documents, and thereby induced the Controller of Imports to grant import licences. The Magistrate acquitted all accused on all charges. But the High Court on State appeal reversed the acquittal of the appellant and convicted him for the substantive offence as well as conspiracy to commit such offence under section 120B, IPC.

Held, the appellant could not be convicted of the offence under section 120B, IPC, when his alleged co-conspirators were acquitted to that offence. When all the accused except one are acquitted of the charge, the remaining one cannot be convicted, unless the charge against him has been that he conspired to commit an offence not only with the acquitted co-accused but also with some other person, who has not been tried, because the offender happens to be absconding, or is an insane, or is a minor below 7 years of age, or because of any other reason and as such a charge is proved.

Authority of the above propositions is to be found in Archbold's *Criminal Pleading, Evidence and Practice*, wherein it is stated that,

Where several defendants are included in the same indictment, the jury may find one guilty and acquit the others, and *vice versa*. But if several are indicated for a riot, and the jury acquit all but two, they must acquit those two also, unless it is charged in the indictment, and proved, that they committed the riot, together with some other person not tried upon that indictment. Similarly, if upon an indictment for a conspiracy, the jury acquit all the prisoners but one, they must acquit that one also, unless it is charged in the indictment and proved that he conspired with some other person not tried upon that indictment.²⁴

Afsan Guru: In *Afsan Guru*²⁵—Commonly known as “Parliament Attack case”, the Apex Court opined that as conspiracy is mostly proved by circumstantial evidence, usually both the existence of conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused while elaborating the principle the court said:

In determining the guilt of the accused rather than adopting an isolated approach to each of the circumstances. In regard to the appreciation of evidence relating to the conspiracy, the court must take care to see that the acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution.

In *Ram Narain Poply*,²⁶ (2003) the Apex Court noted that:

...Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual efforts, would have been impossible, furnish the ground for visiting conspirators and abettors with condign [well deserved] punishment...

A conspiracy may further be a general one and a separate one. A smaller conspiracy may be a part of a larger conspiracy. It may develop in successive stages. New techniques may be invented and new means may be devised for advancement of common plan. For the said purpose, conduct of the parties would also be relevant.

Bimbadhar Pradhan: In *Bimbadhar Pradhan v State of Orissa*,²⁷ the appellant, a Government servant and four other accused who were his subordinates were charged under section 120B read with sections 409 and 477A, IPC. All the accused entered into a conspiracy to misappropriate Government funds placed at their disposal and that they in pursuance of that conspiracy misappropriated the money and falsified official records to cover up their actions. One of the accused turned approver and the other four accused were acquitted by the court by giving them the benefit of doubt.

Held, the conviction of the appellant in this case is perfectly legal and justified. The case is distinguishable from *Topandas*.²⁸ In this case besides the four named accused who were acquitted, there was also one other accused who was later granted immunity from prosecution because he turned approver. Under the circumstances, the conviction of the accused is not vitiated by reason of the absence of two persons.

The very requirement of the concept of agreement as embodied in section 120A, IPC is satisfied when the charge proves the presence of the appellant and the approver in the act of conspiracy to misappropriate Government accounts and falsify official documents.

[s 120A.7] Appraisal of law of conspiracy

The general justification of conspiracy as an inchoate crime is the same as that of other inchoate crimes. It enables preventive action to be taken against intended offenders, in circumstances where it is clear that a fixed intention to commit the crime has been formed. Often, the acts from which conspiracy is inferred will evidence an attempt to commit the crime, but the advantage of showing a conspiracy is that it dispenses with the difficult requirement of proximity in attempt.

A subsidiary advantage of the prosecution is that this charge widens the evidence that may be introduced, but it has been shown that this is not always true in the interest of justice. Of still more doubtful policy is the wide ambit and elasticity of the offence. These characteristics originated in the criminal equity of the Star chamber, and nothing similar is found in continental countries.

“The crime of conspiracy”, remarks Russell, “affords support for those who advance the proposition that criminal law is an instrument of Government.”²⁹ The danger of the effect of such a law has been well recognised by the judiciary from time to time, which is conscious of the need to preserve the liberty of the subject. As explained by Fitzgerald J, “The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be zealously guarded, and never to be pressed beyond its true limits.”³⁰ The abuse of the law of criminal conspiracy in the hands of the Government creates a genuine fear in all minds. Prof Sayre writes: “A doctrine so vague in its outlines and uncertain in its fundamental nature, as criminal conspiracy, lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.”³¹ He further emphasises that it would seem, therefore, of transcendent importance that judges and legal scholars should go to the heart of this matter, and with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and precise limits of the elusive law of criminal conspiracy.³²

The above proposition applies to the law of criminal conspiracy in India as well. There is a close affinity between the Indian and the English law of criminal conspiracy. In fact, the *Criminal Law Amendment Act*, 1913 was passed as an emergent piece of legislation by the British with a political motive and expediency to repress and suppress the then freedom movement in the country, keeping in view the English law of conspiracy. As a

[s 120A] Definition of criminal conspiracy.—

result, inconsistent and unintelligible problems of law were put into action, which are totally unsuited to a democratic country.

It is therefore suggested that sections 120A and 120B be re-examined on a rational basis and amended accordingly. The Law Commission of India has suggested the following redraft of section 120A.

120A. Definition of criminal conspiracy.—When two or more persons agree to commit an offence punishable with death, imprisonment for life, or imprisonment of either description for a term of two years or upwards, or to cause such an offence to be committed, the agreement is designated a criminal conspiracy.

Explanation 1.—It is immaterial whether the commission of the offence is the ultimate object of such agreement or is merely incidental to that object.

Explanation 2.—To constitute a criminal conspiracy, it is not necessary that any act or illegal omission shall take place in pursuance of the agreement.³³

A careful perusal of the suggested provisions reveals that there is basically no change in the present section 120A and the proposed section. *Explanation 2* makes it clear that mere agreement is sufficient to constitute a criminal conspiracy. In fact, an agreement implies the meeting of two minds with reference to a particular matter, and so long as matters are discussed and views are interchanged, but the plan of action not settled by the concurrence of any two or more of the conspirators, the stage of criminal conspiracy would not be considered to have been reached.

Consistency, therefore, requires that a conspiracy should be considered a substantive offence only when the object of conspiracy is extremely serious, such as the waging of war against the sovereign and other acts of equally grave nature, and that other cases of conspiracy should be deemed an offence only when they fall within the definition of abetment, i.e., when the agreement has led to some overt act which does more than merely disclose the *mens rea* or to use the words of *section 107(2), IPC*, if an act or illegal omission takes place in pursuance of the conspiracy and in order to the doing of that thing, (i.e., the thing which is the object of conspiracy), a person is said to have committed the offence of conspiracy.³⁴

Venkatakrishnan: In *R Venkatakrishnan v CBI*, AIR 2010 SC 1812 [[LNIND 2009 SC 1653](#)] , the Apex Court elaborately discussed the law relating to conspiracy and its application in a particular case.³⁵

Sauel Ocasio: In *Sauel Ocasio v US*,³⁶ petitioner Samuel Ocasio, a former police officer, participated in a kickback scheme in which he and other officers routed damaged vehicles from accident scenes to an auto repair shop in exchange for payments from the shop owners. Petitioner was charged with obtaining money from the shop owners under color of official right, in violation of the Hobbs Act, 18 USC §1951, and of conspiring to violate the Hobbs Act, in violation of 18 USC §371. At trial, the District Court rejected petitioner's argument that because the Hobbs Act prohibits the obtaining of property "from another"—a Hobbs Act conspiracy requires proof that the alleged conspirators agreed to obtain property from someone outside the conspiracy. Petitioner was convicted on all counts, and the Fourth Circuit affirmed. Petitioner now challenges his conspiracy conviction, contending that he cannot be convicted of conspiring with the shop owners to obtain money from them under color of official right to the US Supreme Court.

Held: A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right.

- (a) The general federal conspiracy statute, under which petitioner was convicted, makes it a crime to “conspire ... to commit any offense against the United States.” 18 USC § 371. Section 371’s use of the term “conspire” incorporates age-old principles of conspiracy law. And under established case law, the fundamental characteristic of a conspiracy is a joint commitment to an “endeavor which, if completed, would satisfy all of the elements of [the underlying substantive] criminal offense,” *Salinas v US*, 522 US 52 (65). A conspirator need not agree to commit the substantive offense—or even be capable of committing it—in order to be convicted. It is sufficient that the conspirator agreed that the underlying crime be committed by a member of the conspiracy capable of committing it.¹
- (b) These basic principles of conspiracy law resolve this case. To establish the alleged Hobbs Act conspiracy, the Government only needed to prove an agreement that some conspirator commit each element of the substantive offense. Petitioner and the shop owners reached just such an agreement: They shared a common purpose that petitioner and other police officers would obtain property “from another”—that is, from the shop owners under color of official right.
- (c) Contrary to petitioner’s claims, this decision does not dissolve the distinction between extortion and conspiracy to commit extortion. Nor does it transform every bribe of a public official into a conspiracy to commit extortion.

Alito J, delivered the opinion of the court, in which Kennedy, Ginsburg, Breyer, and Ragan JJ, joined. Breyer J, filed a concurring opinion. Thomas J, filed a dissenting opinion. Sotomayor J, filed a dissenting opinion, in which Roberts CJ, joined.

A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement with the owner of the property in question to obtain that property under color of official right. Because petitioner joined such an agreement, his conspiracy conviction must stand.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

¹ Chapter VA (containing sections 120A and 120B) inserted by Act 8 of 1913, section 3.

² Gour, Hari Singh, *Penal Law of India*, 11th Edn, vol II, 2000, pp 1101-1135.

³ Hawk, *Pleas of the Crown*, BK 1, C. 72, section 2.

⁴ Sir James Fitzames Stephen, *A History of the Criminal Law of England*, (1883), vol II, Macmillan and Co. London, p 227.

⁵ In *Poulter’s case (1611)*, 9 Co Rep 55, the criminal aspect of conspiracy was developed by the Star Chamber. This case forms the source of modern law on conspiracy.

[s 120A] Definition of criminal conspiracy.—

- 6 Russell on *Crime*, 12th Edn, (1964), vol I, pp 200-203.
- 7 See Essays on the *Indian Penal Code* , (1962) (NM Tripathi Pvt. Ltd.), pp 87-89; Halsbury's *Law of England*, 4th Edn, (1973), vol 10, pp 310-11. In *R v Parnell*, (1881) 14 Cox CC 508 (513), J Fitzgerald stated: "Conspiracy has been aptly described as divisible under three heads; where the end to be attained is in itself a crime, where the object is lawful but the means to be resorted to are unlawful, and where the object is to do injury to a third party or to a class, though if the wrong were effected by a single individual it would be wrong but not a crime."
- 8 *Mulcahy v The Queen*, (1868) LR 3 HL 306. In *Mogul SS Co v McGregor*, (1892) AC 25 , it was held that "an agreement which is immoral or against public policy or in restraint of trade, or otherwise of such a character that the courts will not enforce it, is not necessarily a conspiracy. An agreement, to be a conspiracy, must be to do that which is contrary to or forbidden by law, as to violate a legal right or make use of unlawful methods, such as fraud or violence, or to do what is criminal."
- 9 See *IPC* , section 107.
- 10 Thug (section 310); belonging to a gang of thieves (section 401); being a member of a gang of dacoits (section 400).
- 11 Gazette of India, (1913), Pt V, p 44.
- 12 Chapter VA, section 120A and 120B, *IPC* added to the *Indian Penal Code* by Act VIII of 1913.
- 13 Chapter V, section 107(2), *IPC*.
- 14 Added to the *Indian Penal Code* by Act XXVII of 1870, section 4.
- 15 See *Essays on the Indian Penal Code*, Indian Law Institute, 1962 p 89.
- 16 Law Commission of India, 42nd Report (1971), p 126.
- 17 See for detail under section 302, *IPC* commentary.
- 18 *Indian Penal Code*, section 43 defines "illegal". See *Shaw v Director of Public Prosecutions*, [\(1961\) 2 All ER 446](#) (HL). The appellant published a booklet entitled, "The Ladies' Directory" with the object of enabling prostitutes to ply their trade. The booklet contained names, addresses and photographs of some of the prostitutes in the nude indicating the type of sexual conduct in which the woman would indulge. The accused was convicted and sentenced on two counts, viz., (1) conspiracy to corrupt public morals, and (ii) living wholly or in part on the earnings of prostitutes contrary to section 30 (1) of the Sexual Offences Act, 1956. Held, that the conduct was calculated and intended to corrupt public morals was an offence under Common Law and it followed that an agreement to do so was a criminal conspiracy.
- 19 See Essays on the *Indian Penal Code* , ILI 1962, pp 86-91. See note of Dissent by Pt. MM Malviya to the Indian Criminal Law Amendment Bill quoted in Roy – Law Relating to Press and Sedition, pp 48-50.

The result of this sweeping enactment is to make a mere breach of contract by two or more persons punishable as a crime. If, for instance a husband and wife agree to sell their house and then think better of it and refuse to convey, they would be punishable under section 120B of the *Penal Code*, though the civil court may not have enforced a specific performance of the contract. The exception of English law that wife and husband are treated as one person, is not acceded to in this chapter. This adds to the absurdity of Indian law on conspiracy which is not found in the English law.

Huda is of the opinion that it is not the policy of law to create offences that cannot ordinarily be proved. Probably, there would have been no danger and inconvenience if the law in India were left exactly where it was before the passing of the *Criminal Law Amendment Act*, 1913 (TLL 1902), p 107.

[s 120A] Definition of criminal conspiracy.—

- 20 *Ram Narain Poply v CBI*, (2003) 3 SCC 641 [[LNIND 2003 SC 26](#)] : AIR 2003 SC 2748 [[LNIND 2003 SC 26](#)] : 2003 Cr LJ 4801 : JT 2003 (1) SC 184 [[LNIND 2003 SC 26](#)] : (2003) 1 Scale 171 [[LNIND 2003 SC 26](#)] : (2003) 42 SCL 275 (SC).
- 21 Granville Williams, *Textbook of Criminal Law*, (2nd Edn, 1983), pp 420 to 438. *Bimbadhar Pradhan v State of Orissa*, AIR 1956 SC 469 [[LNIND 1956 SC 25](#)] .
- 22 *US v Brown*, (1985) 776 F 2d 397 (CA).
- 23 AIR 1956 SC 33 [[LNIND 1955 SC 78](#)] : (1955) 2 SCR 881 : 1956 SCJ 86 : 1956 Cr LJ 138 ; *US v Jackson*, (1982) 696 F. 2d. 578.
- 24 (1958) 43rd Edn (London, Sweet and Maxwell) Chapter 4, section 448, p 597: 2 Hawk C 47 section 8; *R v Manning*, (1884) 12 QBD 241 (B); *R v Plummer*, (1902) 2 KB 339 .
- 25 *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [[LNIND 2005 SC 580](#)] ; See for facts of the case under section 121, IPC commentary.
- 26 *Ram Narain Poply v CBI*, (2003) 3 SCC 641 [[LNIND 2003 SC 26](#)] : AIR 2003 SC 2748 [[LNIND 2003 SC 26](#)] : 2003 Cr LJ 4801 : 2003 AIR SCW 3119.
- 27 AIR 1956 SC 469 [[LNIND 1956 SC 25](#)] : 1956 SCR 206 [[LNIND 1956 SC 25](#)] : 1956 SCJ 441 : 1956 Cr LJ 831 ; See also *State (Delhi Admn.) v VC Shukla*, AIR 1980 SC 1382 : 1980 CLR 301 (SC) : 1980 Cr LJ 965 ; *Shaw v Director of Public Prosecutions*, (1961) 2 All ER 446 (HL); *Knüller Ltd v DPP*, (1972) 2 All ER 898 (HL); Gaur, KD, *Criminal Law: Cases and Materials*, 3rd Edn, (1999), pp 246-255 for cases.
- 28 AIR 1956 SC 33 [[LNIND 1955 SC 78](#)] : (1955) 2 SCR 881 : 1956 SCJ 86 : 1956 Cr LJ 138 .
- 29 Russell on *Crimes*, 12th Edn, (1964), vol I, p 200.
- 30 *Irish State Trials* (1867), quoted in Russell, *op. cit.*, p 203 (*Id.*).
- 31 Sayre: *Criminal Conspiracy*, (1921-22) 35 Harv LR, p 393.
- 32 Sayre: *Criminal Conspiracy*, (1921-22) 35 Harv LR, p 394.
- 33 Law Commission of India, 42nd Report (1971) p 393 and 129.
- 34 *State of Maharashtra v Som Nath Thapa*, AIR 1996 SC 1744 [[LNIND 1996 SC 776](#)] : (1996) 4 SCC 659 [[LNIND 1996 SC 776](#)] : 1996 Cr LJ 2448 . Held, to establish a charge of conspiracy the knowledge about the indulgence in either illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use may be inferred from the knowledge itself; See *Kehar Singh v Delhi Administration*, (Indira Gandhi murder case) AIR 1988 SC 1883 [[LNIND 1988 SC 887](#)] : (1988) 3 SCC 609 [[LNIND 1988 SC 887](#)] : 1988 Supp (2) SCR 24 : 1988 CLR 536 ; *State of Maharashtra v Sukhdeo Singh*, (General AS Vaidya case), AIR 1992 SC 2100 [[LNIND 1992 SC 433](#)] : (1992) 3 SCC 700 [[LNIND 1992 SC 433](#)] : (1992) 3 SCR 480 [[LNIND 1992 SC 433](#)] : 1992 CLR 678 discussed under section 302 of IPC commentary *infra*.
- 35 *R Venkatakrisnan v CBI*, AIR 2010 SC 1812 [[LNIND 2009 SC 1653](#)] : AIR 2010 SC 1812 [[LNIND 2009 SC 1653](#)] .

[s 120A] Definition of criminal conspiracy.—

36 US Supreme Court, May 2016.

End of Document

[s 120B] Punishment of criminal conspiracy.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [\[CHAPTER VA CRIMINAL CONSPIRACY\]](#)

The Indian Penal Code

¹[CHAPTER VA CRIMINAL CONSPIRACY]

[s 120B] Punishment of criminal conspiracy.—

- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, ³⁷[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
- (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]

[s 120B.1] Punishment of criminal conspiracy

Section 120B of IPC prescribes punishment for criminal conspiracy. The section has classified conspiracy into two classes for punishment.

In the first case, where the conspiracy is to commit an offence of serious nature, i.e., to commit an offence punishable with death, imprisonment for life, or rigorous imprisonment for a term of two years or upwards and where no provision is made in the Code for punishment, the person would be liable to be punished in the same manner as if he had abetted such an offence.

In the other category of cases, conspiracy to commit offences other than those covered under the first category (including offences punishable only with fine), conspiracy to commit illegal acts is covered. In such cases the section provides a uniform punishment, viz., imprisonment of either description for a term which may extend up to six months, or fine, or both. In case of offences punishable with fine only a provision has also been made for punishment when the conspiracy is unsuccessful.

And a conspiracy to commit a mere illegal act not amounting to an offence, which lies outside the scope of Chapter V, has been made punishable, the punishment provided being imprisonment up to 6 months, or fine or both. To avoid unnecessary litigation for alleged petty conspiracies, a provision has been made under section 196(1)(b) of the Criminal Procedure Code, 1973 that no court shall take cognizance of a criminal conspiracy except with the previous sanction of the Central Government, or of the State Government.

The essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved because in such a situation, criminal conspiracy is established by proving such an agreement.

[s 120B] Punishment of criminal conspiracy.—

Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in section 120B read with the proviso to sub-section (2) of section 120A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under section 120B and the proof of any overt act by the accused/or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfilment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trapping of the provisions contained in section 120B.

Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is seldom available: offence of conspiracy can be proved by either direct or circumstantial evidence. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objectors set before themselves as the object of conspiracy and about the manner in which the object of conspiracy is to be carried out, all this is necessarily a matter of inference. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not be proved. The evidence as to the transmission of thoughts and sharing the unlawful act is not sufficient.

Ram Narain Poply: A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts he would be held guilty under *section 120B of the IPC*.³⁸

JF v The Queen: In *JF v The Queen*, (2013) SCC 12 (Supreme Court of Canada), the Supreme Court of Canada while dismissing the appeal by accused from judgment affirming conviction for conspiracy to commit murder held accused could be convicted as a principal or as a party:

J, a youth learned that his friend T and her sister R were planning to murder their mother by plying her with alcohol and drowning her, a plan which the sisters ultimately executed and were convicted for. The police found an MSN chat log between J and T in which J provided information to T about death by drowning; suggested that the sisters should give their mother codeine pills in addition to alcohol; and suggested ways to mislead the police. The Crown also led evidence that J supplied the girls with pills and met T and R after the murder to provide an alibi. The trial judge instructed the jury that J could be convicted of conspiracy to commit murder under section 465(1) of the either as a principal, or as a party under section 21(1)(b) or (c) of the Criminal Code. J was convicted of conspiracy to commit murder. The court of Appeal dismissed an appeal from the conviction but reduced J's sentence.

Like all conspiracies, conspiracy to commit murder is a form of inchoate liability. The crime is complete when two or more persons agree to kill a third party. No one need be killed; nor is it necessary that any steps be taken to bring about the murder. Section 21 states:

21. (1) Every one is a party to an offence who

- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it.
-

[s 120B] Punishment of criminal conspiracy.—

-
- 1** Chapter VA (containing sections 120A and 120B) inserted by Act 8 of 1913, section 3.
- 37** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).
- 38** *Ram Narain Poply v CBI*, AIR 2003 SC 2748 [\[LNIND 2003 SC 26\]](#) : (2003) 3 SCC 641 [\[LNIND 2003 SC 26\]](#) : 2003 Cr LJ 4801 : JT 2003 (1) SC 184 [\[LNIND 2003 SC 26\]](#) : (2003) 1 Scale 171 [\[LNIND 2003 SC 26\]](#) : (2003) 42 SCL 275 (SC).

End of Document

**[s 121] Waging, or attempting to wage war, or abetting waging of war,
against the Government of India.—**

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > **K D Gaur: Textbook on Indian Penal Code, 7th ed** > **The Indian Penal Code** > **CHAPTER VI OF OFFENCES AGAINST THE STATE**

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

**[s 121] Waging, or attempting to wage war, or abetting waging of war,
against the Government of India.—**

Whoever, wages war against the ⁶[Government of India], or attempts to wage such war, or abets the waging of such war, shall be punished with death, or ⁷[imprisonment for life] ⁸[and shall also be liable to fine].

⁹[ILLUSTRATION]

¹⁰[***] A joins an insurrection against the ¹¹[Government of India]. A has committed the offence defined in this section.

¹²[***]

[s 121.1] Principle

Every state has the right of self-preservation similar to that of its subjects. Accordingly, laws have been enacted to safeguard and preserve state's existence since time immemorial. In monarchical forms of government, the right of preservation of the State was exalted into a sacred right, and so the violence against the state was

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

considered a *lese majestie-lese majestie human*, an offence against the power, crown, dignity and majesty of the invisible God (*lese majestie divine*) whose throne is in heaven.¹³ Such a crime at common law was considered of the highest order and termed “treason”, a word derived from the French *trahir* and the Latin *faradere* meaning a perfidious (treacherous) betrayal.¹⁴ That is to say, the betrayal of that faith and allegiance due from a subject to his sovereign as the supreme head of a state. Accordingly, the law of treason was jealously guarded, preserved and provision for most severe punishment of capital sentence was prescribed for such an offence.

The *Penal Code* has incorporated the common law concept of preservation of State and has provided for the most severe punishment of the death sentence, or life imprisonment and fine in case of offences against the state under *section 121 Indian Penal Code*.

[s 121.2] Ingredients of section 121

To constitute the offence under *section 121 of the Indian Penal Code* the following ingredients must exist:—

- (1) Accused must wage war, or
- (2) attempt to wage such war, or
- (3) abet the waging of such war,
- (4) against the Government of India.

[s 121.3] Whoever

This section applies to everyone, whether an Indian citizen or a foreigner. Everyone who wages a war against the Government of India is subject to prosecution and punishment under this section. Foreigners are liable on the principle of *de jure gentium* (allegiance and protection are reciprocally due from subject and sovereign) which admits the right of foreigners to enter the country only upon the tacit condition that as they rely upon its protection, they are also subject to its laws.

[s 121.4] Waging war

In view of the gravity of the offence contemplated under this section, the act of waging war, attempting to wage war and abetting the waging of war against the Government of India are treated on equal footing and the same punishment of death or imprisonment for life is prescribed in all the cases. In other words, the section deals with three stages of complicity in waging war against the Government of India, viz., abetment, attempt and actual war.

R v Gordon: The expression “waging war” means waging war in the manner usual in war. Thus, to convict a person under this section it must not only be proved that the persons charged have planned to obtain possession of an armoury and have used the rifles and ammunitions so obtained against the state troops, but also that the seizure of the armoury was part and parcel of a planned action in resisting the troops of the state until successfully capturing the machinery of the Government, or until those in possession of it yield to the demands of the aggressors.¹⁵ The words “waging war” import the same ideas as “levying war” used in English law. As explained by Lord Mansfield CJ,

There are two kinds of levying war: one against the person of the King; to imprison, to dethrone, or to kill him, or to make him change measures, or remove counsellor; the other, which is said to be levied against the Majesty of the King, or, in other words, against him in his legal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the Majesty of the King; and most reasonably

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

so held, because it tends to dissolve all the bounds of society, to destroy property, and to overturn Government; and by force of arms, to restrain the King from reigning according to law.¹⁶

A deliberate and organised attack upon the Crown force could amount to a waging of war, if the object of the insurgents was by armed force and violence to overcome the servants of the Crown and to prevent the general collection of capitation tax.¹⁷

Kunhi: In *Kunhi Kadir v Emperor*, 42 Mad LJ 108 : (1921) 23 Cr LJ 203 , it was held that where the object of a mob was not mere resistance to a District Magistrate, or to any isolated action, or for a particular purpose, but the total subversion of the then British power and the establishment of the Khilafat Government, anyone who was in the mob and took part in it was guilty of waging war.

Surya Kumar Sen: In *Emperor v Surya Kumar Sen*, AIR 1934 Cal 221 (231), the accused had, ever since his release from detention in 1928, planned and plotted against the Government and put his plans into active operation on 18 April 1930 and up to the date of his arrest these plans were implemented with complete ruthlessness and disregard for the sanctity of human life. It was held, that he was guilty under this and the succeeding section of murder and abetment of murder.

[s 121.5] Object of section 121

To constitute an offence under *section 121, IPC* no specific number of persons is necessary and the manner in which they are equipped or armed is not material. The true criterion is *quo animo*, i.e., (with what mind, intent) did the gathering assemble; the object of the gathering must be to attain by force and violence an object of a general public nature, thereby striking directly against the Governmental authority. There is no distinction between principal and accessory and all who take part in the unlawful act incur the same guilt.

But where a group of people pledge to propagate against capitalism and private ownership which according to them are dangerous to the advancement of society, and work towards this end to establish a socialistic state under the leadership of the working class, the act will not come under *section 121, IPC*.

Vasu Nair: It was held in *Vasu Nair v Travancore Cochin State*, AIR 1955 Trav-Co. 33, that it was open to the members of the society to achieve these objects by all peaceful means, ceaselessly fighting public opinion that might be against them and opposing those who desired the continuance of the existing order of society and the present government, and that it would also be legitimate to presume that they desired a change in the existing Government so that they could carry out their programme and policy. The court observed that from these it did not follow that the society desired to bring about the change by force and violence, and that the mere use of the words “fight” and “war” in their pledge did not necessarily mean that the society planned to achieve its objective by force and violence.

Navjot Sandhu alias Afsan Guru: Parliament Attack Case:¹⁸ In *Navjot Sandhu alias Afsan Guru* (2005), the Supreme Court held terrorists entering Parliament House with sophisticated arms and powerful explosives when Parliament was in session causing heavy casualties shaking the entire nation amounts to waging or attempting to wage war against the Government of India. To constitute the offence of waging war military or other forces need not, be direct target against Government of India. Case being rarest of rare, imposition of death sentence was held imperative.

Close to the noon on 13 December 2001, five heavily armed persons entered the Parliament House Complex and inflicted heavy casualties on the security men on duty. In the gun battle which took place in Parliament House Complex, the five terrorists who stormed the Complex were killed. Nine persons including security personnel and one gardener succumbed to the bullets of the terrorists and 16 persons including 13 security men received injuries.

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

In the impugned case, battle-front selected was the Parliament House Complex. The target chosen was the Parliament—a symbol of sovereignty of the Indian republic, comprised of peoples' representatives, the supreme law-making body steers the destinies of vast multitude of Indian people. It is a constitutional repository of sovereign power that collectively belongs to the people of India. The Executive Government through the Council of Ministers is accountable to Parliament. Parliamentary democracy is a basic and inalienable feature of the *Constitution*. Entering the Parliament House with sophisticated arms and powerful explosives with a view to lay a siege of that building at a time when members of Parliament, members of Council of Ministers, high officials and dignitaries of the Government of India gathered to transact Parliamentary business, with the obvious idea of imperiling their safety and destabilizing the functioning of Government and in that process, venturing to engage the security forces guarding the Parliament in armed combat, amounts by all reasonable perceptions of law and common sense, to waging” war against the Government”. The whole of this well planned operation is to strike directly at the Sovereign authority and integrity of Republic of which the Government of India is integral component. The attempted attack on the Parliament is an undoubted invasion of the sovereign attribute of the State including the Government of India which is its alter ego. The attack of this nature cannot be viewed on the same footing as a terrorist attack on some public office building or an incident resulting in the breach of public tranquillity.

The deceased terrorists were roused and impelled to action by a strong anti-Indian feeling. The huge and powerful explosives, sophisticated arms and ammunition carried at variance by the slain terrorists who were to indulge in “*Fidayeen*” (*Jihadi*) operations with a definite purpose in view, is a clear indicator of the grave danger to the lives of the members of the Parliament.

Even a limited number of persons who carry powerful explosives and missiles without regard to their own safety can cause more devastating damage than a large group of persons armed with ordinary weapons or fire arms. Then, the other settled proposition is that there need not be the pomp and pageantry usually associated with war such as the offenders forming themselves in battle-line and arraying in a war like manner. Even a stealthy operation to overwhelm the armed or other personnel deployed by the Government and to attain a commanding position by which terms could be dictated to the Government might very well be an act of waging war.

The Court must be cautious in adopting an approach which has the effect of bringing within the fold of section 121 all acts of lawless and violent acts resulting in destruction of public properties etc., and all acts of violent resistance to the armed personnel to achieve certain political objectives. The expression “waging war” should not be stretched too far to hold that all the acts of disrupting public order and peace irrespective of their magnitude and repercussions could be reckoned as acts of waging war against the Government.

A balanced and realistic approach is called for in construing the expression “waging war” irrespective of how it was viewed in the long-long past. An organised movement attended with violence and attacks against the public officials and armed forces while agitating for the repeal of an unpopular law or for preventing burdensome taxes does not amount to “waging war”.

The planned operations if executed, would have spelt disaster to the whole nation. A war-like situation lingering for days or weeks would have prevailed. Such offensive acts of unimaginable description and devastation would have posed a great threat to the country.

The four accused persons, namely, 1. Mohd Afzal, 2. Shaukat Hussain Guru, 3. AS Gilani and 4. Navjot Sandhu alias Afsan Guru along with some other proclaimed offenders said to be the leaders of the banned organisation known as *Jaish-e-Mohammed* were found to be involved in the crime. They were charged and tried under various sections of *Prevention of Terrorism Act* (POTA), 2002,¹⁹ sections 121, 121A, 122,²⁰ 302, 307 read with section 120B of IPC and section 3²¹ of the *Explosive Substances Act*, 1908. The designated court convicted three accused, namely, 1. Mohd Afzal, 2. Shaukat Hussain Guru, 3. AS Gilani under section 302 read with section 120B, IPC and section 3(2), POTA now deleted and sentenced them to death and also to life imprisonment for various other offences charged.

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

The fourth accused Navjot Sandhu *alias* Afsan Guru was acquitted of all the charges. However, in appeal the High Court dismissed the appeals of 1. Mohd Afzal, 2. Shaukat Hussain Guru and confirmed the death sentence imposed on them. As regards 3. AS Gilani and 4. Navjot Sandhu *alias* Afsan Guru the High Court acquitted them of all the charges.

The Supreme Court dismissed the appeal filed by Mohd. Afzal and confirmed the death sentence imposed on him. As regards Shaukat Hussain Guru his appeal was partly allowed. He was convicted under *section 123, IPC*²² for concealing with intent to facilitate design to wage war against the Government of India and sentenced to 10 years of rigorous imprisonment and a fine of Rs 25,000. State appeal against the acquittal of AS Gilani and Navjot Sandhu *alias* Afsan Guru were dismissed by the Supreme Court.

Confirming the death sentence to the appellant Terrorist Mohd Afzal who was actively associated and involved in the conspiracy to attack the Parliament and overthrow the Government established by law and who was bent upon repeating the acts of treason against the country, Apex Court said Mohd Afzal is a menace to the society and his life should become extinct.

Since the accused Afzal was a party to the conspiracy to commit the offence of murder in the course of execution of the plan he is liable to be punished under *section 120B* read with *section 302, IPC*. The punishment applicable is the one prescribed under *section 109, IPC* in view of the phraseology of *section 120B*

“be punished in the same manner as if he had abetted such offence.”

Section 109, IPC lays down that

“Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, a person abetting the offence shall be punished with the punishment provided for the offence.”

Thus, the conspirator, even though he may not have indulged in the actual criminal operations to execute the conspiracy, becomes liable for the punishment prescribed under *section 302, IPC*. Either death sentence or imprisonment for life is the punishment prescribed under *section 302, IPC*. Concluding the judgment the Court said:

Being rarest of rare case the Court said there can be no doubt that the most appropriate punishment is death sentence. That is what has been awarded by the trial court and the High Court. The present case, which has no parallel in the history of Indian Republic, presents us in crystal clear terms, a spectacle of rarest of rare cases. The very idea of attacking and overpowering a sovereign democratic institution by using powerful arms and explosives and imperiling the safety of a multitude of peoples’ representatives, constitutional functionaries and officials of Government of India and engaging into a combat with security forces is a terrorist act of gravest severity. It is a classic example of rarest of rare cases.

The gravity of the crime conceived by the conspirators with the potential of causing enormous casualties and dislocating the functioning of the Government as well as disrupting normal life of the people of India is something which cannot be described in words. The incident, which resulted in heavy casualties, had shaken the entire nation and the

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

collective conscience of the society will only be satisfied if the capital punishment is awarded to the offender. The challenge to the unity, integrity and sovereignty of India by these acts of terrorists and conspirators, can only be compensated by giving the maximum punishment to the person who is proved to be the conspirator in this treacherous act.

Waging War: To constitute the offence of waging war, under *section 121, IPC* forces need not be direct target of attack. The intention and purpose of the warlike operations directed against the Governmental machinery is an important criterion. If the object and purpose is to strike at the sovereign authority of the Ruler or the Government to achieve a public and general purpose in contradistinction to a private and a particular purpose, that is an important indicia of waging war. Of course, the purpose must be intended to be achieved by use of force and arms and by defiance of Government troops or armed personnel deployed to maintain public tranquility. Though the *modus operandi* of preparing for the offensive against the Government may be quite akin to the preparation in a regular war, it is often said that the number of force, the manner in which they are arrayed, armed or equipped is immaterial. Some of recent examples of terrorists attack are on the Parliament of India on 13 December 2001, in New Delhi, in Mumbai in November 2008.

Mumbai Terrorist Attack Case (2012) Mohammad Ajmal Amir Kasab: In *Mohammad Ajmal Amir Kasab v State of Maharashtra*, (2012) 9 SCC 4, it was revealed that a sinister conspiracy was hatched in Pakistan for committing multiple crimes of a horrendous (terrible nature) kind, namely, to wage war against the Government of India, commission of terrorists acts, murder conspiracy to commit murder, and abetment to commit murder etc. in India. In furtherance of the said conspiracy, ten terrorists including Kasab landed in the Mumbai city's shore from Karachi via Arabian sea in November 2008 with an intention to work *Fidayan* attack in India. The attack begun on 22 November 2008 at about 9.15 AM and it ended when the last of the attackers, who was held up in Taj Mahal Hotel Palace, was killed by Indian security forces at about 9.00 AM on 29 November 2008.²³

The militants targeted a number of high profile landmarks, including the Taj Mahal Palace and Taj Hotel, the Oberoi Trident Hotel, Metro Theatre and the Chhatrapati Shivaji Terminus railway station etc. that lasted for 60 hours killing and injuring hundreds of persons. A total of 162 persons were killed and 238 persons²⁴ were injured and property worth millions were destroyed.

While dismissing the appeal and upholding the death sentence awarded to Ajmal Amir Kasab by the Sessions' court *vide* its judgment dated 26 May 2010 and confirmed by the High Court of Bombay *vide* its judgment dated 21 February 2011. The Apex Court while dismissing the appeal held that since Kasab never showed any remorse for the large-scale murder committed by him, the possibility of question of any reform or rehabilitation of the terrorist accused is out of question. Kasab was executed in November 2012 in Pune Central Jail, Maharashtra.

[s 121.6] Rioting and waging war—Distinguished

Rioting is an offence against public tranquillity (peace) and defined in Chapter VIII under section 146 of the Code, whereas waging war falls under Chapter VI relating to offence against the State and discussed under *section 121, IPC*. In view of the peculiar nature of the offence of rioting and waging war, it becomes difficult at times to identify whether a war has been levied or waged against the state or merely a riot of a serious kind incited. However, there is a clear distinction between the two offences.

Rioting (or tumult) is merely to accomplish some private purpose of those engaged in it, and not to resist or call into question the Government's authority or prerogative; however large or outrageous the mob might be, their action is only a riot. On the other hand, when the rising or insurrection has for its object a general purpose, not confined to the particular views and interests of the persons, concerned in it, but common to the whole community, and strikes directly at the state's authority or that of Parliament, then it assumes the character of waging war (treason). The number and the manner in which persons are equipped or armed are not material.

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

An attack made on one police station would not amount to waging war against the state; unless there was an insurrection *prima facie*, the persons making such an attack would be guilty of rioting.

[s 121.7] Terrorism

In *Regina v Gul Mohammed*, (2012) EWCA Crimes 280, it was held that disseminating terrorist publications on uploaded videos showing attacks by insurgents on coalition forces in Iraq and Afghanistan—and attacks by those engaged in armed struggle against Government on internet is an act of terrorism.

The defendant, a British citizen born on 24 February 1998 in Libya uploaded onto the Internet videos glorifying and encouraging attacks on forces of Her Majesty then serving in Iraq and Afghanistan which showed attacks by insurgents on coalition forces in Iraq and Afghanistan. He was charged²⁵ with six counts of disseminating terrorist publications.¹ In 2008 and 2009 contrary to section 2(1) and (a) of the Terrorists Act, 2006 with intent to encourage the commission of acts of terrorism, contrary to section 2 of the Terrorists Act, 2006.²⁶ The defendant's case was that he believed that the insurgents were rightly resisting the invasion of their countries and that he was encouraging self-defence, not terrorism. After retiring to consider their verdicts, the jury asked the judge whether the attacks seen on the videos came within the definition of terrorism in section 1 of the Terrorism Act, 2000.²⁷ The judge told the jury that the attacks did come within that definition. The defendant was convicted on five of the six counts.

He applied for leave to appeal against conviction on the ground that the definition of terrorism in international law excluded those engaged in an armed struggle against a government who attacked the armed forces of that government. It was common ground on the appeal that the conflicts in Iraq and Afghanistan had been non-international armed conflicts at the relevant time and that the criminal liability of the insurgents was a matter of domestic law.

Dismissing the appeal, Court of Criminal Appeal held that on the face of section 2(1), (2) of the Terrorism Act, 2000, acts by insurgents against the armed forces of a state anywhere in the world which sought to influence a government and were made for political purposes fell within the definition of “terrorism”, and there was no exemption for those engaged in an armed struggle against a government.

¹ Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.

² Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.

³ Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.

⁴ See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.

⁵ See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.

⁶ Subs. by the A.O. 1950, for “Queen”.

⁷ Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

⁸ Subs. by Act 16 of 1921, section 2, for “and shall forfeit all his property”.

⁹ Subs. by Act 36 of 1957, section 3 and Sch II, for “*Illustrations*” (w.e.f. 17-9-1957).

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

- 10 The brackets and letter “(a)” omitted by Act 36 of 1957, section 3 and Sch II (w.e.f. 17-9-1957).
- 11 Subs. by the A.O. 1950, for “Queen”.
- 12 *Illustration* (b) omitted by the A.O. 1950.
- 13 Hari Singh Gour, *Penal Law of India*, 11th Edn, (2000), Vol II, pp 1183 to 1192. Bentham's *Constitutional Code*, vol X, BK I, Chapter VII, p 39.
- 14 Kenny's *Outlines of Criminal Law*, 19th Edn, (1966), section 400.
- 15 *Mir Hasan Khan v State of Bihar*, AIR 1951 Pat 60 (63-64).
- 16 (1781) 21 St. Tr. 486 : 99 ER 372.
- 17 *Aung Hla v Emperor*, AIR 1931 Rang 235 (237-238).
- 18 *Mohd Afzal and Shaukat Hussain Guru v State (NCT) National Capital Territory, Delhi & State (NCT of Delhi) v Navjot Sandhu and Syed Abdul Rehman Gilani*, AIR 2005 SC 3820 [[LNIND 2005 SC 580](#)] : 2005 Cr LJ 3950 : 2005 AIR SCW 4148 : 2005 (5) Supreme 414 ; P Venkatarama Reddi and PP Naolekar JJ.
- 19 *Prevention of Terrorism Act, 2002, sections 3(2), 3(3), 3(4), 3(5) and 4(b)* (now repealed). Section 3(2) POTA states “Whoever commits a terrorist act, shall—
 - (a) if such act has resulted in the death of any person, be punished with death or imprisonment for life and shall also be liable to fine.
- 20 *Section 121, IPC* Waging, or attempting to wage war, or abetting waging of war, against Government of India; section 121A conspiracy to commit offences punishable under *section 121, IPC*; *section 122, IPC* collecting arms, etc., with the intention of waging war against the Government of India; section 123 concealing with intent to facilitate design to wage war.
- 21 The *Explosive Substances Act, 1908 section 3* reads:

Punishment for causing explosion likely to endanger life or property.—Any person who unlawfully and maliciously causes by...

 - (b) any special category of explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with death, or rigorous imprisonment for life, and shall also be liable to fine.
- 22 See *Mohd Afzal and Shaukat Hussain Guru v State (NCT) National Capital Territory, Delhi & State (NCT of Delhi) v Navjot Sandhu and Syed Abdul Rehman Gilani*, AIR 2005 SC 3820 [[LNIND 2005 SC 580](#)] : 2005 Cr LJ 3950 : 2005 AIR SCW 4148 : 2005 (5) Supreme 414 .
- 23 Out of 166 persons killed, 140 were Indians, 5 Israelis, 2 British, 3 Germans, 2 Canadians, 1 Mauritius, 1 Belgium, 1 Malaysian, 1 Australian, 1 Thailand, 1 Singapore, 1 Mexican, 1 Italian, 2 French, 3 Americans and 1 Japanese.
- 24 Out of 238 injured 217 were Indians and 21 foreigners killing took place at 10 places, namely at Kuber (1), Central Station Terminal (CST) (52), Cama Inn (7), Cino Inn (9), Vinoli Chowpati (1), Vile Parle (2), Leopald Cafe (9), Mazgan (13) Hotel Taj (30) and Nariman House (4). In bracket number of persons killed are noted.

[s 121] Waging, or attempting to wage war, or abetting waging of war, against the Government of India.—

25 The videos posted by the defendant on YouTube and other websites in relation to the five counts on which he was convicted showed attacks by Al Qaeda, the Taliban and other proscribed (condemned, banned) groups on military targets, including those in Chechnya and coalition forces in Iraq and Afghanistan, the use of improvised explosive devices ("IEDs") against coalition forces, images of Osama Bin Laden, Al Zargawi and others, excerpts (passages) from "martyrdom videos" and symbols associated with proscribed organisations. There were also shown the 9/11 attack on New York and clips of attacks on civilians. Attacks on police were also included. The videos were accompanied by *nasheeds* (Islamic songs), praising, for example, the bravery of those carrying out the attacks and their martyrdom and encouraging such attacks.

26 Terrorism Act, 2006, section 2: "(1) A person commits an offence if he engages in conduct falling within sub-section (2) and, at time he does so—(a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;....(2) For the purposes of this section a person engages in conduct falling within this sub-section if he—(a) distributes or circulates a terrorist publication;....(e) transmits the contents of such a publication electronically;..."

Section 20: "(1) Expressions used in this Part and in the Terrorism Act, 2000 (C II) have the same meanings in this Part as in that Act. (2) in this Part—"act of terrorism" includes anything constructing an action taken for the purpose of terrorism, within the meaning of the Terrorism Act, 2000..."

27 Terrorism Act, 2006, section 2: "(1) A person commits an offence if he engages in conduct falling within sub-section (2) and, at time he does so—(a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism;....(2) For the purposes of this section a person engages in conduct falling within this sub-section if he—(a) distributes or circulates a terrorist publication;....(e) transmits the contents of such a publication electronically;..."

Section 20: "(1) Expressions used in this Part and in the Terrorism Act, 2000 (C II) have the same meanings in this Part as in that Act. (2) in this Part—"act of terrorism" includes anything constructing an action taken for the purpose of terrorism, within the meaning of the Terrorism Act, 2000..."

[[s 121A] Conspiracy to commit offences punishable by section 121.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VI OF OFFENCES AGAINST THE STATE

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

²⁸[[s 121A] Conspiracy to commit offences punishable by section 121.—

Whoever within or without ²⁹[India] conspires to commit any of the offences punishable by section 121, ³⁰[***]or conspires to overawe, by means of criminal force or the show of criminal force, ³¹[the Central Government or any ³²[State] Government ³³[***]], shall be punished with ³⁴[imprisonment for life], or with imprisonment of either description which may extend to ten years, ³⁵[and shall also be liable to fine].

Explanation.—To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.]

[s 121A.1] Conspiracy to wage war against Government.—Section 121A was inserted in the *Penal Code* by the *Indian Penal Code (Amendment) Act 27 of 1870, section 4*, in order to punish conspiracy punishable under section 121 of the Code. Thus, the conspiracy to wage war against and overawe by criminal force the Central Government or any State Government is punishable with imprisonment for life, or imprisonment of either description which may extend to 10 years and fine. The section is based on the English law of the Treason Felony Act, 1848, which provides punishment for treasonable combinations.³⁶

The section punishes two kinds of conspiracy. The first is a conspiracy to wage war against the Government of India, and the second is conspiracy to overawe by force the Central Government or State Government.

Under this section the agreement of two or more persons to wage war against the Government of India or any

[[s 121A] Conspiracy to commit offences punishable by section 121.—

State Governments is sufficient to hold the accused liable. No act or illegal omission is necessary for such a conspiracy. However, to convict a person under section 121A it must be proved that the accused (i) had entered into a conspiracy, and (ii) the conspiracy was to commit an offence punishable under *section 121, IPC*, or to overawe by criminal force, or show of criminal force the Central or State Government. Conspiracy to overawe by means of criminal force, or show of criminal force, the Central or any State Government clearly embraces not merely a conspiracy to raise a general insurrection, but also a conspiracy to overawe the Central Government or any provincial Government by the organisation of a serious riot and tumultuous unlawful assembly.

Jhabwala: In *SH Jhabwala v Emperor*, ILR (1933) 55 All 1040 ,³⁷ (*Meerut Conspiracy case*), the accused persons formed unions along the lines of Soviet Russian Unions and had allegiance with Soviet Russia. The accused were charged and convicted by the Sessions Court under *section 121A, IPC* with conspiracy to wage war against the Government of India. Allowing the appeal and setting aside the conviction, their Lordships of Allahabad High Court, held that conspiracy to change the form of the Government of India, or of any State Government, even though it may amount to an offence under any other section of the Code, would not be an offence under *section 121A, IPC*, unless it were conspiracy to overawe such Government by means of criminal force or show of criminal force.

- 1** Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870 (XXII of 1870)* section 4.
- 2** Section 124A was inserted by the *IPC (Amendment) Act, 1870 (XXII of 1870)* section 4.
- 3** Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4** See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5** See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 28** Ins. by Act 27 of 1870, section 4.
- 29** The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 30** The words “or to deprive the Queen of the sovereignty of the Provinces or of any part thereof” omitted by the A.O. 1950.
- 31** Subs. by the A.O. 1937, for “the Government of India or any Local Government”.
- 32** Subs. by the A.O. 1950, for “Provincial”.
- 33** The words “or the Government of Burma” omitted by the A.O. 1948.
- 34** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life or any shorter term” (w.e.f. 1-1-1956).
- 35** Ins. by Act 16 of 1921, section 3.
- 36** Treason which is a capital offence in England is contained in Treason Act, 1975. Section 1 provides that it is treason for any person to, “within the realm or without, compass, imagine, invent, devise or intend death or destruction or any bodily harm tending to death or destruction maim, mutilate or wounding, imprisonment or restraint, of the person of...the king.”
- 37** *Mir Hasan Khan v State of Bihar*, AIR 1951 Pat 60 .

[[s 121A] Conspiracy to commit offences punishable by section 121.—

End of Document

[s 122] Collecting arms, etc., with intention of waging war against the Government of India.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VI OF OFFENCES AGAINST THE STATE

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 122] Collecting arms, etc., with intention of waging war against the Government of India.—

Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the ³⁸[Government of India], shall be punished with ³⁹[imprisonment for life] or imprisonment of either description for a term not exceeding ten years, ⁴⁰[and shall also be liable to fine].

[s 122.1] Collecting arms to wage war.—This section makes the very act of preparation to wage war against the Government of India punishable owing to the gravity and seriousness of the nature of the offence in contemplation to overawe by force the Central or State Governments established by law. Thus, the act of collecting men, ammunitions or to make other preparation with an intention to wage war against the Government of India or on territories of States at peace with India are punishable under *sections 122 and 124, IPC*.⁴¹ These are exceptions to the general rule that preparation to commit an offence is not punishable in law. The punishment may extend up to imprisonment for life, or imprisonment of either description for a term not exceeding 10 years, and fine.

[s 122] Collecting arms, etc., with intention of waging war against the Government of India.—

- 1** Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.
- 2** Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.
- 3** Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4** See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5** See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 38** Subs. by the A.O. 1950, for “Queen”.
- 39** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).
- 40** Ins. by Act 16 of 1921, section 3.
- 41** *Section 399, IPC* punishes preparation to commit dacoity.

End of Document

[s 123] Concealing with intent to facilitate design to wage war.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 123] Concealing with intent to facilitate design to wage war.—

Whoever by any act, or by any illegal omission, conceals the existence of a design to wage war against the ⁴²[Government of India], intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[s 123.1] Collecting arms to wage war

This section makes the very act of preparation to wage war against the Government of India punishable owing to the gravity and seriousness of the nature of the offence in contemplation to overawe by force the Central or State Governments established by law. Thus, the act of collecting men, ammunitions or to make other preparation with an intention to wage war against the Government of India or on territories of States at peace with India are punishable under *sections 122 and 124, IPC*.⁴³ These are exceptions to the general rule that preparation to commit an offence is not punishable in law. The punishment may extend up to imprisonment for life, or imprisonment of either description for a term not exceeding 10 years, and fine.

The object of the section is to ensure that the information should not be withheld from the police who are to take proper steps for the suppression of such crimes or to bring the offender to book.⁴⁴ However, the liability under this section is not absolute but is subject to the following conditions, viz., (i) there must be a design to wage war

[s 123] Concealing with intent to facilitate design to wage war.—

against the Government of India, (ii) the accused must have knowledge of such design, (iii) the accused must have concealed the existence of such design, and (iv) the accused must thereby have intended to facilitate the waging of such war, or knew that it was likely that such concealment would facilitate the same.

[s 123.2] Duty to Inform the Public about the Design to Wage War against the Government of India.

Shaukat Hussain Guru: In *Shaukat Hussain Guru v State (NCT) National Capital Territory, Delhi*⁴⁵ (2008), the Supreme Court held that *section 39, CrPC* casts a duty on every person aware of the commission of, or of the intention of any other person to commit any offence punishable under *sections 121 to 126, IPC*, to forthwith inform to the nearest Magistrate or police officer of such commission or intention unless there is a reasonable excuse for not doing so. A person charged for a higher offence and on the evidence if the court finds that the accused has committed a lesser offence, then he can be convicted of the lesser offence, even if not charged for a lesser offence.

Aggrieved by the dismissal of the review petition, against his conviction on 22 September 2005,⁴⁶ the petitioner Shaukat Hussain filed a curative petition before the Supreme Court on the ground that the petitioner had not been charged under *section 123, IPC* but has been convicted under that offence depriving him of an opportunity to prove the defence available under *section 39(1) of the Code of Criminal Procedure, 1973*. The petitioner further pleaded that his conviction under *section 123, IPC* is not only without jurisdiction, but was in total contravention of the principle of natural justice.

Dismissing the curative petition, a Bench of four judges on 12 January 2007 held that:

The fact that there was no charge against him (the petitioner) under this particular section does not in any way, result in prejudice to him because the charge of waging war and other allied offences are the subject matter of charges. We are of the view that that the accused Shaukat is not in any way handicapped by the absence of charge under *section 123 IPC*. The case which he had to meet under *section 123* is no different from the case relating to the major charges which he was confronted with. In the face of the stand he had taken and his conduct even after the attack, he could not have pleaded reasonable excuse for not passing on the information. Viewed from any angle, the evidence on record justifies his conviction under *section 123, IPC*.

The accused Shaukat having known about the plans of Afzal⁴⁷ in collaboration with terrorists, he refrained from informing the police or Magistrate intending thereby or knowing it to be likely that such concealment on his part will facilitate the waging of war. It is in this context, it is relevant to refer to *section 39, CrPC*.

Thus, by his illegal omission to apprise the police or Magistrate of the design of Afzal and other conspirators to attack Parliament which is an act of waging war against the Government of India, the appellant Shaukat has made himself liable for punishment for the lesser offence under *section 123, IPC*.

¹ Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870 (XXII of 1870)* section 4.

² Section 124A was inserted by the *IPC (Amendment) Act, 1870 (XXII of 1870)* section 4.

[s 123] Concealing with intent to facilitate design to wage war.—

- 3 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4 See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 42 Subs. by the A.O. 1950, for “Queen”.
- 43 Section 39(1)(i) CrPC, 1973 states: sections 121 to 126, both inclusive and section 130 (that is to say offences against the State specified in Chapter VI of the *Indian Penal Code*.”
- 44 *Ram Balak v State of Bihar*, AIR 1964 Pat 62 .
- 45 AIR 2008 SC 2419 : 2008 Cr LJ 3016 : 2008 AIR SCW 3688 : (2008) 6 SCC 776 . PP Naolekar and VS Sirpukar JJ; See *Nazir Khan v State of Delhi*, (2003) 8 SCC 461 [[LNIND 2003 SC 696](#)] : AIR 2003 SC 4427 [[LNIND 2003 SC 696](#)] : 2003 Cr LJ 5021 : 2003 AIR SCW 5068.
- 46 *State (NCT of Delhi) v Navjot Sandhu @ Afsan Guru*, AIR 2005 SC 3820 [[LNIND 2005 SC 580](#)] : 2005 Cr LJ 3950 : 2005 AIR SCW 4148 : 2005 (6) SCJ 210 . See under section 121, IPC commenting.
- 47 The appellant Shaukat had the knowledge of conspiracy and the plans to attack the Parliament House. His close association with Afzal during the crucial period, his visits to the hide-outs to meet Afzal, which implies awareness of the activities of Afzal, the last minute contacts between him and Afzal and their immediate departure to Srinagar in Shaukat's truck with the incriminating laptop and phone held by Afzal would certainly give rise to a high degree of probability of knowledge on the part of Shaukat that his cousin had come with others to attack Parliament and to indulge in the terrorists acts. He was aware of what was going on and he used to extend help to Afzal whenever necessary.

[s 124] Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 124] Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.—

Whoever, with the intention of inducing or compelling the ⁴⁸[President] of India, or the ⁴⁹[Governor ⁵⁰[***]] of any ⁵¹[State], ⁵²[***] ⁵³[***] ⁵⁴[***] to exercise or refrain from exercising in any manner any of the lawful powers of such ⁵⁵[President] or ⁵⁶[Governor ⁵⁷[***]],

assault or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such ⁵⁸[President or ⁵⁹[Governor ⁶⁰[***]]],

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[s 124.1] Assaulting President, Governor, etc.

This section is an extension of the second clause of *section 121A, IPC*, which makes conspiracy, to overawe by means of criminal force or show of criminal force Government of India or any state Government, punishable. It makes assault or wrongful restraint committed on the President of India or Governor of any State, who are the highest executive officers of the Government, an offence. The section provides for a deterrent punishment of

[s 124] Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power.—

imprisonment of either description which may extend to 7 years with fine. The provision is based on the principle that the high officers of the State who are required to run the administration of the Government should be free from the fear of personal harm and injury while discharging their legal duties. However, the protection is not absolute. It extends only so long as they discharge their official functions.

- 1 Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.
- 2 Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.
- 3 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4 See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 48 Subs. by the A.O. 1950, for "Governor General".
- 49 Subs. by Act 3 of 1951, section 3 and Schedule, for "Governor" (w.e.f. 1-4-1951).
- 50 The words "or Rajpramukh" omitted by the A.O. (No. 2) 1956.
- 51 Subs. by the A.O. 1950, for "Province". Earlier the word "Province" was substituted by the A.O. 1937, for the word "Presidency".
- 52 The words "or a Lieutenant-Governor" omitted by the A.O. 1937.
- 53 The words "or a Member of the Council of the Governor General of India" omitted by the A.O. 1948.
- 54 The words "or of the Council of any Presidency" omitted by the A.O. 1937.
- 55 The words "Governor General, Governor, Lieutenant-Governor or Member of Council" have successfully been amended by the A.O. 1937, the A.O. 1948 and the A.O. 1950 to read as above.
- 56 The words "Her Majesty or" omitted by the A.O. 1950. The words "or the Crown Representative" ins. after the word "Majesty" by the A.O. 1937 were omitted by the A.O. 1948.
- 57 The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 58 Subs. by Act 4 of 1898, section 4, for section 124A. Earlier section 124A was inserted by Act 27 of 1870, section 5.
- 59 The words "Her Majesty or" omitted by the A.O. 1950. The words "or the Crown Representative" ins. after the word "Majesty" by the A.O. 1937 were omitted by the A.O. 1948.
- 60 The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.

[[s 124A] Sedition.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

⁶¹**[[s 124A] 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, ⁶²[***] the Government established by law in ⁶³[India], ⁶⁴[***] shall be punished with ⁶⁵[imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1 .—The expression “disaffection” includes disloyalty and all feelings of enmity.

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

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

[s 124A.1] Introduction

The law of sedition in India has assumed controversial importance largely because of change in body politic,

[[s 124A] Sedition.—

and specially because of constitutional provision of freedom of speech and expression guaranteed as a fundamental right under *Article 19(1)(a) of the Constitution*. The law of sedition is contained in *sections 124A, IPC and 153A, IPC* and in other Statutes.⁶⁶ However, the general statement of law is similar in all the provisions and can be well understood from looking at the provisions given in *section 124A, IPC*.

Section 124A defines the offence of sedition. The section has had a chequered career and a historical genesis would reveal the various vicissitudes (changes) it has undergone through legislative amendments and judicial interpretation.

The offence of sedition corresponding to section 124A was originally section 113 of Macaulay's Draft *Penal Code*, 1837, but for some unaccountable reasons it was omitted from the *Penal Code*. However, the need for such a law was felt shortly after the *Penal Code* came into operation and in 1870 on the suggestion of Sir James Stephen, the then law member of the Government of India, section 124A was added in the Code by the *Indian Penal Code (Amendment) Act, 1870*,⁶⁷ which ran as follows:

124A. Exciting disaffection.—Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority, of the Government, against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the methods of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.

The above provision was later replaced by the present section 124A by the *IPC Amendment Act of 1898*.⁶⁸ Some minor changes of inconsequential character were made in 1937, 1948, 1950 and by the *Part B States (Law) Act, 1951* respectively.

The provision of the law of sedition is based on the principle that every state, whatever its form of Government, has to be armed with the power to punish those who by their conduct jeopardise the safety and stability of the state, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the state or to public disorder.⁶⁹ The very existence of the state will be in jeopardy, if the Government established by law is subverted. Hence, the continued existence of the Government established by law is an essential condition for the stability of the state. That is why "sedition", as an offence in section 124A, has been placed under Chapter VI relating to offences against the state.

[s 124A.2] Sedition: Meaning

Sedition is nothing but libel (defamation) of the established authority of law, i.e., Government. Hence, it is called seditious libel in England. Sedition in the ordinary sense means a stirring up of rebellion against the Government.⁷⁰ However, in law it has a technical meaning and includes all those acts and practices which have for their object to excite discontent or dissatisfaction towards the *Constitution*, or the Government, or Parliament to create public disturbance, or to lead to civil war, and generally all endeavours to promote public discord and disorder.⁷¹ In other words, sedition is used to designate those activities of a man whether by words, or deeds or writings, which are calculated to disturb the tranquillity of the state and lead people to subvert the Government established by law. Thus, sedition is a crime against society nearly allied to that of treason, and it frequently precedes treason by a short interval. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the Government and to bring the administration of justice into contempt, and the very

[[s 124A] Sedition.—

tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war, to bring into hatred or contempt the Sovereign or the Government, the laws or *Constitution* of the realm and generally all endeavours to promote public disorder.⁷²

[s 124A.3] Types of sedition

Stephen has defined sedition, as applicable under English law, as a conduct which has, either as its object, or as its natural consequence, the unlawful display of dissatisfaction with the Government or with the existing order of society. The seditious conduct may be by words, by deed, or by writing. Five specific heads of sedition may be enumerated according to the object of the accused:—

- (1) To excite disaffection against the King, Government, or *Constitution*, or against Parliament or the administration of justice;
- (2) To promote, by unlawful means, any alteration in Church or State;
- (3) To incite a disturbance of the peace;
- (4) To raise discontent among the King's subjects; and
- (5) To excite class hatred.⁷³

But criticism of political matters is not of itself seditious. The test is the manner in which it is done. Candid and honest discussion is permitted. The law only interferes when the discussion passes the bounds of fair and honest criticism against the Government.

[s 124A.4] Ingredients of sedition

Section 124A, IPC defines the offence of sedition and prescribes punishment for sedition which may extend up to imprisonment for life, and fine, or imprisonment up to 3 years and fine.

The word sedition does not occur in the body of the section. It finds place only as a marginal note to the section which is not an operative part of the section, but simply states the name by which the offence defined in the section is known.⁷⁴

The following are the essential ingredients of the section, viz.,

- (1) Bringing or attempting to bring into hatred; or
- (2) Exciting or attempting to excite disaffection against the Government of India;
- (3) Such act or attempt may be done (a) by words, either spoken or written, or (b) by signs, or (c) by visible representation; and
- (4) The act must be intentional.

Explanation 1 to the section sets out the scope of disaffection and *Explanations 2 and 3* state what is not considered seditious intention as indicated under English law. That is to say, criticism of Government measures and administrative and other actions of the Government, if done without exciting or attempting to excite hatred, contempt or disaffection towards the Government established by law, is not sedition.

The section places absolutely on the same footing the successful excitation of disaffection and the unsuccessful attempt to excitation. The offence consists in making use of any means for the purpose of bringing the Government into hatred or contempt.

[s 124A.5] “Hatred” or “contempt”

Hatred implies an ill-will, while contempt implies a low opinion. In other words, hatred and contempt are the state of mind in relation to the object. The hatred and contempt in order to be punishable under this section must relate to the hatred and contempt of the state, or of the established form of Government. Hatred and contempt towards the Government may be created by writing, imputing to the Government base, dishonourable, contemptuous, malicious motives in the discharge of its duties or by writing that unjustly accuses the Government of hostility or indifference to the welfare of the people.⁷⁵

An attack on imperialism as a system or a school of opinion without reference to persons involves no incitement to hatred or contempt of those who are in the system or hold the opinion. There must be a direct and immediate object of incitement to violence and the mere talk of armed revolution in Russia or even in India in theoretical terms and the verbal demand for a national Government and a national army to resist, say, Japanese aggression, is anything but an incitement to violence.

A speech which brings the Government into hatred and contempt cannot be considered innocuous because it could increase the level of hatred and contempt that already is existing in the minds of the people to whom it is addressed. Further, it is quite possible by the abuse of Government officials to make an endeavour to bring into hatred or contempt the Government established by law in India.⁷⁶

The accused in the course of a speech delivered to the tenants of a certain *taluka* (village) made an attack on its landlords, money lenders and the Government, saying that the landlords and money lenders of that *taluka* were oppressing the peasants, that the Government was behind the landlords and money lenders, and that they could not get rid of the money-lenders and landlords unless they got rid of the Government. It was held that the accused was guilty of sedition as the effect of his speech was to suggest that the Government was not looking after the interests of the peasants, but was supporting those who oppressed them, which brought the Government established by law in India into hatred or contempt and excited disaffection towards that Government.

[s 124A.6] Disaffection: Meaning

Explanation 1 to section 124A, IPC does not define the word “disaffection”, but simply states that disaffection includes disloyalty and all feelings of enmity. This is an important word and its exact meaning has to be understood in order to designate a particular act as seditious and punishable under this section.

The expression disaffection may be defined as primarily meaning the contrary to affection, and it goes very much towards expressing the same as hatred or dislike. It may cover something, perhaps a little different from the expression hatred, because it includes disloyalty. To urge people to rise against the Government is tantamount to trying to excite feelings of disloyalty in their minds. Feelings of enmity include ill will, hostility, feelings of dislike amounting to enmity, and anything of a similar class or character, which can be demonstrated under the expression disloyalty and feeling of enmity.⁷⁷

The courts have interpreted the word, “disaffection”⁷⁸ widely as stated below:

1. Disaffection means a feeling contrary to affection, in other words, dislike or hatred.
2. It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. Disloyalty is perhaps the general term, including every possible form of bad feeling towards the Government.
3. It signifies political alienation or discontent, that is to say, a feeling of disloyalty to the Government or existing power, which tends to dispose a person not to obey, but rather to resist and attempt to subvert that Government or power. It cannot be construed to mean an absence of, or the contrary of affection, or love, that is to say, dislike or hatred.
4. It is a positive political distemper, and not a mere absence or negation of love or goodwill. It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity towards the Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, makes men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder.⁷⁹
5. It means “disloyalty”. Anyone who excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in India, excites or attempts to excite, feelings of disaffection.⁸⁰
6. Disaffection is a feeling, and not the want of a feeling. It is not the absence of affection. It is not indifference, but a positive emotion, not necessarily prompting to action, but with a tendency to influence conduct just as all our feelings do. It is not necessarily limited to “feelings of enmity”. It is intended to express a feeling which can only exist between the ruler and the ruled. Feelings of personal affection in such a connection are not demanded but only such feelings as the relation of the subject to the Government necessarily implies. This relation implies the recognition, on the part of the ruled, of the Government as a Government. The ruler must be accepted as a ruler, and disaffection, which is the opposite of that feeling, is the repudiation of that spirit of acceptance of a particular Government as ruler.⁸¹

In other words, the expression “disaffection” signifies political alienation or discontent. That is to say, a feeling of disloyalty to the Government of existing power, which tends to a disposition not to obey but to resist and attempt to subvert the Government or power.⁸² Disaffection etymologically denotes the negation of affection, goodwill, or credibility, i.e., the loss of regard, positivity towards, or belief, faith, trust in those attributes of a person, organisation or object once thought to be genuine but subsequently suspected to be false. But negation of a positive emotion does not signal its replacement *ipso facto* with another of a negative nature. To say “I no longer love you” can in no way be equated with “I hate you”. Thus, disaffection with the Government signifies loss of faith, belief, or confidence in its genuinity. Thus, a state of “limbo”, of suspended emotion. Thus, state veers to a negative emotion when the Government in question takes no steps to re-engage confidence in its credibility. Thus, disloyalty or a predisposition not to obey the rules set forth by the Government replaces disaffection, and this predisposition leads further to resistance to the Government and eventually attempt to subvert the Government, when it fails to check the evolution of emotional negativity by positive steps to reinstate affection or credulity. The section uses the term “disaffection” therefore as a collective noun embracing all its potential negative end results.

Jogendra Chunder Bose: In the case of *QE v Jogendra Chunder Bose*, (1891) 19 ILR Cal 35 (44), (*Bengabasi case*), Sir Comer Patheram CJ, has very elaborately explained the meaning of the word disaffection in the following words:—

[[s 124A] Sedition.—

Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of man's sentiments or action and yet to like him. The meaning of the two words is... distinct... If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. 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 the intention to create such feeling.

[s 124A.7] Conflicting judicial approach to the interpretation of section 124A

An examination of the judgments of the courts of law would reveal that judicial thinking with regard to the meaning and scope of section 124A has proceeded along two lines. According to one view, the statutory offence of sedition in India is different from the common law offence of sedition inasmuch as it seeks to punish all types of bad feelings, and unlike English law that fails to prescribe what has been described as an external standard for the purposes of measuring the nature and quality of bad feelings. It punishes not only any positive expression of dissatisfaction, but all subjective feelings of enmity in oneself and attempts to cause disloyalty or enmity in others also.

The view that exciting or attempting to excite a feeling of disaffection, hatred or contempt is punishable *per se* as such, irrespective of whether or not disorder follows or is likely to follow has been dominant in our legal system.

Balgangadhar Tilak: In the celebrated case of *QE v Bal Gangadhar Tilak*,⁸³ Strachey J, while delivering the judgment of the court observed that the amount or intensity of the disaffection is absolutely material. If a man excites or attempts to excite feelings of disaffection great or small, he is guilty under this section. He further observed that—

The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A and would probably fall within other sections of the *Penal Code*. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section.⁸⁴

Niharendu Majumdar: The other view finds its expression in the words of Sir Maurice Gwyer CJ, in *Niharendu Majumdar's* case, arising under rule 34(6)(e) of the Defence of India Rules and the Defence of India Act of 1939, which was in *pari materia* with section 124A of the *Indian Penal Code*. This view marks a departure from the strict rule of construction inasmuch as it attempts to bring the offence of sedition in line with the English law on the question. Gwyer CJ, speaking for the Federal Court observed that:—

The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilisation and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation

[[s 124A] Sedition.—

because some on whom the duty rests have performed it ill. It is to this aspect of the functions of Government that in our opinion the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it... seek to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek, as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Government, but because where Government and the law cease to be obeyed, because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is Thus, the gist of the offence. The acts of words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency.⁸⁵

The liberal interpretation of the provisions of *section 124A of the Penal Code* in *Niharendu Majumdar* brought the Indian law of sedition at par with its counterpart in English law. Thus, public disorder or reasonable anticipation or likelihood of public disorder was held to be the gist of the offence. This view of the law of sedition was also taken by Bombay,⁸⁶ Calcutta,⁸⁷ Allahabad⁸⁸ and Lahore High Courts.⁸⁹

However, the binding effect of the rule in *Niharandu Majumdar's* case was nullified by a subsequent decision of the Privy Council in *KE v Sadashiv Narayan's*, AIR 1947 PC 48 : 74 Ind App 89,⁹⁰ in which the observations of Stachery J, in *Tilak's* case regarding the scope of section 124A were approved, having indicated the correct law on the question of sedition. The same rule continues to be in operation today.

Mohandas Karamchand Gandhi: *Mohandas Karamchand Gandhi*,⁹¹ being the editor of the paper “Young India” and Shri Shankarlal Ghelabhai Sanker, printer and publisher were charged on 11 March 1922 by LN Brown, Additional District Magistrate, Ahmedabad under *section 124A, IPC*, for bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards His Majesty’s Government established by law in British India, by means of the written words contained in the articles “Tampering with Loyalty”⁹² (29 September 1921), “The Puzzle and its Solution”⁹³ (15 December 1921), and “Shaking the Manes”⁹⁴ (lion) (23 February 1922) published at Ahmedabad as contained in the appendix.

The words “hatred” or “contempt” are words of which the meaning is sufficiently obvious. The word “disaffection” is defined in the section includes disloyalty and all feeling of enmity and the word as used in the section means political alienation or discontent – a spirit of disloyalty to the Government is equivalent to an attempt to excite-political hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance.

Guilty Pleaded: Gandhiji instead of contesting the charge pleaded guilty. In his written statement, he explained the reasons that compelled him to promote “disaffection” towards the Government established by law in British India.

Written Statement: The written statement submitted by Gandhiji gives in brief an account of the state of affairs prevailing in India during the British rule that prompted him to undertake such steps is printed below:

I owe it perhaps to the Indian public and to the public in England, to explain why from a staunch loyalist and cooperator, I have become an uncompromising dis-affectionist and noncooperator. To the court too I should say why I plead guilty to the charge of promoting disaffection towards the Government established by law in India.

My public life began in 1893 in South Africa in troubled weather. My first contact with British authority in that country was not of a happy character. I discovered that as a man and an Indian, I had no rights because I was an Indian. But I

[[s 124A] Sedition.—

was not baffled (confused). I thought that this treatment of Indians was an excrescence (strong experience) upon a system that was intrinsically and mainly good. I gave the Government my voluntary and hearty cooperation, criticizing it freely where I felt it was faulty but never wishing its destruction.

Consequently when the existence of the Empire was threatened in 1899 by the Boer challenge, I offered my services to it, raised a volunteer ambulance corps and served at several actions that took place for the relief of Ladysmith. Similarly, in 1906, at the time of the "Zulu" revolt, I raised a stretcher bearer party and served till the end of the "rebellion". On both the occasions I received medals and was even mentioned in dispatches. For my work in South Africa I was given by Lord Hardinge a *Kaisar-i-Hind* gold medal. When the war broke out in 1914 between England and Germany, I raised a volunteer ambulance corps in London, consisting of the then-resident Indians in London, chiefly students. Its work was acknowledged by the authorities to be valuable. *Lastly*, in India when a special appeal was made at the War Conference in Delhi in 1918 by Lord Chelmsford for recruits, I struggled at the cost of my health to raise a corps in Kheda, and the response was being made when the hostilities ceased and orders were received that no more recruits were wanted. In all these efforts at service, I was actuated by the belief that it was possible by such services to gain a status of full equality in the Empire for my countrymen.

The first shock came in the shape of the Rowlatt Act – a law designed to rob the people of all real freedom. I felt called upon to lead an intensive agitation against it. Then followed the Punjab horrors beginning with the massacre at Jallianwala Bagh and culminating in crawling orders, public flogging and other indescribable humiliations. I discovered too that the plighted word of the Prime Minister to the Mussalmans of India regarding the integrity of Turkey and the holy places of Islam was not likely to be fulfilled. But in spite of the forebodings and the grave warnings of friends, at the Amritsar Congress in 1919, I fought for cooperation and working of the Montagu-Chelmsford reforms, hoping that the Prime Minister would redeem his promise to the Indian Mussalmans, that the Punjab wound would be healed, and that the reforms, inadequate and unsatisfactory though they were, marked a new era of hope in the life of India.

But all that hope was shattered. The *Khilafat* promise was not to be redeemed. The Punjab crime was whitewashed and most culprits went not only unpunished but remained in service, and some continued to draw pensions from the Indian revenue and in some cases were even rewarded. I saw too that not only did the reforms not mark a change of heart, but they were only a method of further robbing India of her wealth and of prolonging her servitude.

I came reluctantly to the conclusion that the British connection had made India more helpless than she ever was before, politically and economically. A disarmed India has no power of resistance against any aggressor if she wanted to engage in an armed conflict with him. So much is this the case that some of our best men consider that India must take generations before she can achieve Dominion Status. She has become so poor that she has little power of resisting famines. Before the British advent, India spun and wove in her millions of cottages, just the supplement she needed for adding to her meagre agricultural resources. This cottage industry, so vital for India's existence, has been ruined by incredibly heartless and inhuman processes as described by English witnesses. Little do town dwellers know how the semi-starved masses of India are slowly sinking to lifelessness. Little do they know that their miserable comfort represents the brokerage they get for their work they do for the foreign exploiter, that the profits and the brokerage are sucked from the masses. Little do they realise that the Government established by law in British India is carried on for this exploitation of the masses. No sophistry, no jugglery in figures, can explain away the evidence that the skeletons in many villages present to the naked eye. I have no doubt whatsoever that both England and the town-dweller of India will have to answer, if there is a God above, for this crime against humanity, which is perhaps unequalled in history. The law itself in this country has been used to serve the foreign exploiter. My unbiased examination of the Punjab Martial Law cases has led me to believe that at least ninety-five per cent of convictions were wholly bad. My experience of political cases in India leads me to the conclusion, in nine out of every ten, the condemned men were totally innocent. Their crime consisted in the love of their country. In ninety-nine cases out of hundred, justice has been denied to Indians as against Europeans in the courts of India. This is not an exaggerated picture. It is the experience of almost every Indian who has had anything to do with such cases. In my opinion, the administration of the law is prostituted, consciously or unconsciously, for the benefit of the exploiter.

The greatest misfortune is that the Englishmen and their Indian associates in the administration of the country do not

[[s 124A] Sedition.—

know that they are engaged in the crime I have attempted to describe. I am satisfied that many Englishmen and Indian officials honestly believe that they are administering one of the best systems devised in the world and that India is making steady though slow progress. They do not know that a subtle but effective system of terrorism and an organised display of force on the one hand, and the deprivation of all powers of retaliation or self-defence on the other, has emasculated the people and induced in them the habit of simulation. This awful habit has added to the ignorance and the self-deception of the administrators.

Section 124A, under which I am happily charged, is perhaps the prince among the political sections of the *Indian Penal Code* designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by law. If one has no affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote, or incite to violence. But the section under which mere promotion of disaffection is a crime: I have studied some of the cases tried under it; I know that some of the most loved of India's patriots have been convicted under it. I consider it a privilege, therefore, to be charged under that section. I have endeavoured to give in their briefest outline the reasons for my disaffection. I have no personal illwill against any single administrator, much less can I have any disaffection towards the King's person.

But I hold it to be a virtue to be disaffected towards a Government which in its totality has done more harm to India than any previous system. India is less manly under the British rule than she ever was before. Holding such a belief, I consider it to be a sin to have affection for the system. And it has been a precious privilege for me to be able to write what I have in the various articles tendered in evidence against me.

In fact, I believe that I have rendered a service to India and England by showing in non-cooperation, the way out of the unnatural state in which both are living. In my opinion, non-cooperation with evil is as much a duty as is cooperation with good. But in the past, noncooperation has been deliberately expressed in violence to the evil-doer. I am endeavouring to show to my countrymen that violent noncooperation only multiplies evil; and that as evil can only be sustained by violence, withdrawal of support of evil requires complete abstention from violence. Nonviolence implies voluntary submission to the penalty for noncooperation with evil.

I am here, therefore, to invite and submit cheerfully to the highest penalty that can be inflicted upon me for what in law is deliberate crime, and what appears to me to be the highest duty of a citizen. The only course open to you, the Judge and the assessors, is either to resign from your posts and thus, dissociate yourselves from evil, if you feel that the law you are called upon to administer is an evil, and that in reality I am innocent, or to inflict on me the severest penalty, if you believe that the system and the law you are assisting to administer are good for the people of this country, and that my activity is, therefore, injurious to the common weal (well-being).

LN Brown, ADM Ahmedabad – 18 March 1922

It would be of interest to give the full text of the judgment delivered by the Sessions Judge in open Court at Ahmedabad.

Mr Gandhi, you have made my task easy in one way by pleading guilty to the charge. Nevertheless what remains, namely, the determination of a just sentence, is perhaps as difficult a proposition as a judge in this country could have to face. The law is no respecter of persons. Nevertheless, it will be impossible to ignore the fact that, in the eyes of millions of your countrymen, you are a great patriot and a great leader. Even those who differ from you in politics look upon you as a man of high ideals and of noble and of even saintly life. I have to deal with you in one character only. It is not my duty and I do not presume to judge or criticise you in any other charter.

It is my duty to judge you as a man subject to the law, who has by his own admission broken the law and committed what to an ordinary man must appear to be grave offences against the state. I do not forget that you have constantly preached against violence and that you have on many occasions, as I am willing to believe, done much to prevent violence, but having regard to the nature of your political teachings and the nature of many of those to whom it is addressed, how you could have continued to believe that violence and anarchy would not be the inevitable consequence, it passes my capacity to understand.

There are probably few people in India who do not sincerely regret that you should have made it impossible for any Government to leave you at liberty. But it is so. I am trying to balance what is due to you against what appears to me to be necessary in the interests of the public, and I propose, in passing sentence, to follow the precedent of a case, in many respects similar to this case, that was decided some 12 years ago against Mr Bal Gangadhar Tilak under *section 124A, IPC*. The sentence that was passed upon him as it finally stood was a sentence of simple imprisonment for 6 years. You will not consider it unreasonable, I think, that you should be classed with Mr Tilak, and that is the sentence, 2 years' simple imprisonment on each count of the three charges, i.e., 6 years in all, which I feel it my duty to pass upon you and I should like to say in doing so that, if the course of events in India should make it possible for the Government to reduce the period and release you, no one will be better pleased than I.

Gandhiji was accordingly sentenced to 6 years of simple imprisonment for sedition under *section 124A IPC* and was kept in Poona Jail.

Remission of sentence: After almost a year of Gandhiji serving in Poona jail the Governor of the then Bombay Presidency on 4 February 1924 in exercise of the powers conferred by section 401, of the *Code of Criminal Procedure, 1898*⁹⁵ remitted the unexpired portion of the 6 years of simple imprisonment passed upon Mohandas Karamchand Gandhi by the Sessions Court of Ahmedabad.

Text of three articles published in “Young India” that was considered Seditious under *section 124A, IPC* formed the charge against Gandhiji.

Article I

A PUZZLE AND ITS SOLUTION⁹⁶

Lord Reading is puzzled and perplexed. Speaking in reply to the addresses from the British Indian Association and the Bengal National Chamber of Commerce at Calcutta, His Excellency said:

I confess that when I contemplate the activities of a section of the community, I find myself still, notwithstanding persistent study ever since I have been in India, puzzled and perplexed. I ask myself what purpose is served by flagrant breaches of the law for the purpose of challenging the Government and in order to compel arrest.

The answer was partly given by Pandit Motilal Nehru when he said on being arrested that he was being taken to the house of freedom. We seek arrest because the so-called freedom is slavery. We are challenging the might of this Government because we consider its activity to be wholly evil. We want to overthrow the Government. We want to compel its submission to the people's Will. We desire to show that the Government exists to serve the people, not the people to serve the Government. Free life under the Government has become intolerable, for the price exacted for the retention of freedom is unconscionably great. Whether, we are

[[s 124A] Sedition.—

one or many, we must refuse to purchase freedom at the cost of our self-respect or our cherished convictions. I have known even little children become unbending when an attempt has been made to cross their declared purpose, be it ever so flimsy in the estimation of their parents.

Lord Reading must clearly understand that the noncooperators are at war with the Government. They have declared rebellion against it inasmuch as it has committed a breach of faith with the Mussalmans, it has humiliated the Punjab and it insists upon imposing its Will upon the people and refuses to repair the breach and repent of the wrong done in the Punjab.

There were two ways open to the people, the way of armed rebellion and the way of peaceful revolt. Non-cooperators have chosen, some out of weakness, some out of strength, the way of peace, i.e., voluntary suffering.

If the people are behind the sufferers, the Government must yield or be overthrown. If the people are not with them they have at least the satisfaction of not having sold their freedom. In an armed conflict, the more violent is generally the victor. The way of peace and suffering is the quickest method of cultivating public opinion, and, therefore, when victory is attained, it is for what the world regards as Truth. Bred (developed) in the atmosphere of law-courts, Lord Reading finds it difficult to appreciate the peaceful resistance to authority. His Excellency will learn by the time the conflict is over that there is a higher court than courts of justice, and that is the court of conscience. It supersedes all other courts.

Lord Reading is welcome to treat all the sufferers as lunatics, who do not know their own interest. He is entitled, therefore, to put them out of harm's way. It is an arrangement that entirely suits the lunatics and it is an ideal situation if it also suits the Government. He will have cause to complain if, having courted imprisonment, noncooperators "fret and fume" or "whine for favours" as Lalaji puts it. The strength of a noncooperator lies in his going to jail uncomplainingly. He loses his case if, having courted imprisonment, he begins to grumble, immediately his courtship is rewarded. The threats used by His Excellency are unbecoming. This is a fight to the finish. It is a conflict between the reign of violence and of public opinion. Those who are fighting for the latter are determined to submit to any violence rather than surrender their opinion.

Article II

TAMPERING WITH LOYALTY⁹⁷

His Excellency the Governor of Bombay had warned the public some time ago, that he "meant businesses", that he was no longer going to tolerate the speeches that were being made. In his note on the Ali Brothers and others he has made clear his meaning. The Ali Brothers are to be charged with having tampered with the loyalty of the sepoy and with having uttered sedition. I must confess, that I was not prepared for the revelation of such hopeless ignorance on the part of the Governor of Bombay. It is evident that he has not followed the course of Indian history during the past twelve months. He evidently does not know, that the National Congress began to tamper with the loyalty of the sepoy in September last year, that the Central Khilafat Committee began it earlier and that I began it earlier still, for I must be permitted to take the credit or the odium of suggesting, that India had a right openly to tell the sepoy and everyone who served the Government in any capacity whatsoever, that he participated in the wrongs done by the Government. The Conference at Karachi merely repeated the Congress declaration in terms of Islam. Only a Mussalman divine can speak for Islam, but speaking for Hinduism and speaking for nationalism. I have no hesitation in saying, that it is sinful for anyone, either as soldier or civilian, to serve this Government which has proved treacherous to the Mussalmans of India and which has been guilty of the inhumanities of the Punjab. I have said this from many a platform in the presence of sepoys a native or Indian serving in British army. And if I have not asked individual sepoys to come out, it has not been due to want of Will but of ability to support them. I have not hesitated to tell the sepoy, that if he could leave the service and support himself without the Congress or the Khilafat aid, he should leave at once. And I promise, that as soon as the spinning-wheel finds an abiding place in every home and Indians begin to feel that weaving gives anybody any day an honourable livelihood, I shall not hesitate, at the peril of

[[s 124A] Sedition.—

being shot, to ask the Indian sepoy individually to leave his service and become a weaver. For, has not the sepoy been used to hold India under subjection, has he not been used to murder innocent people at Jallianwala Bagh, has he not been used to drive away innocent men, women and children during that dreadful night at Chandpur, has he not been used to subjugate the proud Arab of Mesopotamia, has he not been utilised to crush the Egyptian? How can any Indian having a spark of humanity in him and any Mussalman having any pride in his religion feel otherwise than as the Ali Brothers have done?

The sepoy has been used more often as a hired assassin than as a soldier defending the liberty or the honour of the weak and the helpless. The Governor has pandered (weaknesses) to the basest (dishonourable) in us by telling us what would have happened in Malabar but for the British soldier or sepoy. I venture to inform His Excellency, that Malabar Hindus would have fared better without the British bayonet (sharp edged blade attached to rifle at the end of nossle), that Hindus and Mussalmans would have jointly appeased the Moplahs, that possibly there being no Khilafat question there would have been no Moplah riot at all, that at the worst supposing that Mussulmans had made common cause with the Moplahs, Hinduism would have relied upon its creed of nonviolence and turned every Mussalman into a friend, or Hindu valour would have been tested and tried. The Governor of Bombay has done a disservice to himself and his cause (whatever it might be), by fomenting Hindu-Muslim disunion, and has insulted the Hindus, by letting them infer from his note, that Hindus are helpless creatures unable to die for or defend their earth, home or religion. If, however, the Governor is right in his assumptions, the sooner the Hindus die out, the better for humanity. But let me remind His Excellency, that he has pronounced the greatest condemnation upon British rule, in that it finds Indians today devoid of enough manliness to defend themselves against looters, whether they are Moplah Mussalmans or infuriated (enraged) Hindus of Arrah.

His Excellency's reference to the sedition of the Ali Brothers is only less unpardonable than his reference to the tampering. For he must know, that sedition has become the creed of the Congress. Every non-co-operator is pledged to preach disaffection towards the Government established by law. Noncooperation, though a religious and strictly moral movement, deliberately aims at the overthrow of the Government, and is therefore legally seditious in terms of the *Indian Penal Code*. But this is no new discovery. Lord Chelmsford knew it. Lord Reading knows it. It is unthinkable that the Governor of Bombay does not know it. It was common cause that so long as the movement remained nonviolent nothing would be done to interfere with it.

But it may be urged, that the Government has a right to change its policy when it finds, that the movement is really threatening its very existence as a system. I do not deny its right. I object to the Governor's note, because it is so worded as to let the unknowing public think, that tampering with the loyalty of the sepoy and sedition were fresh crimes committed by the Ali Brothers and brought for the first time to His Excellency's notice.

However, the duty of the Congress and Khilafat workers is clear. We ask for no quarter; we expect none from the Government. We did not solicit the promise of immunity from prison so long as we remained nonviolent. We may not now complain, if we are imprisoned for sedition. Therefore, our self-respect and our pledge require us to remain calm, unperturbed and nonviolent. We have our appointed course to follow. We must reiterate from a thousand platforms the formula of the Ali Brothers regarding the sepoys, and we must spread disaffection openly and systematically till it please the Government to arrest us. And this we do, not by way of angry retaliation, but because it is our *dharma*. We must wear *khadi* even as the Ali Brothers have worn it, and spread the gospel of swadeshi. The Mussalmans must collect for Smyrna (former name Izmir) relief and the Angora Government. We must spread like the Ali Brothers the gospel of Hindu-Muslim unity and of non-violence for the purpose of attaining Swaraj and the redress of the Khilafat and the Punjab wrongs.

We have almost reached the crisis. It is well with a patient who survives a crisis. If on the one hand, we remain firm as a rock in the presence of danger, and on the other observe the greatest self-restraint, we shall certainly attain our end this very year.

Article III

SHAKING THE MANES⁹⁸ (Lions)

How can there be any compromise whilst the British Lion continues to shake his gory (violent) claws in our faces? Lord Birkenhead reminds us that Britain has lost none of her hard fibre. Mr Montagu tells us in the plainest language that the British are the most determined nation in the world, who will brook (allow) no interference with their purpose. Let me quote the exact words telegraphed by Reuter:

If the existence of our Empire were challenged, the discharge of responsibilities of the British Government to India prevented and demands were made in the very mistaken belief that we contemplated retreat from India—then India would not challenge with success the most determined people in the world who would once again answer the challenge with all the vigour and determination at its command.

Both Lord Birkenhead and Mr Montagu little know that India is prepared for all “the hard fibre” that can be transported across the seas and that her challenge was issued in the September of 1920 at Calcutta that India would be satisfied with nothing less than Swaraj and full redress of the Khilafat and the Punjab wrongs. This does involve the existence of the “Empire”, and if the present custodians of the British Empire are not satisfied with its quiet transformation into a true Commonwealth of free nations, each with equal rights and each having the power to secede (leave) at Will from an honourable and friendly partnership, all the determination and vigour of “the most determined people in the world” and the “hard fibre” will have to be spent in India in a vain effort to crush the spirit that has risen and that will neither bend nor break. It is true that we have no “hard fibre”. The rice-eating, puny (small and weak) millions of India seem to have resolved upon achieving their own destiny without any further tutelage and without arms. In the Lokamanya’s language it is their “birthright”, and they will have it in spite of the “hard fibre” and in spite of the vigour and determination with which it may be administered. India cannot and will not answer this insolence (disrespect) with insolence, but if she remains true to her pledge, her prayer to God to be delivered from such a scourge (suffering) will certainly not go in vain. No empire intoxicated with the red wine of power and plunder of weaker races has yet lived long in this world, and this “British Empire”, which is based upon organised exploitation of physically weaker races of the earth and upon a continuous exhibition of brute force, cannot live if there is a just God ruling the Universe. Little do these so-called representatives of the British nation realise that India has already given many of her best men to be dealt with by the British “hard fibre”. Had *Chauri Chaura* not interrupted the even course of the national sacrifice, there would have been still greater and more delectable (delightful) offerings placed before the Lion, but God had willed it otherwise. There is nothing, however, to prevent all those representatives in Downing Street and Whitehall from doing their worst. I am aware that I have written strongly about the insolent (insulting) threat that has come from across the seas, but it is high time that the British people were made to realise that the fight that was commenced in 1920 is a fight to the finish, whether it lasts 1 month or 1 year or many months or many years and whether the representatives of Britain re-enact all the indescribable orgies (wild activity) of the Mutiny days with redoubled force or whether they do not. I shall only hope and pray that God will give India sufficient humility and sufficient strength to remain nonviolent to the end. Submission to the insolent challenges that are cabled out on due occasions is now an utter impossibility.

[s 124A.8] Constitutionality of section 124A

After the *Constitution of India* came into operation an important question relating to the constitutionality of section 124A, *IPC vis-a-vis Article 19* was raised in a few cases leading to a conflict of decisions in High Courts. There are two divergent views in this regard.

The protagonists of one view hold that section 124A, *IPC* is *ultra vires* of the *Constitution* insofar as it seeks to punish merely bad feelings against the Government. It is an unreasonable restriction on freedom of speech and expression guaranteed under Article 19(1)(a) and is not saved under Article 19(2) of the *Constitution* by the expression “in the interest of public order”.⁹⁹

Tara Singh: In *Tara Singh v State of Punjab*, AIR 1951 EP 27, ¹⁰⁰ section 124A, IPC was struck down as unconstitutional being contrary to freedom of speech and expression guaranteed under Article 19(1)(a). Watson CJ, while delivering the judgment of the court observed that—

India is now a sovereign democratic State. Government may go and caused to go without the foundation of the State being impaired. A law of sedition though necessary during the period of foreign rule has become inappropriate by the very nature of the change which has come about.¹⁰¹

To avert the constitutional difficulty as a result of the above referred cases the Constitutional First (Amendment) Act, 1951 added in Article 19(2) two words of widest import, viz., “in the interest of”, and “public order”, thereby including the legislative restrictions on freedom of speech and expression.

The advocates of the other view held that section 124A, IPC is constitutional, and is not in contravention of Article 19(1)(a) as it is saved by the expression “in the interest of public order” in Article 19(2). It has been stated that the expression in the interest of public order is of wider connotation, and includes not only the acts which are likely to disturb public order but something more than that. In accordance with this interpretation section 124A, IPC has been held *intra vires* of the Constitution. This view found blessings from the Supreme Court in *Kedar Nath v State of Bihar*,¹⁰² wherein it was held that any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidity. Sinha CJ, speaking through the court observed that—

The provisions of the section read as a whole, along with the explanations, make it reasonably clear that the section aims at rendering penal, only such activities as would be intended, or have a tendency, to create disorder or disturbance, of public peace by resort to violence. The explanations appended to the main body of the section make it clear that the criticism of public measures or comment on government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc., which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order. So construed, the section strikes the correct balance between individual fundamental rights and the interest of public order.

The court further stated that, the right guaranteed under Article 19(1)(a) is subject to such reasonable restrictions as would come within the purview of clause (2), to Article 19 which comprises (a) security of the state, (b) friendly relations with foreign States, (c) public order, (d) decency or morality, etc. With reference to the constitutionality of section 124A of the Indian Penal Code, as to how far they are consistent with the requirements of clause (2) of Article 19 with particular reference to security of the state and public order, the section, it must be noted, penalises any spoken or written words or signs or visible representations, etc., which have the effect of bringing, or which attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards “the Government established by law” has to be distinguished from the persons for the time being engaged in carrying on the administration. “Government established by law” is the visible symbol of the state. The very existence of the State would be in jeopardy, where the Government established by law is subverted.

The continued existence of the Government established by law is an essential condition of the stability of the state. Hence, any act within the meaning of section 124A which has the effect of subverting the Government by bringing that Government into contempt or hatred, or creating disaffection against it, would be within the penal

[[s 124A] Sedition.—

statute because the feeling of disloyalty to the Government established by law or enmity to it imports the idea of tendency to public disorder by the use of actual violence or incitement to violence. In other words, any written or spoken words, etc., which have implicit in them the idea of subverting Government by violent means, which are compendiously included in the term “revolution”, have been made penal by the section in question. But the section has taken care to indicate clearly that strong words under lawful means used to express disapprobation of the measures of the Government with the view to their improvement or alteration would not come within the section. Similarly, comments, however, strongly worded, expressing disapprobation of actions of the Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to Government established by law is not the same thing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of the those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitation to public disorder or the use of violence.

[s 124A.9] Suggestion for amendment of section 124A

In view of the controversy which has raged round *section 124A, IPC* since its enactment and the changed conditions of today, it would be appropriate to revise the formulation of the offence so as to make it a patently reasonable restriction under *Article 19(2)*. The elements mentioned in *Article 19(2)* which are relevant to the offence of sedition are integrity of India, security of the State and public order. The section has been found by the courts, as discussed before, to be defective because the pernicious tendency or intention underlying seditious utterances have not been expressly related to the interests of integrity or security of India or of public order.

Another lacuna, as pointed out by the Law Commission of India, is that the definition of sedition does not take into consideration disaffection towards (a) the *Constitution*, (b) the legislatures, and (c) administration of justice, all of which would be as disastrous to the security of the state as disaffection towards the executive Government.

The quantum of punishment provided for the offence also needs to be rationalised. Perhaps a maximum punishment at 7 years of rigorous imprisonment and fine would be appropriate, taking into consideration the gravity of the offence.

Accordingly, *section 124A, IPC* may be revised as suggested by the Law Commission of India in the following words:—

124A Sedition.—Whoever by words, either spoken or written, by signs, or by visible representation, or otherwise, excites, or attempts to excite, disaffection towards the *Constitution* or the Government, or the Parliament of India, or the Government, or Legislature of any State, or the administration of justice, as established by law, intending or knowing it to be likely thereby to endanger the integrity or security of India, or of any State, or to cause public disorder, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall be liable to fine.

Explanation 1.—The expression disaffection includes feelings of enmity, hatred or contempt.

Explanation 2.—Comments expressing disapprobation of the provisions of the *Constitution*, or of the actions of the Government, or of the measures of Parliament or a State Legislature, or of the provisions for the administration of Justice, with a view to obtaining their alteration by lawful means without exciting or attempting to excite disaffection, do not constitute an offence under this section.¹⁰³

[s 124A.10] Insult to National Flag, *Constitution* and National Anthem

In 1971, the Parliament enacted the *Prevention of Insults to National Honour Act, 1971* (69 of 1971) to prevent insults to National Honour. It is a small Act consisting of three sections. Section 1 extends its operation to the whole of India. Section 2¹⁰⁴ envisages that a person in public place burns, mutilates defaces, defiles, disfigures, destroys, or tramples upon or otherwise brings into contempt the National Flag or the *Constitution of India*, he commits an offence.

Similarly, section 3 provides that prevention of the singing of the National Anthem or causing disturbance in any Assembly engaged in such singing is punishable. However, the Supreme Court in *Bijoe Emmanuel*,¹⁰⁵ held that not joining in singing the national anthem does not amount to disrespect to the national flag. Punishment under both sections 2 and 3 may extend to 3 years of imprisonment or fine or with both.

- 1 Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.
- 2 Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.
- 3 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4 See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 61 Subs. by Act 4 of 1898, section 4, for section 124A. Earlier section 124A was inserted by Act 27 of 1870, section 5.
- 62 The words “Her Majesty or” omitted by the A.O. 1950. The words “or the Crown Representative” ins. after the word “Majesty” by the A.O. 1937 were omitted by the A.O. 1948.
- 63 The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.
- 64 The words “or British Burma” omitted by the A.O. 1948. Earlier the words “or British Burma” were inserted by the A.O. 1937.
- 65 Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life or any shorter term” (w.e.f. 1-1-1956).
- 66 Press (Emergency) Powers Act, 1931; Defence of India Regulations, 1914, rule 34(6)(1).
- 67 Act XVII of 1870, section 5.
- 68 Section 4 of Act IV of 1898.
- 69 See, Laws of Sedition in India, Essay on the *Indian Penal Code*, (ILI 1966), p 135.
- 70 *Kedar Nath v State of Bihar*, AIR 1962 SC 955 [[LNIND 1962 SC 21](#)] : (1962) 2 Cr LJ 103 : 1962 Supp (2) SCR 769 : 1963 (1) SCJ 18 .
- 71 Webster's Third New International Dictionary (GC Merriam Co., USA, (1976), p 652.

[[s 124A] Sedition.—

- 72** Fitzgerald J, in *Reg. v AM Sullivan*, (1868) 11 Cox CC 44.
- 73** Stephen, *Commentaries on the Laws of England*, (1950), vol IV, pp 141, 142.
- 74** *Emperor v Sadashiv Narayan Bhalerao*, AIR 1947 PC 82 .
- 75** *Annie Besant v Advocate General of Madras*, AIR 1919 PC 31 . This was a case under the Indian Press Act (1 of 1910) which was closely similar to section 124A of the Penal Code.
- 76** “Jansakti” of Sylhet Re, AIR 1932 Cal 649 : (1932) 36 Cal WN 962.
- 77** *Emperor v Narayan Vasudev Phadke*, (1940) 42 Bom LR 861 : AIR 1940 PC 379 .
- 78** Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, vol I, pp 505-506.
- 79** *Emperor v Ramchandra Narayan*, (1897) LLR 22 Bom 152 (162); *Queen Empress v Bal Gangadhar Tilak*, (1898) ILR 22 Bom 112.
- 80** *Queen Empress v Amba Prasad*, (1897) ILR 20 All 55 (68) (FB).
- 81** *Emperor v Bhaskar Balwant Bhopatkar*, (1906) 8 Bom LR 421 [[LNIND 1906 BOM 11](#)] (428).
- 82** *Emperor v Ram Chandra Narayan*, ILR (1897) 22 Bom 152 .
- 83** *QE v Bal Gangadhar Tilak*, (1898) ILR 22 Bom 112.
- 84** *Niharendu Majumdar v Emperor*, AIR 1942 FC 22 (26).
- 85** *Niharendu Majumdar v Emperor*, AIR 1942 FC 22 (26).
- 86** *QE v Ram Chandra Narain*, ILR (1897) 22 Bom 152 (FB).
- 87** *Kamal Krishna v Emperor*, AIR 1935 Cal 636 .
- 88** *Arjun Arora v Emperor*, 1937 All LJ 261.
- 89** *Pindi Das v Emperor*, 1938 Lah 629.
- 90** See *QE v Amba Prasad*, (1897) ILR 20 All 55 (FB) Edge CJ, went to the extent of making an observation that a man may be guilty of the offence defined in section 124A of attempting to excite feelings of disaffection against the Government established by law in British India, although in a particular article or speech he may insist against the desirability or expediency, of obeying and supporting the Government.

[[s 124A] Sedition.—

- 91** *Emperor v Mohandas Karamchand Gandhi and Shankarlal Ghelabhai Sankar*, Session case No. 45/1922 Ahmedabad; Author expresses deep sense of gratitude to DC Verma J former Vice-Chairman, Central Administrative Tribunal, Ahmedabad for making available the text of the judgment from the original court records kept in archives at Ahmedabad.
- 92** Young India, dated 29-9-1921.
- 93** Young India, dated 15-12-1921.
- 94** Young India, dated 23-2-1922.
- 95** *Section 401(1), CrPC*, 1898 [corresponds to *section 432(1) of CrPC, 1973*] confers power on the Government to suspend or remit the sentence. *Section 401(1), section 432(1) CrPC, 1973* states:
- 432. Power to suspend or remit sentences.**—When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.
- 96** MK Gandhi, Young India, 15 December 1921, published from Ahmedabad.
- 97** MK Gandhi, Young India, 29 September 1921, published from Ahmedabad.
- 98** MK Gandhi, Young India, 23 February 1921, published from Ahmedabad.
- 99** *Ram Nandan v State of Uttar Pradesh*, AIR 1969 All 101 . *Article 19(1)(a) of the Constitution* reads as follows:—
- 19(1) All citizens shall have the right (a) to freedom of speech and expression.... This guaranteed right is subject to the right of the Legislature to impose reasonable restrictions, the ambit of which is indicated by clause (2), which, in its amended form is as follows:—
- (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause *in the interests of the sovereignty and integrity of India*, the security of the State, friendly relations with Foreign States, *public order*, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
- 100** *Ramesh Thappar v State of Madras*, AIR 1950 SC 124 [[LNIND 1950 SC 27](#)] : 1950 SCR 594 [[LNIND 1950 SC 27](#)] .
- 101** *Tara Singh Gopichand v. State*, AIR 1951 EP 27 (129) : 1951 Cri LJ 449 [[LNIND 1950 PNH 11](#)] .
- 102** AIR 1962 SC 955 [[LNIND 1962 SC 21](#)] : (1962) 2 Cr LJ 103 : 1962 Supp (2) SCR 769 : 1963 (1) SCJ 18 : 1962 BLJR 636 .
- 103** Law Commission of India, 42nd Report (1971), pp 149-150.
- 104** **Insult to Indian National Flag and Constitution of India.**—Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the *Constitution of India* or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.
- Explanation 1.*—Comments expressing disapprobation or criticism of the *Constitution* or of the Indian National Flag or of any measures of the Government with a view to obtain an amendment of the *Constitution of India* or an alternation of the Indian National Flag by lawful means do not constitute an offence under this section.
- Explanation 2.*—The expression “Indian National Flag” includes any picture, painting, drawing or photograph or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance, or represented on any substance.
- Explanation 3.*—The expression “public place” means any place intended for use by, or accessible to, the public and includes any public conveyance.

- 105** *Bijoe Emmanuel v State of Kerala*, AIR 1987 SC 748 [\[LNIND 1986 SC 257\]](#) : 1986 Cr LJ 1736 : (1986) 3 SCC 615 [\[LNIND 1986 SC 257\]](#) : 1986 Ker LT 1037 [\[LNIND 1986 SC 257\]](#) (SC) : (1986) 2 Scale 217 . The children belonging to Jehovah's community were expelled from the school for not joining in singing National Anthem. The Court observed that the children used to stand respectfully at the time of prayer; it was only because of their consciously held religious faith, they did not sing, and hence expulsion was not justified and violates the provisions of *Articles 19(1)(a)* and *25(1)* of the *Constitution* and also Prevention of Insults to the National Honour Act, 1971, section 3 is inapplicable in such a case.

[s 125] Waging war against any Asiatic Power in alliance with the Government of India.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 125] Waging war against any Asiatic Power in alliance with the Government of India.—

Whoever wages war against the Government of any Asiatic Power in alliance or at peace with the ¹⁰⁶[Government of India] or attempts to wage such war, or abets the waging of such war, shall be punished with ¹⁰⁷[imprisonment for life], to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

[s 125.1] Waging war against any Asiatic Power

This section is based on the principle of international peaceful coexistence and desire on the part of the Government to remain in friendly relationship with its neighbours. Accordingly, the section makes waging, abetting, or attempting to wage war against any Asiatic power in alliance with the Government punishable with imprisonment for life, or up to 7 years of imprisonment, to which fine may also be added. Perhaps it would be appropriate to delete that word “Asiatic” from the section. This is necessary to faster and promote international peace. The deletion becomes more relevant in view of constitutional provision under *Article 51*, which enjoins upon the state to promote international peace and security.¹⁰⁸ The deletion will be in conformity with *section 126, IPC* which does not use “Asiatic”. In fact, “Asiatic” is redundant and should be omitted.

-
- 1** Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.
- 2** Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.
- 3** Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4** See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5** See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 106** Subs. by the A.O. 1950, for “Queen”.
- 107** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).
- 108** *Article 51* says: The State shall endeavour to—(a) promote international peace and security (b) maintain just and reasonable relation between nations; (c) foster respect for international law and treaty obligations in the dealing of the organized people with one another; and (d) encourage settlement of international disputes by arbitration.

[s 126] Committing depredation on territories of Power at peace with the Government of India.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 126] Committing depredation on territories of Power at peace with the Government of India.—

Whoever commits depredation, or makes preparation to commit depredation, on the territories of any Power in alliance or at peace with the ¹⁰⁹[Government of India], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

[s 126.1] Depredation on friendly countries

Section 126 makes depredation (damage), robbing or plundering an offence, whereas section 125 deals with waging of war. The scope of section 126 is wider than that of section 125 inasmuch as the former is applicable to any foreign country at peace with India, whereas the latter is limited in scope and confined to Asiatic Powers only.

Depredation means to plunder or rob. To invoke this section there must be a raid by a group of men into a foreign territory for the purpose of robbery, plunder or laying waste. Punishment under the section may extend

[s 126] Committing depredation on territories of Power at peace with the Government of India.—

to 7 years of imprisonment of either description with fine and forfeiture of property used or intended to be used in committing such depredation.

1 Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.

2 Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.

3 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.

4 See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.

5 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.

109 Subs. by the A.O. 1950, for “Queen”.

[s 127] Receiving property taken by war on depredation mentioned in sections 125 and 126.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VI OF OFFENCES AGAINST THE STATE

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 127] Receiving property taken by war on depredation mentioned in sections 125 and 126.—

Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

[s 127.1] Receiving property taken by war

Section 127 makes a person liable only, if he knowingly receives property taken by war or depredation against a friendly State as defined under *sections 125 and 126, IPC*. A receiver of such property is an accessory after the fact as termed under the English law and is similarly punishable. The receiver of the spoils of war or depredation is in the nature of a *particeps criminis*, (a partner in crime). When he knows of the origin of the property he is accountable as a principal offender. Such persons acquire property usually by purchase at a nominal price. For instance, raids or plunderers generally drive cattle across the international boundary between neighbouring countries and sell them at a nominal price just to be rid of them quickly. Of course, if the purchaser does not know such facts and he honestly believes in good faith the genuineness of the transaction, he is exempt from liability under this section. The offence under this section is similar to that prescribed under

[s 127] Receiving property taken by war on depredation mentioned in sections 125 and 126.—

section 411, *IPC*, which makes dishonestly receiving stolen property an offence. The section prescribes imprisonment which may extend to 7 years and fine and forfeiture of property as well.

1 Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870 (XXII of 1870)* section 4.

2 Section 124A was inserted by the *IPC (Amendment) Act, 1870 (XXII of 1870)* section 4.

3 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.

4 See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.

5 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.

[s 128] Public servant voluntarily allowing prisoner of State or war to escape.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 128] Public servant voluntarily allowing prisoner of State or war to escape.—

Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with ¹¹⁰[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[s 128.1] Principle

Sections 128, 129 and 130 deal with the rescue and escape of State prisoners. A public servant voluntarily allowing a state prisoner to escape is liable under *section 128, IPC*, whereas if he negligently suffers such prisoners to escape he is accountable under *section 129, IPC*. Section 130 relates to anyone aiding or rendering assistance in the escape of a state prisoner.

To bring action under this section, the accused must be a public servant; he must have custody of the prisoner; the prisoner must be a state prisoner, or a prisoner of war; and the public servant must voluntarily allow such prisoner to escape.

[s 128] Public servant voluntarily allowing prisoner of State or war to escape.—

[s 128.2] State Prisoner

A state prisoner is one whose arrest and confinement is necessary in order to preserve the security and integrity of India from foreign hostility or from internal commotion. Such a person is confined by the orders of the Government of India and may be detained in any fortress or jail.¹¹¹ An Indian as well as a foreigner may be arrested under the provisions of these regulations and all such persons will be designated “State prisoner”.

[s 128.3] “Prisoner of War”

A prisoner of war is an enemy taken in arms and not others who being in arms submit and surrender themselves. According to international law, prisoners of war or others taken in custody after surrender are not to be slain, but treated as prisoners until the termination of hostilities.

This section prescribes punishment to the extent of life imprisonment or imprisonment of either description for a term which may extend to 10 years, and fine in case a public servant voluntarily allows a prisoner to escape from his custody.

¹ Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870 (XXII of 1870)* section 4.

² Section 124A was inserted by the *IPC (Amendment) Act, 1870 (XXII of 1870)* section 4.

³ Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.

⁴ See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.

⁵ See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.

¹¹⁰ Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

¹¹¹ Bengal Reg. III of 1818, Bombay Reg. XXV of 1817 and Madras Reg. II of 1819 substantially reproduced in Act 34 of 1850 and Act III of 1858.

[s 129] Public servant negligently suffering such prisoner to escape.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > **K D Gaur: Textbook on Indian Penal Code, 7th ed** > **The Indian Penal Code** > **CHAPTER VI OF OFFENCES AGAINST THE STATE**

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 129] Public servant negligently suffering such prisoner to escape.—

Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

[s 129.1] Public servant negligently allowing a prisoner of war to escape

The offence under section 129 is similar to that of section 128, except for the fact that under section 129 the public servant is negligent in discharging his duty in keeping the prisoner in custody, whereas in section 128 the act is intentional in allowing the state prisoner or prisoner of war to escape from custody. The section provides punishment which may extend to 3 years of imprisonment and fine.

[s 129] Public servant negligently suffering such prisoner to escape.—

- 1 Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.
- 2 Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.
- 3 Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4 See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5 See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.

End of Document

[s 130] Aiding escape of, rescuing or harbouring such prisoner.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VI OF OFFENCES AGAINST THE STATE](#)

The Indian Penal Code

CHAPTER VI OF OFFENCES AGAINST THE STATE

Chapter VI of the Code deals with offences against the State. It comprises of 12 sections commencing from sections 121 to 130 and 121A¹ and 124A² which were added to the Code in 1870. The offences prescribed under this Chapter may broadly be classified into five categories³ depending on the gravity of the offence. These are:

- (i) Waging, collecting, concealing attempting, abetting, conspiring to wage, collecting arms or ammunition to wage war against the Government of India (*IPC, sections 121, 121A, 122, 123*);
- (ii) Assaulting the President of India, or Governor of any state with intent to compel or restrain the exercise of any lawful authority (*IPC, section 124*);
- (iii) Sedition *IPC, section 124A*⁴;
- (iv) Waging War against any Asiatic Power at peace with the Government of India (*IPC, section 125*), or committing depredation (damage caused by an attack) on territories of such state (*IPC, sections 125 and 126*; and
- (v) Permitting or aiding the escape of a state prisoner or a prisoner of war (*IPC, sections 128, 129 and 130*).⁵

[s 130] Aiding escape of, rescuing or harbouring such prisoner.—

Whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner, shall be punished with ¹¹²[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in ¹¹³[India], is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

[s 130.1] Aiding or harbouring etc., a State prisoner

Section 130 deals with aiding, escape of, or rescuing or harbouring a state prisoner or prisoner of war who has escaped from lawful custody. The section is of a general nature and applicable to all and not limited to the Government servants, as in the case of *sections 128 and 129, IPC*. To bring an action under this section the accused must be shown to have knowledge that the person assisted is a State prisoner. The punishment under this section may extend to life imprisonment, or imprisonment of either description which may extend to 10 years, and fine.

-
- 1** Section 121A was inserted by *Indian Penal Code (Amendment) Act, 1870* (XXII of 1870) section 4.
- 2** Section 124A was inserted by the *IPC (Amendment) Act, 1870* (XXII of 1870) section 4.
- 3** Ratanlal and Dhirajlal, *Law of Crimes*, 24th Edn, pp 470 to 480.
- 4** See *Essays on the Indian Penal Code*, ILI (1962), pp 135 to 143.
- 5** See KD Gaur, *Criminal Law Cases and Materials*, 5th Edn, (2008) pp 731-740.
- 112** Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).
- 113** The words “British India” have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, section 3 and Schedule (w.e.f. 1-4-1951), to read as above.

[s 131] Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > CHAPTER VII OF OFFENCES RELATING TO THE ARMY, [NAVY AND AIR FORCE]

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 131] Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.—

Whoever abets the committing of mutiny by an officer, soldier, ²[sailor or airman], in the Army, ³[Navy or Air Force] of the ⁴[Government of India] or attempts to seduce any such officer, soldier, ⁵[sailor or airman] from his allegiance or his duty, shall be punished with ⁶[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

⁷[Explanation.—In this section the words “officer”, ⁸[“soldier”, ⁹[“sailor”] and “airman”] include any person subject to the ¹⁰[Army Act, ¹¹[the Army Act, 1950 (46 of 1950)¹²], ¹³[the Naval Discipline Act, ¹⁴[***] the Indian Navy (Discipline) Act, 1934 (34 of 1934)¹⁵] ¹⁶[the Air Force Act or ¹⁷[the Air Force Act, 1950 (45 of 1950)]]], as the case may be.]

[s 131.1] Introduction

Chapter 7 of the *Penal Code* (in sections 131 to 140) deals with offences relating to the Army, Navy and Air Force. The Code excludes from liability, under section 139 those persons who are subject to the *Army Act, 1950*, *Indian Navy (Discipline) Act, 1934* and the *Air Force Act, 1950* for any of the offences defined in this chapter since the same are punishable under those enactments. It is only with respect to civilians who are not subject to the above Acts that the provisions of Chapter 7 could be made applicable. It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject for punishment and therefore this chapter has been added in the Code.¹⁸ That is to say, it covers those offences which might be committed by the civilian population in relation to the defence service personnel who are designated to maintain perfect discipline in the armed forces of the Union.¹⁹

[s 131.2] Scope

Sections 131 and 132 of the Code punish abetment of mutiny and attempt to seduce defence personnel from duty; section 131 supplements and extends the scope of penal provisions of army,²⁰ air force²¹ and navy²² relating to mutiny and desertions to civilians. The section prescribes punishment for abetment of mutiny and attempt to seduce defence service personnel from duty.

[s 131.3] Mutiny

[s 131] Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.—

The word “mutiny” has not been defined in the Code. However, in common parlance it means collective insubordination or the combination of two or more persons to resist or to induce others to resist lawful military authority.²³ When a soldier resists by force or a number of soldiers rise against or oppose their military superiors, such an act constitutes mutiny. The acts of disobedience and insubordination that took place at different places in the country after the blue star operation in the Amritsar Golden Temple complex in 1983, are good examples of mutiny.

[s 131.4] Attempt to Seduce

An act may amount to an attempt to seduce when *A*, a publisher, published an article in his magazine purporting to be a letter from a sympathiser of terrorists in Punjab calculated to seduce Sikh soldiers of the Indian army to desist from their allegiance and their duty to the Government of India, and *B* abetted the same by printing the article in his press. Both *A* and *B* are guilty of abetting and attempting to seduce soldiers under section 130 of the Code.²⁴ So, whenever soldiers, sailors or airmen go on strike, they and their abettors (other than soldiers) are both liable, the latter under *section 130, IPC* and the former under military law.²⁵

But the section is not applicable when a person tenders friendly advice to a sepoy to give up his job for trade, or to secure his discharge and start a business. The section applies to incitement, leading military personnel to mutiny in mass, or to the breach of allegiance or duty of such personnel. In view of the gravity of the offence the section prescribes punishment with imprisonment for life or with imprisonment of either description which may extend to ten years and fine.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

² Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

³ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

⁴ Subs. by the A.O. 1950, for “Queen”.

⁵ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

⁶ Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

⁷ Ins. by Act 27 of 1870, section 6.

⁸ Subs. by Act 10 of 1927, section 2 and Sch I, for “and soldier”.

⁹ Ins. by Act 35 of 1934, section 2 and Schedule.

¹⁰ Subs. by Act 10 of 1927, section 2 and Sch I, for “Articles of War for the better government of Her Majesty’s Army, or to the Articles of War contained in Act No. 5 of 1869”.

¹¹ Subs. by Act 3 of 1951, section 3 and Schedule, for “the Indian *Army Act*, 1911” (w.e.f. 1-4-1951).

¹² Now see the *Navy Act*, 1957 (62 of 1957).

¹³ Ins. by Act 35 of 1934, section 2 and Schedule.

¹⁴ The words “or that Act as modified by” omitted by the A.O. 1950.

¹⁵ Now see the *Navy Act*, 1957 (62 of 1957).

¹⁶ Subs. by Act 14 of 1932, section 130 and Schedule, for “or the *Air Force Act*”.

¹⁷ Subs. by Act 3 of 1951, section 3 and Schedule, for “the Indian *Air Force Act*, 1932” (w.e.f. 1-4-1951).

[s 131] Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty.—

18 See Draft *Penal Code*, note D, p 120.

19 The *Army Act* 46 of 1950.

20 The *Army Act* 46 of 1950.

21 The *Air Force Act* 45 of 1950.

22 The Indian Navy Discipline Act of 1934.

23 Manual of Indian Military Law, (1918 Edn), p 114.

24 *Pindi Das*, (1907) PWR (Cr 32).

25 Mutiny including any endeavour to seduce under *section 40 of the Army Act, 1950*—abstention from duty is a capital offence punishable by death.

[s 132] Abetment of mutiny, if mutiny is committed in consequence thereof.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VII OF OFFENCES RELATING TO THE ARMY, [NAVY AND AIR FORCE]

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 132] Abetment of mutiny, if mutiny is committed in consequence thereof.—

Whoever abets the committing of mutiny by an officer, soldier, ²⁶[sailor or airman] in the Army, ²⁷[Navy or Air Force] of the ²⁸[Government of India], shall, if mutiny be committed in consequence of that abetment, be punished with death or with ²⁹[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

[s 132.1] Abetment of mutiny

Section 132 deals with cases when mutiny is committed in pursuance of abetment or seduction, whereas section 131 with cases when offence is not committed. In fact, this section deals with an aggravated form of the offence prescribed in section 131 and prescribes the extreme penalty of the death sentence, life imprisonment or imprisonment of either description which may extend to 10 years and fine.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

²⁶ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

²⁷ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

²⁸ Subs. by the A.O. 1950, for “Queen”.

²⁹ Subs. by Act 26 of 1955, section 117 and Schedule, for “transportation for life” (w.e.f. 1-1-1956).

[s 133] Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 133] Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.—

Whoever abets an assault by an officer, soldier, ³⁰[sailor or airman], in the Army, ³¹[Navy or Air Force] of the ³²[Government of India], on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

[s 133.1] Abetment of assault by soldier

Sections 133 and 134 make abetment of assault by any defence service personnel on any superior officer punishable.³³ Section 133 punishes abetment of assault by an officer, soldier, sailor, or airmen, or on any one of his superior officers. Assault means the striking of a superior officer or using or offering violence against him during the course of his duty. The section prescribes punishment for a term of 3 years imprisonment of either description and fine.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

³⁰ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

³¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

³² Subs. by the A.O. 1950, for “Queen”.

³³ *Army Act, 1950 section 40* prescribes punishment up to 14 years of imprisonment in the case of military personnel for such assaults.

[s 133] Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office.—

End of Document

[s 134] Abetment of such assault, if the assault is committed.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 134] Abetment of such assault, if the assault is committed.—

Whoever abets an assault by an officer, soldier, ³⁴[sailor or airman], in the Army, ³⁵[Navy or Air Force] of the ³⁶[Government of India], on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[s 134.1] Abetment of assault when committed

Section 134 is an aggravated form of offence described in *section 133, IPC*. According to section 134, when an assault is committed in pursuance of abetment, punishment may extend to 7 years of imprisonment of either description or fine.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

³⁴ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

³⁵ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

³⁶ Subs. by the A.O. 1950, for “Queen”.

[s 135] Abetment of desertion of soldier, sailor or airman.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 135] Abetment of desertion of soldier, sailor or airman.—

Whoever abets the desertion of any officer, soldier, ³⁷[sailor or airman], in the Army, ³⁸[Navy or Air Force] of the ³⁹[Government of India], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[s 135.1] Abetment of desertion of soldier

Sections 135 and 136 prescribe punishment for abetment of desertion and knowingly harbouring a deserter.⁴⁰ To bring an action under this section it is enough if desertion is abetted. Desertion in law means to remain unlawfully absent from duty with no intention of returning to duty. Intention not to return is the essence of the offence of desertion. In the absence of such an intention, if an officer, soldier, sailor or airman overstays, he will be treated as absent from duty without leave under the Military Law. Section 135 prescribes punishment for abetment to desertion of up to 2 years of imprisonment or with fine, or with both.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

³⁷ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

³⁸ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

³⁹ Subs. by the A.O. 1950, for “Queen”.

⁴⁰ *Army Act, 1950* section 38 prescribes imprisonment up to 7 years in the case of army personnel for desertion and aiding deserters.

[s 136] Harboursing deserter.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 136] Harboursing deserter.—

Whoever, except as hereinafter expected, knowing or having reason to believe that an officer, soldier, ⁴¹[sailor or airman], in the Army, ⁴²[Navy or Air Force] of the ⁴³[Government of India], has deserted, harbours such officer, soldier, ⁴⁴[sailor or airman], shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

[s 136.1] Harboursing deserter

Section 136 makes harbouring of an officer, soldier, sailor or airman, knowing or having reason to believe that he has deserted from the Army, Navy or Air Force of the Government, punishable with imprisonment of either description which may extend to 2 years, or with fine, or with both. A person harbouring a deserter is similar to an accessory after the fact, as explained under the English law. The gist of the offence is concealment of a deserter to prevent his arrest.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

⁴¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

⁴² Subs. by the A.O. 1950, for “Queen”.

⁴³ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

⁴⁴ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

[s 136] Harboursing deserter.—

End of Document

[s 137] Deserter concealed on board merchant vessel through negligence of master.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 137] Deserter concealed on board merchant vessel through negligence of master.—

The master or person in charge of a merchant vessel, on board of which any deserter from the Army, ⁴⁵[Navy or Air Force] of the ⁴⁶[Government of India] is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

[s 137.1] Concealment of deserter on board

Section 137 fixes criminal responsibility on the part of the master, or person in charge of a merchant vessel, or ships engaged in commerce, for negligence in allowing a deserter from the Army, Air Force, or Navy of the Government of India to be on board. However, this section is not applicable in the case of war. A master is under legal duty to have a thorough search of his vessel done before disembarkation. Hence, if a master does not perform his statutory obligation with the necessary diligence, he is guilty of an offence under this section. But if a deserter was not found even after a thorough search, as he had taken passage in disguise, the master is not criminally responsible. Neglect of duty or want of discipline is the essence of liability.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

⁴⁵ Subs. by the A.O. 1950, for “Queen”.

⁴⁶ Subs. by Act 10 of 1927, section 2 and Sch I, for “or sailor”.

[s 138] Abetment of act of insubordination by soldier, sailor or airman.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 138] Abetment of act of insubordination by soldier, sailor or airman.—

Whoever abets what he knows to be an act of insubordination by an officer, soldier, ⁴⁷[sailor or airman], in the Army, ⁴⁸[Navy or Air Force] of the ⁴⁹[Government of India], shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[s 138.1] Abetment of an act of insubordination

Section 138 punishes abetment of an act of insubordination by defence service personnel—soldier, sailor, airman, in the Army, Navy or Air Force of the Government of India,⁵⁰ for a term of imprisonment of either description which may extend to 6 months, or with fine, or with both. To convict a person under this section it must be shown that the accused abetted an act knowing it to be an act of insubordination, and that the act of insubordination was committed in consequence of abetment.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

⁴⁷ Subs. by Act 10 of 1927, section 2 and Sch I, for “or Navy”.

⁴⁸ Subs. by the A.O. 1950, for “Queen”.

⁴⁹ Subs. by the A.O. 1950, for “Queen”.

⁵⁰ Such an act of insubordination is punishable under *section 42 of the Army Act, 1950* with seven years of imprisonment.

[s 138A] Application of foregoing sections to the Indian Marine Service.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 138A] Application of foregoing sections to the Indian Marine Service.—

[Ins. by Act 14 of 1887, sec. 79 and Rep. by the *Amending Act*, 1934 (35 of 1934), sec. 2 and Sch.].

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

[s 139] Persons subject to certain Acts.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 139] Persons subject to certain Acts.—

No person subject to ⁵¹[the *Army Act*, ⁵²[the *Army Act, 1950* (46 of 1950), or the *Naval Discipline Act*, ⁵³⁵⁴[***] the *Indian Navy (Discipline) Act, 1934* (34 of 1934)⁵⁵], ⁵⁶[the *Air Force Act* ⁵⁷[the *Air Force Act, 1950* (45 of 1950)]]], is subject to punishment under this Code for any of the offences defined in this Chapter.

[s 139.1] Defence personnel not liable under *IPC*

Section 139 is an explanatory clause. It clarifies that the defence personnel who are subject to the *Army Act, 1950*; the *Navy Act, 1934*; and the *Air Force Act, 1950* or any other law shall not be subject to punishment under this chapter. Such persons (defence personnel) would be governed by the Act to which they are subjected to and punished more severely than civilians for the same offence.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “AND NAVY”.

⁵¹ Subs. by Act 10 of 1927, section 2 and Sch I, for “any Article of War for the Army or Navy of the Queen, or for any part of such Army or Navy”.

⁵² Subs. by Act 3 of 1951, section 3 and Schedule, for “the *Indian Army Act, 1911*” (w.e.f. 1-4-1951).

⁵³ Ins. by Act 35 of 1934, section 2 and Schedule.

⁵⁴ The words “or that Act as modified” omitted by The A.O. 1950.

⁵⁵ Now see the *Navy Act, 1957* (62 of 1957).

⁵⁶ Subs. by Act 14 of 1932, section 130 and Schedule, for “or the *Air Force Act*”.

⁵⁷ Subs. by Act 3 of 1951, section 3 and Schedule, for “the *Indian Air Force Act, 1932*” (w.e.f. 1-4-1951).

[s 139] Persons subject to certain Acts.—

End of Document

[s 140] Wearing garb or carrying token used by soldier, sailor or airman.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VII OF OFFENCES RELATING TO THE ARMY, \[NAVY AND AIR FORCE\]](#)

The Indian Penal Code

CHAPTER VII OF OFFENCES RELATING TO THE ARMY, ¹[NAVY AND AIR FORCE]

[s 140] Wearing garb or carrying token used by soldier, sailor or airman.—

Whoever, not being a soldier, ⁵⁸[sailor or airman], in the Military, ⁵⁹[Naval or Air] service of the ⁶⁰[Government of India], wears any garb or carries any token resembling any garb or token used by such a soldier, ⁶¹[sailor or airman] with the intention that it may be believed that he is such a soldier, ⁶²[sailor or airman], shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

[s 140.1] Wearing garb used by soldier

This section punishes the wearing of the dress of a soldier, sailor or airman with the intention of inducing others to believe that the person is in defence service at the time. The punishment may extend to 3 months of imprisonment, or fine up to Rs 500 or with both. However, the mere wearing of a military man's dress is no offence without the specific intention to deceive others. Thus, stage or screen actors in cinemas wearing every kind and shade of uniform would not come within the purview of this section.

¹ Subs. by Act 10 of 1927, section 2 and Sch I, for "AND NAVY".

⁵⁸ Subs. by Act 10 of 1927, section 2 and Sch I, for "or sailor".

⁵⁹ Subs. by Act 10 of 1927, section 2 and Sch I, for "or Navy".

⁶⁰ Subs. by the A.O. 1950, for "Queen".

⁶¹ Subs. by Act 10 of 1927, section 2 and Sch I, for "or sailor".

⁶² Subs. by Act 10 of 1927, section 2 and Sch I, for "or sailor".

[s 141] Unlawful assembly.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > **K D Gaur: Textbook on Indian Penal Code, 7th ed** > **The Indian Penal Code** > **CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY**

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 141] Unlawful assembly.—

An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

First.—To overawe by criminal force, or show of criminal force, ⁵ [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant; or

Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

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

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

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

[s 141] Unlawful assembly.—

[s 141.1] Object

Section 141, IPC prohibits use of criminal force by five or more persons with a design to do any of the acts set out in the section. It is the cardinal principle of law that the tumultuous assemblage of men shall be discouraged since prevention of offences involving the presence of a plurality of offenders becomes comparatively a difficult task for the law.⁶ Hence, in earlier times even the mere assemblage of people was regarded as a menace to the public peace and therefore regarded as unlawful.⁷ However, with the growth of democratic institutions and civilisations; the assembling of men became a necessity and recognised as one of the basic rights of man.⁸ Hence, an assemblage of men, however large; is not *per se* illegal. It becomes so when they meet for an unlawful purpose, as stated in *section 141, IPC*, since the law regards such a gathering as conducive to rioting and disorder.

[s 141.2] Essentials of unlawful assembly

To constitute an “unlawful assembly” the following three conditions must co-exist:—

- (1) There must be an assembly of five persons;
- (2) The assembly must have a common object; and
- (3) The common object must be to commit one of the five illegal objects specified in the section.

[s 141.3] Assembly must be of five persons

An assembly of five or more than five persons, combined for one or the other purposes indicated in *section 141*, is declared in law an “unlawful assembly”. In fixing, the number of persons for an unlawful assembly at five, *section 141, IPC* has made a departure from the English law, under which an assembly of only three persons constitutes an unlawful assembly.

Hunt: An unlawful assembly under the English law has been defined in the famous case of *R. v Hunt*, as follows:—

An assembly of three or more persons with intent either to commit a crime by open force or to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it.⁹

It is evident from the above statement and the definition of an “unlawful assembly” given under *section 141 of the Indian Penal Code* is akin to the meaning given to it under the English Common Law, except in two respects.

First.—The number of persons composing the assembly must be five or more under *section 141*, whereas it must be three or more under English Law.

Second.—Under English common law no common purpose of the assembly (except such as might be implied by assembling in such a manner as tends to endanger the public peace and excite fear and alarm among the people) is necessary unless a statute provides for a common purpose of the assembly.

[s 141] Unlawful assembly.—

As far as conviction for being a member of an unlawful assembly is concerned, the Supreme Court of India has invariably upheld in a number of cases¹⁰ that where only five named persons have been charged for constituting an unlawful assembly, and one or more of them are acquitted, the remaining accused (who are less than five) cannot be convicted as members of an unlawful assembly, unless it is proved that the unlawful assembly, besides convicted persons, consisted of some other persons as well who were not identified and so could not be named.

Mohan Singh: In *Mohan Singh v State of Punjab*,¹¹ five named persons were charged under section 302 read with section 149, IPC for committing murder as members of an unlawful assembly. Two of them were acquitted, giving them the benefit of doubt and the other three were convicted by the High Court under sections 302/149. On appeal the Supreme Court held that the remaining three could not be convicted as members of an unlawful assembly in the absence of any evidence to the effect that besides those five named in the charge there were other persons who were not identified and so not named.

Maina Singh: In *Maina Singh v State of Rajasthan*,¹² the appellant Maina Singh along with four other named persons, was charged with committing various offences as a member of an unlawful assembly. Four of the accused were acquitted by the High Court giving them the benefit of doubt and the appellant was convicted for offences as a member of an unlawful assembly. The Supreme Court quashed the conviction and held that the appellant, Maina Singh, could not be convicted for offences as a member of an unlawful assembly, since there was no evidence to show that the offence was committed by him along with other named persons.

Achhey Lal: In *Achhey Lal v State of Uttar Pradesh*,¹³ the Supreme Court quashed the conviction of the appellant for offences under section 302, IPC read with section 149 as a member of an unlawful assembly, since of the 15 named accused charged with assaulting the deceased, 14 were acquitted by the High Court, and the sole appellant was convicted for the offence as a member of an unlawful assembly without recording any finding to the effect that after the acquittal of the 14 named accused, the unlawful assembly consisted of five persons or more, known or unknown, identified or unidentified.

Ram Bilas Singh: In *Ram Bilas Singh v State of Bihar*¹⁴ the Supreme Court has identified those situations wherein, a court will be justified in holding that there was an unlawful assembly of five or more persons even where less than five persons are convicted as members thereof. For instance:—

- (a) the charge states that apart from the persons named, several other unidentified persons were also members of the unlawful assembly whose common object was to commit an unlawful act, and the evidence led to prove that this charge is accepted by the court,
- (b) the first information report and the evidence show such to be the case, even though the charge does not state so,
- (c) even though the charge and the prosecution witnesses named only the acquitted and the convicted accused persons, there is other evidence which clearly establishes the participation in the unlawful assembly of other persons besides those named in the charge:

Provided, in cases (b) and (c), no prejudice has resulted to the accused persons who have been convicted by reason of the omission to mention in the charge that the other unnamed persons had also participated in the offence.¹⁵

Kartar Singh: In *Kartar Singh v State of Punjab*¹⁶, 13 persons were charged under section 149, IPC as members of an unlawful assembly, but only three (including the appellant) were convicted for the offence and

[s 141] Unlawful assembly.—

the remaining 10 were acquitted by giving them the benefit of doubt as they were not identified. The conviction of the appellant as a member of an unlawful assembly which consisted of three convicted accused and some others who were not identified and so not named, was upheld by the Supreme Court because there was sufficient evidence to show there were several others who participated in the offence though their identity was not known and so not named. Reghubar Dayal J, speaking through the Court, said:

If the courts below could legally find that the actual number of members in the appellant's party were more than five, the appellant's party will constitute an unlawful assembly even when only three persons have been convicted.¹⁷

Dharam Pal: In *Dharam Pal v State of Uttar Pradesh*,¹⁸ four accused were tried with fourteen others for rioting. The trial court gave the benefit of doubt to eleven and acquitted them. The remaining seven were convicted for the offence under *section 302, IPC* read with *section 149, IPC* and other offences. The High Court gave the benefit of doubt to four of them and held that at least four of the accused participated in the crime because of their admission and the injuries. The conviction of the appellant as a member of an unlawful assembly was upheld because the court assigned at the conclusion that the attacking party could not conceivably have been of less than five which was the number of the other party.

It is well settled, that the mere presence of a person in an assembly does not incriminate him to be a member of an unlawful assembly, unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under *section 142 of the Indian Penal Code*. It is necessary, therefore, for the prosecution to lead some evidence pointing to the conclusion that all the appellants had somehow participated in prosecution of the common object of the assembly.

[s 141.4] Assembly must have a common object

The law does not declare a mere assemblage of men, however large, illegal unless it is inspired by an illegal object. The mere presence of a person at the scene of the offence or in crowd does not make him a member of an unlawful assembly, unless it is proved that he did something or omitted to do something which would make him a member of an unlawful assembly. In other words, it must be proved that the persons had a common object, that they were actuated by the common object, and that the object was one of those set out in *section 141 of the Indian Penal Code*.

The word “object” means the purpose or design to do a thing aimed at and that the object must be “common” to the persons who comprise the assembly.¹⁹ That is to say, the object must be shared and possessed by all the members of the assembly, or that they should all be aware of it, and concur in it. The same object is not necessarily a common object, and becomes so only when it is known to and shared by all the members of the assembly. For instance, where only four of the five accused assembled are found to have shared a common object and not the fifth, the assembly is not an unlawful assembly. A common object must be established and it must be common to at least five persons.

The word “assembly” under *section 141, IPC* implies a meeting of five or more persons in pursuance of a common unlawful object. So it is not every combination or assemblage of five or more persons which the law discourages, but rather the combination of five or more persons only for a common unlawful object which is discouraged.

An assembly, which is lawful when it assembled, may subsequently become an unlawful assembly by the subsequent act of its members as stated in the *Explanation* clause attached to *section 141, IPC*. In *Moti Das v State of Bihar*²⁰, it was held that an assembly, which was lawful to start with, became unlawful the moment one of the members called on the others to assault the victim and his associates, and in response to his invitation all the members of the assembly started to chase the victim while he was running.

[s 141] Unlawful assembly.—

Chandrika Prasad: Similarly, in *Chandrika Prasad v State of Bihar*,²¹ wherein the unlawful object of the assembly developed at the spot of occurrence and the members continued in the assembly not merely as passive or innocent spectators, but indulged in overt acts along with others, the Supreme Court upheld the conviction of the accused for offences as members of an unlawful assembly, which though lawful to start with became unlawful by subsequent conduct of its members.

[s 141.5] Mere presence in assembly not sufficient

The Supreme Court has more than once reiterated the rule that mere presence of a person at the place where members of an unlawful assembly have gathered for carrying out their illegal object, does not incriminate him as a member thereof, unless it is shown that he did something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under *section 142 of the Indian Penal Code*. In *Baldin v State of Uttar Pradesh*,²² all the appellants, who were original inhabitants of the village, were convicted for murder of some refugees settled there by the Government and also for other offences as members of an unlawful assembly. The lower courts convicted them all on the basis of omnibus (same) evidence in general terms to the effect that the original inhabitants of the village were all inimically disposed towards the refugees, and all those appellants and many more were the miscreants and were armed with deadly weapons, such as guns, spears, axes, etc.

Their Lordships of the Supreme Court examined the case of each individual accused to satisfy themselves that mere spectators who had not joined the assembly and who were unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes. Subsequently the Supreme Court set aside the convictions of four appellants (Thakur Das, Ishwari Prasad, Mulloo and Jagdish), to whom no overt act could be attributed, nor any particular part could be assigned in the occurrence; the convictions of the rest were maintained and their appeals dismissed.

[s 141.6] Illegal objects

As stated earlier, an assembly of five or more persons is designated as an unlawful assembly, if the common object of the persons composing that assembly is any one of the following five objects declared illegal under *section 141, IPC*:

- (i) To overawe Government by criminal force;
- (ii) To resist the execution of law or legal process;
- (iii) To commit an offence;
- (iv) Forcible possession or dispossession of any property; or
- (v) To compel any person to do illegal acts.

[s 141.6.1] To overawe Government by criminal force

The gist of an offence under this clause consists in (a) overawing, (b) by a show of criminal force, the Government servant or a public servant in the lawful discharge of his duty.

The word “overawe” means more than the creation of apprehension or alarm or fear. A person is said to overawe another when he restrains him by awe, fear or superior influence. Overawing merely by superior influence is not criminal, nor is overawing by fear illegal, unless it is attended by a show of criminal force. But where a person is terrified into doing what he had otherwise no mind to do, of refraining from doing what he had otherwise a mind to do, he is said to be overawed, and where that fear is brought on by a show of force, he is

[s 141] Unlawful assembly.—

said to be overawed by a show of criminal force.²³ When a procession is organised to give vent to popular indication against local police force, mere shouting of objectionable and provocative slogans by the members will not amount to overawing the police as such words are not likely to inspire terror. But when members also resort to pelting of stones on the police force, resulting in actual injuries to members of police force, such an act amounts to overawing them.²⁴

It is important to note that the clause confers absolute protection to the Government inasmuch as mere overawing of Government by show of force by itself is illegal, whereas, in the case of a public servant the use of criminal force to overawe him is only illegal if it is used to obstruct him in the exercise of his lawful power.

[s 141.6.2] To resist execution to legal process

Resistance to law or legal process connotes some overt act. Mere words with no inclination to put them into effect do not suffice to attract the provision of the clause. The execution of any law means the carrying out of the provisions of law, or the enforcement of any act warranted by law. And “legal process” would mean a measure in accordance with the law. For example, a notification issued in accordance with section 30 of the Police Act prohibiting processions without a licence is one such process and resistance to it would amount to resistance to a “legal process.”²⁵ Accordingly, where a crowd refuses to disperse at the command of the police, the refusal to disperse itself constitutes an over act.²⁶

Ramprit Ahir: Where the act or the process is not legal, the resistance offered against it cannot be illegal. In *Ramprit Ahir's*²⁷ case, a police party, on being informed that certain persons were waiting near a particular railway line with the intention of committing robbery in a train, hastened to the spot and found the accused and certain other persons near the railway line, when the police attempted to arrest them, a fight ensued in which the police had the upper hand and succeeded in apprehending the accused and bringing them to the police station. The court held that the police had no justification for attempting to arrest the accused and consequently the resistance offered by the accused was not illegal within section 141(2) of the Indian Penal Code.

Pagla Baba: Similarly, in *Pagla Baba*,²⁸ when the entry of a police party into a *math* (abode of religious priests) for search of arms and arrest of some inmates of the *math* was not authorised by law, the police party cannot be held to have acted in due discharge of their duties and under process of law. Hence, resistance to their action to attempt to arrest, or to seize property, cannot be an illegal act so as to designate them (inmates) members of an unlawful assembly.

Uma Charan: Likewise, in *Uma Charan Singh*,²⁹ it was held that where warrant of attachment is illegal, resistance to execution of such warrant cannot render persons resisting liable as members of an unlawful assembly.

[s 141.6.3] Commission of an offence

The word “offence” in clause 3 is intended to include all offences both against body and property,³⁰ and is not restricted only to mischief³¹ criminal trespass³² and offences *ejusdem generis*, as, strictly speaking, it would seem to be in view of the preceding enumeration.

The word “offence” in section 141 means a thing punishable under a special or local law, if it is punishable under such law with imprisonment for a term of six months or upwards whether with or without fine.³³ Thus, where a licence is issued to organisers of a procession who defy conditions of the licence, the assembly is not an unlawful assembly under clause 3 of section 141 as offence under section 32 of the Police Act is punishable with a fine of Rs 200 only.³⁴ But where the complainant, a *Harijan* was maltreated by *panchayat* members for giving water to a high caste *Thakur* and was put under fear and wrongful confinement to enforce practice of “untouchability”, the *panchayat* members were held guilty as members of an unlawful assembly for having committed an offence under section 7(1)(c) of the Protection of Civil Rights Act, 1955.³⁵

[s 141.6.4] Forcible possession or dispossession

Clause 4 prohibits use of criminal force as well as show of criminal force by five or more than five persons, if their common object is (i) to take or obtain possession of any property, or (ii) to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or (iii) to enforce any right or supposed right.

(i) *First*.—This clause prohibits use of criminal force or show of criminal force to any person, when five or more than five persons join in “taking or obtaining” possession of any property.

Possession is the most important factor in determining the applicability of this clause. Even taking of possession of one's own property by force is unlawful.³⁶ The clause upholds possession compared to mere right to property, since possession is considered 99 per cent ownership in the eyes of the law. The law upholds possession as paramount in order to preserve peace and order in the community as against the mere right to property.

Baljit Singh: In *Baljit Singh v State of Uttar Pradesh*,³⁷ the Supreme Court held that where a party has a right as well as possession over the subject of that right, they are entitled to resist and repel an aggression for defending their possession and for doing so they cannot be convicted as members of an unlawful assembly within the meaning of clause (4) of section 141 of the Indian Penal Code. In this case, the accused party was in actual possession of the disputed land after its purchase and were sought to be dispossessed by the complainant's party, who trespassed on the land armed with *lathis*. The accused party in defending their possession caused the death of one of the dispossessors, inflicting on him 72 injuries. The Supreme Court set aside the conviction of the appellants under sections 147, 323/149 and 302/149 as they were held to have exercised their right of private defence, but which they exceeded in causing as many as 72 injuries, to the deceased and, accordingly, they were convicted for culpable homicide not amounting to murder under section 304 Pt I read with section 34 of the Penal Code.

However, there can be no right of private defence where the fight is premeditated on both sides unless the object of the assembly is shown to have been to repel forcible and criminal aggression.³⁸ In the case of a free fight, both sides mean to fight from the start and therefore neither party can have the right of private defence.

Manna: Thus, in *Manna v Emperor*³⁹, where Muslims started the construction of a slaughter house with a view to completing it, if necessary by use of force, and Hindus on learning of this intent went to the place armed to prevent construction and a fight ensued, the court held that both the parties of Muslims as well as of Hindus, constituted unlawful assemblies and neither of them was held to have exercised the right of private defence.

(ii) *Second*.—This clause prohibits use of criminal force or show of criminal force to any person, when five or more than five persons join in depriving any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment.

In the case of incorporeal rights, such as a right of way, or a right to use water, etc., no one is said to be in possession of it except during the actual moment when he is peacefully exercising it. If any person during the actual moment of peaceful enjoyment of right of way, or of use of water, or other incorporeal right, is deprived of such use or enjoyment by five or more than five persons by force, they can be convicted for constituting an unlawful assembly. So where an assembly of five or more persons came with the object of destroying a *bundh* and thereby depriving the cultivators of the use of water from a certain channel of which the latter were in lawful enjoyment, it was held that the assembly was an unlawful assembly.⁴⁰

(iii) *Third*.—This clause prohibits use of criminal force or show of criminal force to any person, when five or more than five persons join in enforcing any right or supposed right.

Medhi Shahwalli: In *Medhi Shahwalli*,⁴¹ it was held that the phrase “to enforce a right”, can only apply when the party claiming the right has no possession over the subject of that right and therein lies the distinction between “enforcing a right” and “maintaining a right”. A party in possession is entitled to resist and repel an aggression and his action in doing so would be for the maintenance of the right and not for enforcing the same.

The clause prohibits enforcement of “any right” or “supposed right”. The distinction between the two terms depends upon the actual existence of a right and the supposed existence of that right.

Budan Shah: In *Budan Shah*,⁴² it was held the expression to “enforce a right” implies the existence of two persons—the person who enforces it and the person against whom it is enforced. Such a situation arises only when the property over which, or the subject in respect of which, the right is sought to be enforced is not in the possession of the person trying to enforce that right, but in the possession of the person against whom that right is sought to be enforced. So where the Muslims have a right even to prohibit the playing of music before a mosque, they cannot enforce such prohibition by using criminal force and attacking the processionists. And if they do so, they would constitute an unlawful assembly and no question of self-defence would arise in that case, because the common object is not to protect a right but to enforce the same.

“Supposed right” is no right at all. It is mere pretention to a right which does not exist. And, therefore, no one has the right to vindicate his “supposed right”. So when a crowd of Muslims gathered near a mosque on the highway, where a number of men assembled and forcibly interrupted a procession on the ground that they had a right to do so because it caused them annoyance and was a nuisance,⁴³ or when a toddy shop was pulled down by cutting and destroying the *spathes* of toddy trees,⁴⁴ or when more than five persons joined to humiliate their adversaries,⁴⁵ the accused persons were held to have constituted an unlawful assembly because they used force in vindication of their supposed rights.

[s 141.6.5] To compel to do illegal acts

It is illegal for five or more than five persons, if their common object is to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do, by means of criminal force or show of criminal force. Clause (5) is very comprehensive and applies to all the rights a man can possess. It is not sufficient to bring a case under this clause that the accused should have merely used criminal force or show of criminal force to take possession of property, unless the use of force was accompanied by some criminal intent. So where a person sees another person committing theft, the former is entitled to arrest the latter under *section 43 of the Code of Criminal Procedure, 1973*. If other persons intervene to secure the release of the thief from the person arresting him, they constitute an unlawful assembly within the meaning of clause (5) of *section 141, IPC*.⁴⁶

¹ *IPC*, sections 141-145.

² *IPC*, sections 146-148, 152-156.

³ *IPC*, section 153A.

⁴ *IPC*, sections 159, 160.

⁵ Subs. by the A.O. 1950, for “The Central or any Provincial Government or Legislature”.

⁶ Kenny's *Outlines of Criminal Law*, 19th Edn, (1966), p 412.

[s 141] Unlawful assembly.—

7 Gour, Hari Singh, *Penal Law of India*, 11th Edn, vol II, pp 1290-1317.

8 *Constitution of India*, Article 19(1)(b) states: 'All citizens shall have the right—

....

(b) to assemble peaceably and without arms.

9 *R. v Hunt*, (1820) 1st Trials NS 171 : (1820) 3 B and A 566. *Corpus juris*. (66), p 38:

(a) A disturbance of the public peace by three or more persons who meet together with an intent mutually to assist each other in the execution of some unlawful enterprise of a private nature with force and violence.

(b) The meeting together of three or more persons, to the disturbance of the public peace, and with the intention of cooperating in the forcible and violent execution of some unlawful private enterprise.

(c) An assembly of three or more persons who, with intent to carry out any common purpose assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighbourhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly, needlessly, and without any reasonable occasion, provoke other persons to disturb the peace tumultuously.

(d) Any tumultuous disturbance of the public peace by three persons or more, having no avowed, ostensible, legal or constitutional object, assembled under such circumstances, and deporting themselves in such a manner as to produce danger to the public peace and tranquillity, and which excites terror, alarm and consternation (shock) in the neighbourhood.

10 *Ram Bilas Singh v State of Bihar*, (1964) 1 Cr LJ 573 ; *Dharam Pal v State of Uttar Pradesh*, AIR 1975 SC 1917 [[LNIND 1975 SC 314](#)] ; *Maina Singh v State of Rajasthan*, AIR 1976 SC 1084 [[LNIND 1976 SC 97](#)] ; *Achhey Lal v State of Uttar Pradesh*, 1978 Cr LJ 1101 (SC).

11 AIR 1963 SC 174 [[LNIND 1962 SC 118](#)] : (1963) 1 Cr LJ 100 : 1962 Supp (3) SCR 848 .

12 AIR 1976 SC 1084 [[LNIND 1976 SC 97](#)] : (1976) 3 SCR 651 [[LNIND 1976 SC 97](#)] : (1976) 2 SCC 827 [[LNIND 1976 SC 97](#)] : 1976 CLR 158 (SC) : 1976 CAR 145 .

13 1978 Cr LJ 1101 (SC) : AIR 1978 SC 1152 : (1978) 3 SCC 526 : 1978 UJ 262 .

14 (1964) 1 Cr LJ 573 (SC) : (1964) 1 SCR 775 [[LNIND 1963 SC 22](#)] .

15 (1964) 1 Cr LJ 573 (578) (SC) (*per* Mudholkar J), para 16 : (1964) 1 SCR 775 [[LNIND 1963 SC 22](#)] .

16 AIR 1961 SC 1787 [[LNIND 1961 SC 210](#)] : 1962 SCR (2) 395 .

17 AIR 1961 SC 1787 [[LNIND 1961 SC 210](#)] (1789), (para 11).

18 AIR 1975 SC 1917 [[LNIND 1975 SC 314](#)] : (1975) 2 SCC 596 [[LNIND 1975 SC 314](#)] : 1975 CLR 537 (SC) : 1975 Cr LJ 1666 : 1975 CAR 343 : 1975 SCC (Cri) 704 [[LNIND 1975 SC 314](#)] .

19 *Shiekh Yusuf v Emperor*, AIR 1946 Pat 127 .

20 AIR 1954 SC 657 : 1954 Cr LJ 1708 .

21 AIR 1972 SC 109 [[LNIND 1971 SC 453](#)] : (1972) 4 SCC 140 [[LNIND 1971 SC 453](#)] : 1972 Cr LJ 22 : 1972 UJ 43 : 1971 CAR 425 . In *Komma Neelakantha v State of Andhra Pradesh*, (1978) Cr LJ 780 , the Supreme Court has reaffirmed its earlier view on the subject.

[s 141] Unlawful assembly.—

- 22** AIR 1956 SC 181 .See also *Musakhan v State of Maharashtra*, (1976) Cr LJ 1987 (SC) : 1976 CLR 466 (SC) : 1976 CAR 375 : AIR 1976 SC 2566 : 1977 SCC (Cri) 164 .
- 23** Gour, *Penal Law of India*, 11th Edn, vol II, pp 1303 to 1310.
- 24** *Durga Das v State of Punjab*, AIR 1970 Punj 271 , where conviction of the appellants for shouting of slogans was held wrong.
- 25** *King Emperor v Abdul Hamid*, (1922) 2 Pat 134 (SB); *Ramendra Chandra Ray v Emperor*, (1931) ILR 58 Cal 1303.
- 26** *Emperor v Abdul Hamid*, AIR 1923 Pat 1 .
- 27** (1925) 26 Cr LJ 1608 .
- 28** *Pagla Baba v State of Orissa*, AIR 1957 Ori 130 [[LNIND 1957 ORI 1](#)] .
- 29** *Uma Charan Singh v Emperor*, 1902 ILR 29 Cal 244.
- 30** *Ghansa Singh v State of Rajasthan*, AIR 1958 Raj 226 [[LNIND 1957 RAJ 120](#)] .
- 31** *IPC*, section 425.
- 32** *IPC*, section 441.
- 33** Ratanlal and Dhirajlal, *Law of Crimes*, 23rd Edn, (1987), pp 461-470. For definition of offence see *IPC*, section 40 at pp 87-92 *supra*.
- 34** *Bhalchandra v Emperor*, AIR 1929 Bom 433 .
- 35** *Ram Bahu v Emperor*, AIR 1955 Pat 381 . Although in this case the assembly was not held to be unlawful assembly within the meaning of section 141, *IPC*.
- 36** *Faiyaz Khan v Rex*, AIR 1949 All 180 [[LNIND 1948 ALL 13](#)] .
- 37** AIR 1976 SC 2273 : (1976) 4 SCC 590 : 1976 CLR (SC) 451 : 1976 Cr LJ 1745 : 1976 CAR 396 .
- 38** *Gaman v Crown*, (1947) 48 Cr LJ 590 .
- 39** AIR 1934 Lah 209 .
- 40** *Dy. Legal Remembrancer v Matukdhari Singh*, AIR 1917 Cal 687 .
- 41** *Emperor v Medhi Shahwalli*, (1941) 42 Cr LJ 281 .
- 42** *Budan Shah v Govt of Mysore*, (1950) 55 Mys HCR 317.
- 43** In English law the use of force even in the assertion of supposed right is protected. Gour, Hari Singh, *Penal Law of India*, 11th Edn, vol II, 1317 to 1319.
- 44** *Marrimuthu Naidu Re*, AIR 1923 Mad 606 [[LNIND 1923 MAD 345](#)] .
- 45** *Ram Sahay Ram v Emperor*, (1920) 57 IC (C) 278.
- 46** *Mohd Hasnain v Rex*, AIR 1949 All 351 [[LNIND 1948 ALL 39](#)] .

[s 142] Being member of unlawful assembly.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 142] Being member of unlawful assembly.—

Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

[s 142.1] Member of an unlawful assembly

Section 141 having explained what an unlawful assembly is, section 142 declares who is a member of an unlawful assembly and sections 143 to 145 prescribe punishment to the member of an unlawful assembly. According to section 142 anyone who joins an unlawful assembly or continues in it, is a member of an unlawful assembly. In other words, to hold a person as a member of an unlawful assembly, the following two conditions are necessary, viz.,

- (1) The person joining the assembly must be aware of the facts which render the assembly unlawful as specified in *section 141, IPC*, and
- (2) The person must either intentionally join that assembly, or if he joined the assembly before being so aware,⁴⁷ he must continue in it after becoming so aware.

The mere presence of a person in an assembly does not make him a member of an unlawful assembly, unless

[s 142] Being member of unlawful assembly.—

it is proved that he did something or omitted to do something which would make him a member of an unlawful assembly or unless the case falls under *section 142, IPC*.⁴⁸ Thus, the crucial question to determine the membership of an assembly in such a case is whether the assembly consisted of five or more persons and whether the said person entertained one or more of the common objects as specified by *section 141, IPC*. Thus, if a person is not aware of the facts, which render an assembly unlawful, section 141 is not attracted and would not come into operation. A member of an unlawful assembly may withdraw from the assembly. It may be either actual and voluntary or involuntary depending on the facts and circumstances of the case.

¹ *IPC* , sections 141-145.

² *IPC* , sections 146-148, 152-156.

³ *IPC* , section 153A.

⁴ *IPC* , sections 159, 160.

⁴⁷ *Masalti v State of Uttar Pradesh*, AIR 1965 SC 202 [[LNIND 1964 SC 173](#)] : 1965 (1) Cr LJ 226 : (1964) 8 SCR 133 [[LNIND 1964 SC 173](#)] .

⁴⁸ *Baladin v State of Uttar Pradesh*, AIR 1956 SC 181 : 1956 Cr LJ 345 .

[s 143] Punishment.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 143] Punishment.—

Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[s 143.1] Punishment

Section 143 makes very membership in an unlawful assembly, as defined in sections 141 and 142, an offence punishable, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

¹ IPC , sections 141-145.

² IPC , sections 146-148, 152-156.

³ IPC , section 153A.

⁴ IPC , sections 159, 160.

[s 143] Punishment.—

End of Document

[s 144] Joining unlawful assembly armed with deadly weapon.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 144] Joining unlawful assembly armed with deadly weapon.—

Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[s 144.1] Joining unlawful assembly

The offence under section 144 is an aggravated form of the offence prescribed under *section 143, IPC*. The risk to the public tranquility is aggravated by the intention of using force, evinced by carrying arms or deadly weapons such as pistols, guns, spears, swords, daggers, *kripans* and *kantas*, etc. section 144 provides that where a member of an unlawful assembly is armed with a deadly weapon, which used as a weapon of offence, is likely to cause death, he would be liable to an enhanced punishment which may extend to two years of imprisonment, or with fine, or with both.

¹ *IPC* , sections 141-145.

[s 144] Joining unlawful assembly armed with deadly weapon.—

2 *IPC* , sections 146-148, 152-156.

3 *IPC* , section 153A.

4 *IPC* , sections 159, 160.

End of Document

[s 145] Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 145] Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.—

Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[s 145.1] Joining unlawful assembly after commanded to disperse

Section 145 makes continuance or joining in an unlawful assembly, after being commanded to disperse, punishable with up to two years of imprisonment, or with fine, or with both.⁴⁹

¹ IPC , sections 141-145.

[s 145] Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.—

2 *IPC* , sections 146-148, 152-156.

3 *IPC* , section 153A.

4 *IPC* , sections 159, 160.

49 *Girdhara Singh v Emperor*, (1922) 23 Cr LJ 5 .

End of Document

[s 146] Rioting.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 146] Rioting.—

Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

[s 146.1] Rioting: Principle and scope

Section 146 defines the offence of rioting and section 147 prescribes the punishment for rioting. The basis of the law as to rioting is the definition of an unlawful assembly, a riot being simply an unlawful assembly in a particular state of activity, that activity being accompanied by the use of force or violence. It is only the use of force that distinguishes rioting from an unlawful assembly.⁵⁰

A riot has been defined by Howkins, as a tumultuous disturbance of the peace by three or more persons assembling together of their own accord with an intent mutually to assist one another against anyone who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.⁵¹

[s 146.2] Distinction between riot and rout

English law distinguishes between a riot and rout. The unlawful assembly becomes a rout as soon as some act

[s 146] Rioting.—

has been done “moving towards” the execution of the common purpose; and the rout becomes riot when some act is done in part execution of this common purpose; a rout being a disturbance of the peace by persons assembled together with an intention to do a thing which, if executed, would make them rioters, and actually making a movement towards the execution thereof but not executing it. The *Indian Penal Code* has made no such distinction between the two.

[s 146.3] What constitutes rioting

To constitute rioting under section 146 the following ingredients must be established:—

- (1) There must be an unlawful assembly (section 141);
- (2) The accused must be a member of such an unlawful assembly (section 142);
- (3) Force or violence must be used by the said unlawful assembly or any member thereof;
- (4) **Hazara Singh:** In *Hazara Singh*,⁵² it was held that the said force or violence must be used in prosecution of the common object of the said unlawful assembly.

Use of force⁵³ is a necessary condition to attract this section, as mere intention to use force does not suffice to hold a person liable for rioting.

The use of any force, even though it is of the slightest possible character, by any one member of the assembly once established would constitute rioting. For instance, where a member of an unlawful assembly in prosecution of the common object of the assembly throws down a man and causes him bodily hurt, the offence of rioting under section 146 is complete as soon as the man is thrown down by using force and the hurt subsequently caused would come under *section 323 or 325 of Indian Penal Code*.

[s 146.4] Prosecution of common object

Section 141 illustrates what objects is deemed unlawful. If the common object of an assembly is not illegal, it is not rioting, even if force is used by any member of that assembly. Acts done by some members outside the common objects are only chargeable against the actual perpetrator of those acts.

[s 146.5] Resistance to illegal warrant

Resistance to the execution of an illegal warrant within reasonable bounds, does not amount to rioting, but when the right of resistance is executed and a severe injury, not called for, is inflicted, the person who inflicts the injury may be convicted of causing such injury.

[s 146.6] Sudden quarrel

Mere use of force by persons assembled does not render all of them liable for rioting. The essence of the offence lies in the use of force to achieve a common design. This implies some degree of previous concert and deliberation. If a group of persons assembled for any lawful purpose suddenly quarrel with no previous design or intention, it is not a riot in the technical sense of the term. Similarly, it is not a riot when members of an audience in a public theatre applaud or hiss (to make a sound) in a performance, but if a number of men come prepared to interrupt the performance by causing a disturbance, this would be rioting, though they may not resort to personal violence or cause any injury to the house.

[s 146.7] Private defence

There can be no right to private defence when a riot is premeditated on both sides. When both parties are

[s 146] Rioting.—

armed and prepared to fight, it is immaterial as to who is the first to attack, unless it is shown that the party was acting within the legal limits of the right of private defence.

-
- 1** *IPC* , sections 141-145.
- 2** *IPC* , sections 146-148, 152-156.
- 3** *IPC* , section 153A.
- 4** *IPC* , sections 159, 160.
- 50** *Per* Plowden J, in *Rasul*, (1889) PR No. 4. See *supra* note 6, p 1274.
- 51** *Per* Howkins, 1, Howk, PC (c) 65 section 1. See Public Order Act, 1986, section 1 for definition of Riot & section 2 for violent disorder. The former requires 12 and the latter 3 persons to constitute the offence. See Smith and Hogan, Criminal Law, 5th Edn, (1983) 732.
- 52** *Hazara Singh v State of Punjab*, (1971) 3 SCR 674 [[LNIND 1971 SC 104](#)] : (1971) 1 SCC 529 [[LNIND 1971 SC 104](#)] : 1971 UJ 326 : 1971 SCC (Cri) 237 [[LNIND 1971 SC 104](#)] : 1971 CAR 228 .
- 53** See section 349, *IPC* for definition of “force”.

[s 147] Punishment for rioting.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 147] Punishment for rioting.—

Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[s 147.1] Punishment

Section 147 prescribes punishment for rioting, which may extend to two years of imprisonment, or fine, or both.

¹ IPC , sections 141-145.

² IPC , sections 146-148, 152-156.

³ IPC , section 153A.

⁴ IPC , sections 159, 160.

[s 147] Punishment for rioting.—

End of Document

[s 148] Rioting, armed with deadly weapon.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 148] Rioting, armed with deadly weapon.—

Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[s 148.1] Rioting with deadly weapons likely to cause death

Section 148 is an aggravated form of rioting as defined in *section 147, IPC*. Under this section when a person, being armed with a deadly weapon, or a weapon which is likely to cause death, commits rioting, he is subjected to enhanced punishment, which may extend to three years of imprisonment, or fine, or both.

Md. Ankoos: In *Md Ankoos v The Public Prosecutor, High Court of Andhra Pradesh*⁵⁴, (2010), the Apex Court held that where the appellants accused have been expressly charged for the offence punishable under section 148 and have been acquitted there under, they cannot be legally convicted for the offence punishable under section 302 read with section 149. It is so because the offence of rioting must occur when members are charged with murder as the common object of the unlawful assembly. Section 148 creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under section 148 for legally recording their conviction under section 302 read with section 149. However, where an accused is charged under section 148 for rioting armed with deadly weapon and acquitted, conviction of such accused under *section 302 read with section 149, IPC* could not be legally recorded.

[s 148] Rioting, armed with deadly weapon.—

Five persons were done to death in the intervening night of 2 and 3 October 2000 in village Thimmapur, District Warangal (Andhra Pradesh). The villagers suspected that deceased were practicing sorcery (magic) and due to that few deaths took place in the village. 77 persons were sent up for trial for the offences under sections 148, 448, 307, 302. 120B read with 109, *IPC*. The Court of 2nd Additional Sessions Judge at Warangal acquitted all of them *vide* his judgment dated 9 June 2009. In the appeal by the State of Andhra Pradesh, High Court confirmed the judgment of acquittal of 59 accused but convicted 19 persons under *section 302* read with *section 149, IPC* and sentenced them to undergo imprisonment for life *vide* judgment dated 4 October 2007.

Allowing the appeal the Apex Court held that the appellants cannot be legally convicted for the offence punishable under *section 302* read with *section 149, IPC*, because the offence of rioting must occur when members are charged with murder as the common object of the unlawful assembly. *Section 148, IPC* creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under *section 148, IPC* for legally recording their conviction and or *section 302* read with *section 149, IPC*. However, where an accused is charged under *section 148, IPC* and acquitted, conviction of such accused under *section 302* read with the judgment of the court, it is observed that the amount or intensity of the disaffection is absolutely material. He further observed that—

The offence consists in exciting or attempting to excite in other certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within *section 124A* and would probably fall within other sections of the *Penal Code*. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government, and still if he tried to excite feelings of enmity to the Government, that itself is sufficient to make him guilty under the section.⁵⁵

¹ *IPC* , sections 141-145.

² *IPC* , sections 146-148, 152-156.

³ *IPC* , section 153A.

⁴ *IPC* , sections 159, 160.

⁵⁴ AIR 2010 SC 566 [[LNIND 2009 SC 1959](#)] .

⁵⁵ AIR 2010 SC 566 [[LNIND 2009 SC 1959](#)] ; DK Jain and RM Lodha JJ.

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

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

[s 149.1] Principle of Joint liability of members of an unlawful assembly

Section 149 does not create a new offence as in *sections 34* and *120B, IPC*. It incorporates the principle of vicarious liability and holds a person liable for an offence, which he might not have actually committed, by reason of his being a member of an unlawful assembly. The section provides that every member of an unlawful assembly having a common object is responsible for acts committed by any other member of that assembly, and is guilty of the substantive offence and hence punishable for that offence.⁵⁶ As stated by the Supreme Court in *Umesh Singh*,⁵⁷ an accused whose case falls within the terms of *section 149, IPC* cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he had joined.

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

[s 149.2] Criminal liability for an act will be determined according to the object of the member of the assembly

Bhimrao: In *Bhimrao v State of Maharashtra*⁵⁸ (2003), the question was whether the appellant who was member of an unlawful assembly sharing the common object of causing assault on the deceased could be convicted under section 326/149 or section 302/149 or *section 352* read with *section 149, IPC*.

In the impugned case all the accused along with some others formed an unlawful assembly with the common object of causing assault on one Prabhakar. With this object in view they went to the house of Prabhakar where some of the members entered the house and assaulted Prabhakar causing grievous injuries consequent to which he died after six days. While Prabhakar was being assaulted inside the house the appellants stood outside, but did not take part in the assault on the deceased.

The Sessions Judge considering that the common object of the assembly was that of committing murder convicted the appellants under *section 302* read with *section 149, IPC*.

However, the High Court arrived at the conclusion that when the members of an unlawful assembly reached the house of Prabhakar, some entered the house and attacked Prabhakar causing him grievous injuries, which was something more than the original object of the assembly of mere causing assault, while the appellants stayed outside the house. Accordingly, the High Court convicted those who were inside the house under section 304, Pt II, while those who were outside the house guilty of offence punishable under *section 326* read with *section 149, IPC*.

Allowing the appeal the Apex Court held that the High Court having rightly given a specific finding that the original object of the assembly was only to assault deceased Prabhakar and also having given a finding that the said common object got changed only in regard to those members of the unlawful assembly who entered the house, the act of those members of the unlawful assembly who entered the house could not be attributed to the appellants. The appellants accordingly could be held guilty of the causing assault punishable under *section 352* read with *section 149, IPC* only.

[s 149.3] Scope and applicability of section 149

Umesh Singh: In *Umesh Singh*,⁵⁹ the accused (appellants) numbering about 20 assembled together armed with guns and *lathis* came to the "*khalihan*"⁶⁰ of Bhola Singh where he and other members of his family were thrashing paddy. The accused tried to take away paddy and threatened that any resistance would be met with serious consequence that might even result in death, and ultimately some persons gunned down and physically assaulted by *lathis* etc. One of the accused Sheonandan Singh snatched a child one and half years old from the arm of a lady and threw the child on the ground resulting in his death.

The trial court convicted the accused under *section 302* read with *section 149, IPC* and sentenced Sheopujan Singh and Upendra Singh to death and others to life imprisonment.

The High Court in appeal reduced the death sentence to life imprisonment in case of Sheopujan Singh and Upendra Singh and dismissed appeal in case of others.

The Supreme Court endorsing the High Court's view held that it is futile to contend for the appellants that their conviction is in any way bad in view of the fact that the appellants were members of an unlawful assembly which was armed with *lathis* and guns and a declaration had been made that in the event there is any resistance to take away the paddy which is the original object, they were willing to take the life and take away the paddy.

Unlawful Assembly and Murder: In *Roy Fernandes v State of Goa*,⁶¹ the Supreme Court held that acquittal of

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

three accused persons belonging to unlawful assembly by giving them benefit of doubt would not be sufficient to negate the theory of there, being an unlawful assembly of which appellant was a member for murder of the deceased. Acquittal of three accused persons belonging to a group of five members of an unlawful assembly for murder and offences punishable under *sections 143, 148, 323, 325 and 302, IPC* read with *section 149, IPC* by giving them benefit of doubt would not be sufficient to negate theory of there being an unlawful assembly of which appellant was member.

Incident in question securing on account of sudden dispute between parties arising out of proposed fencing of property. Appellant accused along with four companions rushed to the spot to intervene and prevent other party from putting offence.

Held, assembly was unlawful though accused persons had not come to place of occurrence with common object of killing deceased.

[s 149.4] Ingredients

To hold a member of an unlawful assembly liable under this section the following two conditions must be fulfilled:—

- (i) The offence must have been *committed by one or the other member of the assembly in prosecution of the common object* of the unlawful assembly; and
- (ii) The offence must be such as the *members of the unlawful assembly knew it to be likely to be committed* in prosecution of the common object.

In other words, the first clause of section 149 contemplates the commission of an offence by any member of an unlawful assembly in prosecution of the common object;

While the second clause embraces within its fold the commission of an act, which may not necessarily be the common object of the assembly, nevertheless the members of the assembly had knowledge of the likelihood of the commission of an offence.

Thus, a person is constructively made liable on the principle of joint liability for an offence which he has not actually committed.⁶² Before recording a conviction under *section 149, IPC* the essential ingredients of *section 141, IPC* must be established.

Shambhu Nath: Shah J, speaking through the Supreme Court in *Shambhu Nath Singh*,⁶³ has laid down the law laid down in *section 149, IPC* in the following words:

Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed.

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

But members of an unlawful assembly may have community of object up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of *section 149 of the Indian Penal Code* may be different on different members of the same unlawful assembly.⁶⁴

[s 149.5] Each member of an unlawful assembly is vicariously liable for the *criminal act* committed by others

In the *State of Rajasthan v Nathu*⁶⁵ (2003), the Apex Court set aside the order of acquittal recorded by the High Court in respect of those accused whom it had held had not committed the act and restored their conviction under *section 302* read with *section 149, IPC* and sentence recorded by the trial court.

The accused five in number with a view to eliminate the complainant and to avenge long standing animosity carried formidable arms, entered the house of the complainant by breaking the wall and finding that he was not there butchered his children. The High Court in this case distinguished the role-played by the accused D who had struck a fatal blow and rest of the other four accused persons and acquitted rest of the four accused persons.

Rejecting the High Court's contention the Apex Court held that the fact that only two accused came to the house after breaking the wall and the remaining accused persons entered through the door was inconsequential for determining their common object. Once it had been proved that death had been caused in prosecution of the common object of the unlawful assembly, it was not necessary to record a definite and specific finding as to which particular accused out of the members of the unlawful assembly caused that fatal injury.

Once an unlawful assembly has come into existence and the said assembly continued to share the common object, each member of the assembly became vicariously liable for the *criminal act* committed by a member of the unlawful assembly in prosecution of the common object of the unlawful assembly. The common object to kill the complainant was clearly gatherable from the formidable weapon, which the accused carried, and their aggressive behaviour of entering the house by breaking down the wall.

Again in a particular case the common object of the assembly might be the commission of a particular act, while there might be likelihood of yet another offence of being committed, the knowledge whereof is capable of being safely attributable to the members of the assembly. Under these circumstances in either case each member of the assembly would be vicariously liable for the commission of the offence.⁶⁶

In the absence of definite role played by the accused appellants in Group rivalries and enmity between two groups resulting in murder, accused appellants are entitled to be acquitted by giving them benefit of doubt under *sections 149/300, IPC*.

In *Eknath Ganpat Aher v State of Maharashtra*⁶⁷, two appeals filed by the fourteen accused persons who have been convicted and sentenced under *sections 149/300, IPC* by 2nd Additional Sessions Judge, Ahmednagar. The accused were charged for causing grievous hurt in prosecution of the common object of the unlawful assembly and also for committing murder of the members of the other group which has been upheld by the High Court of Bombay,

Allowing the appeal and setting aside conviction, the Apex Court held that, it is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

having participated in the assault. In such situations the Courts are called upon to be very cautious and sift (examine) the evidence with care. Where after a close scrutiny of the evidence, if a reasonable doubt arises in the mind of the court with regard to the participation of any of those who have been roped in; the court would be obliged to give them the benefit of doubt.

In spite of three innocent persons including two children having lost their precious life by a mob allegedly comprising of nearly 20 people that entered in to the house of the victim and assaulting and killing of three persons accused are entitled to benefit of doubt in view of the accused having being not identified by any particular individual of assault and killing of victims.

[s 149.5.1] Credibility of testimony

Sections 149 and 302 IPC Kamta Yadav. In *Kamta Yadav v State of Bihar*⁶⁸, Supreme Court speaking through AK Sikri J said, credibility and trustworthiness of all these eye witnesses could not be shaken by the accused persons. The conviction can be done on their testimonies even if they are related to the deceased.

AK Sikri, J said:

Five Appellants, who were tried for offence under *section 302* read with *section 149 of Indian Penal Code, 1860* and convicted by the Trial Court approached Apex Court after their conviction was upheld by the High Court. During the pendency of this appeal, one of the accused persons, namely Hiralal Yadav, expired and the appeal qua him stood abated. The validity of the judgment of the High Court in respect of the remaining four appellants is the subject matter of this appeal. To trace out the prosecution case in brief, it may be mentioned that on 16 November 1991, at about 9:00 am. Ajodhaya Yadav, armed with a lathi, and other four Appellants armed with bhala, were ploughing a field belonging to the informant while Kashinath Yadav exhorted others to kill the informant Ramji Yadav. Hiralal Yadav caused a bleeding injury on the head of the informant with a bhala.

The informant in order to save his life shouted on which his uncle Ramayan Yadav (deceased), his father Dharichhan Yadav (PW-1) and his brother Bir Bahadur Yadav (PW-3), came in order to save him. Hiralal Yadav then caused a bhala injury on the chest and abdomen of the deceased who fell down and became unconscious. PW-1 also fell down as he was assaulted with bhala by Kashinath Yadav and Kamta Yadav causing injuries on his abdomen, back of the body and hand. PW-3 was also assaulted by Ajodhaya Yadav with lathi and also by Bhim Yadav with bhala on head causing bleeding injury.

On the shouts raised by the informant and his parry, Dudhnath Yadav (PW-2) and Jagdish Yadav came and saved them. Other persons from the village also came and thereafter the accused person stopped assaulting and fled away. The reason for the occurrence was said to be a dispute over the land and litigation in the past which had resulted in filing of a Court case also.

While dismissing the appeal Apex Court said: (i) There were six eye witnesses and three of them were injured eye witnesses, which was a heavy factor to show the actual presence of witnesses at the scene of occurrence.

The only requirement is to examine their depositions with greater caution and deeper scrutiny is needed, which exercise was done by both the Courts below. In fact, when the accused were confronted with the factual and legal position, they could not even provide any answer to the same. The accused could not point out as to how non-examination of independent persons acted to the prejudice of them. [10] and [11].

Appeal dismissed.

Hazi Khan: In *State of Rajasthan v Hozikhan*,⁶⁹ the Apex Court said, when all 10 accused are found present on

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

the place of occurrence and participatory in assault on deceased, common intention of all accused is believed regardless of weapons of offence. Accused liable to be proved under sections 326, 149 and 53 (PW7]. Keeping in view severity of assault by accused persons with dangerous weapons accused sentenced to for 7 years with of Rs 2000 code (PW 8).

These appeals by the State of Rajasthan are against the acquittal of the accused respondents of the charges framed against them under sections 148, 302, 307, 323/149, 324/149, 326/149, 324, 326 and 323 of *Indian Penal Code, 1860*. Allowing the appeal partially apex Court held insofar as the substantive offence under section 302, IPC or under section 307, IPC, 1860 with the aid of either section 34, IPC and section 149. IPC has been framed. The evidence on record is not sufficient to attribute any specific injury suffered by the deceased to any particular accused. In such a situation, the High Court was perfectly justified in acquitting the accused of the offences under section 302, IPC or under section 307, IPC.

However, we have noticed that charge was also framed against the accused respondents under section 326 read with section 149, IPC. If all the accused were present at the place of occurrence and had participated in the assault on left said of the chest of Suresh Babu. The deceased fell down and AI inflicted two more stab injuries. When the deceased was struggling to stand up and escape the other accused indiscriminately beat him with a reaper cutting machine and sticks. The time of attack was 8:25 pm Suresh Babu died. The post-mortem certificate referred to 26 injuries on the body of the deceased Suresh Babu and the cause of death was stated as "the deceased died of multiple injuries sustained to chest". The Trial Court convicted the group of accused but the High Court of Kerala acquitted a few while making *subjective inquiry of individual role*. The High Court referred to the clash between the supporters of CPI(M) and BJP workers. It held that the deceased was attacked due to political rivalry. But the High Court found that there is no evidence to show that the members of the unlawful assembly (especially A3, A4, A14, A15 and A18) had a common object to commit murder of Suresh Babu. The reasoning given by the High Court was (a) the accused were not aware that the deceased was travelling in the bus, and (b) there was no evidence to show that they formed an unlawful assembly with a view to attack and commit his murder.

Allowing the appeal and upholding the conviction awarded by the Trial Court against accused. The Supreme Court through, I Nageswara Rao J rightly held that

The deceased and accused belong to two political parties opposed to each other. There were three other incidents of clashes between the rival groups. The existence of a CPI(M) officer at Ottapilavu junction new Incident place is proved. The accused along with others assembled and were searching for BJP workers travelling in the buses that were passing through the junction. The common object of the member of the unlawful assembly was to attack any BJP supporter who was passing through Ottapilavu junction. Unfortunately, Suresh Babu was in the bus and he was killed in the attack.

SA Bobde J, who rightly limited himself only to this issue, also explained the joint liability jurisprudence which will be a beacon in future decision making. His *ratio decidendi can be found in this statement*;

But having participated and gone along with the others, an inference whether inculpatory or exculpatory can be drawn from the conduct of such an accused. The following questions arise with regard to the conduct of such an accused:—

- (i) What was the point of time at which he discovered that the assembly intended to kill the victim?
- (ii) Having discovered that, did he make any attempt to stop the assembly from pursuing the object?
- (iii) If he did, and failed, did he dissociate himself from the assembly by getting away?

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

Under *section 149 of Indian Penal Code, 1860* the prosecution is required to prove participation beyond reasonable doubts. One, the accused was a member of unlawful assembly (section 142). Crime was committed in prosecutions of common object (141/149).

A curious onlooker or a bystander is not a member of unlawful assembly because he lacks intention to become member of unlawful assembly (section 142).

Sections 149, 149, 302 and 324 — IPC

In *Pappi @ Mehboob v State of Rajasthan*⁷⁰,—In an appeal by the accused who has been convicted for offence punishable under *section 302 of the Indian Penal Code* the Apex Court said:

Trial Court convicted and sentenced all five Accused for assaulting Victim/deceased who succumbed to injuries – High Court/Appellate Court acquitted other Accused but maintained conviction and sentence of Accused no. 1 *u/s. 302 of IPC* while acquitting *u/s 148, 324/149 of IPC*—Accused no. 1 / Appellant filed this appeal—Whether acquittal of Co-Accused can form basis for acquittal of Appellant. Apex court held, that direct evidence to substantiate involvement of Appellant in commission of crime—Evidence given by injured eye-witness/PW6 besides independent witness/PW9 and other circumstances, pointed towards guilt of Appellant – Appellant gave first blow and continued to give further blows, as result of which deceased suffered multiple injuries and succumbed—Acquittal of co-accused no ground to discard otherwise reliable evidence pointing towards complicity of Appellant—No fault with impugned judgment.

Dismissing the appeal Apex Court held there is direct evidence to substantiate the involvement of the appellant (Accused No. 1) in the commission of the crime, given by the injured eye-witness (PW6) besides the independent witness (PW9) and other circumstances, pointing towards the guilt of the appellant who gave the first blow and continued to give further blows, as a result of which deceased Guddu suffered multiple injuries and succumbed to those injuries.

Suffice it to observe that the acquittal of the co-accused by giving benefit of doubt, by itself can be no ground to discard the otherwise reliable evidence which has remained unshaken, pointing towards the complicity of the appellant in the commission of crime. In that view of the matter, no fault can be found with the impugned judgment affirming the finding of guilt against the appellant alone, amongst the five accused tried together, while convicting the appellant simpliciter under *section 302 of IPC*.

In *Munishamappa, Lakshmana, Rani, Venkateshappa v State, Dr Dhananjaya Y Chandrachud, J v State of Karnataka*.⁷¹

The Principal Sessions Judge, Kolar, acquitted eleven persons who were tried for offences under sections 143, 148, 323, 324 and 302 read with *section 149 of the Indian Penal Code* and *sections 3, 4 and 5 of the Explosive Substances Act, 1908*. The Karnataka High Court allowed the state appeal in part and convicted ten of the accused (accused Nos. 1 to 4, 6 to 8 and 10 to 12 before Trial Court) of offences punishable under *section 304 Pt I read with section 149 of the Penal Code* and sentenced them to rigorous imprisonment for a period of seven years each. Further, each of them was convicted under *section 324 read with section 149 of the Code* and sentenced to suffer rigorous imprisonment for a period of one year with a fine of Rs 5000/-.

In the present case, applying the same rationale, we are of the view that the common object within the meaning

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

of section 149 is evident from the genesis of the incident, the manner in which the accused returned after the initial altercation armed with lethal weapons and the nature of the injuries which were inflicted in concert.

Dismissing the submission which has been urged on behalf of the complainant, the Apex Court said we are not inclined to interfere with the finding of the High Court that the conviction must be based on the provisions of section 304 Pt I of the Code. In coming to this conclusion and affirming the view of the High Court, we have based ourselves on the background of the dispute, circumstances in which the incident took place and all the surrounding circumstances. However, we are of the view that the sentence which has been imposed by the High Court should be enhanced to ten years rigorous imprisonment. We accordingly affirm the judgment of the High Court convicting accused Nos. 1, 2, 3, 4, 6, 7, 8 and 11 of the offence under section 304 Pt I. However, they are sentenced to undergo rigorous imprisonment of ten years.

Khilan: In *Khilan v State of Madhya Pradesh*,⁷² (2010), the appellants eight persons⁷³ armed with deadly weapons allegedly formed unlawful assembly and in furtherance of their common object committed murder of deceased Toopan Singh. Medical evidence showed that deceased had suffered five incised injuries. Weapons used were recovered at the instance of appellant and evidence of witnesses was consistent. The High Court, though acquitted one of appellant, has reaffirmed finding of conviction by trial Court on independent appreciation of evidence. Cogent reasons were given in support of conclusions by High Court. In absence of any infirmity, Supreme Court declined to exercise powers of special leave to appeal under *Article 136 of the Constitution*.

Dismissing the appeal the Apex Court held in the absence of any exceptional circumstances or any miscarriage of justice which would shock the conscience of the Court, the opinion expressed by the courts below was either manifestly perverse or unsupportable from the evidence on record, it is not possible for the Apex Court to convert itself into a court to review evidence for a third time.

[s 149.6] Mere Presence in an Unlawful Assembly will not make a Person Liable Unless there is Common Object

Shivjee Singh: In *Shivjee Singh v State of Bihar* (2009),⁷⁴ the Apex Court reiterated its earlier view that mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object.⁷⁵

Distinction between two parts of section 149, i.e., (i) common object and (ii) knowledge cannot be ignored or obliterated. The word “knew” used in the second branch of the section 149 implies something more than a possibility and it cannot be made to bear the sense of “might have been known”. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object.

That, however; does not make the converse proposition true; there may be a case which would come within the second part but not within the first part. The distinction between the two parts of section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined,—

- (i) whether the offence committed falls within the first part, or
- (ii) it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

However, there may be cases which would be within first part, but offences committed in prosecution of the common object would be generally, if not always, be within the second part, namely, offences which the parties knew to be likely committed in the prosecution of the common object.

Appellant in Criminal Appeal No. 1494 of 2004 were sentenced to life imprisonment.⁷⁶ Ambika Singh – appellant in Criminal Appeal No. 484 of 2006 was sentenced to three years, and five years for the three different offences.⁷⁷

When the factual scenario is considered in the background of the above principles set-out above, the inevitable conclusion is that the appeal filed by the appellants in Criminal Appeal No. 1494 of 2004 deserves to be allowed. Their conviction is set-aside so far their conviction under *section 302* read with *section 149, IPC* is concerned. But the sentence imposed for the offence punishable under *section 147* is maintained. The sentence shall be three months for the offence punishable.

So far the other appeal is concerned, the evidence brought on record clearly establish the accusations. Therefore, while Criminal Appeal No. 1494 of 2004 is partly allowed, Criminal Appeal No. 484 of 2006 is dismissed.

Daya Kishan: In *Daya Kishan*⁷⁸ (2010), the Apex Court held merely because appellant was member of an unlawful assembly one member of which had gun, appellant cannot be convicted for murder under *section 302, IPC* with the aid of *section 149, IPC*.

This appeal, is directed against judgment of High Court of Punjab and Haryana whereby the High Court has dismissed the appeal filed by the appellant and confirmed judgment of the Sessions Judge, Sonapat convicting the appellant under *section 302* read with *section 149, IPC* and life imprisonment and fine of Rs 3,000, under *section 307* read with *section 149, IPC*.

The only point argued was that the appellant could not have been fastened with the liability under *section 302* read with *section 149, IPC* for the death of Rajesh, which was caused by the accused Pohla @ Sat Narayan.

Setting aside the conviction, the Apex Court held the prosecution has not proved that common object of the unlawful assembly was to cause death of the deceased Rajesh, but at best it can be said that it was proved that common object of the assembly was to teach Sanjay a lesson and in that process to injure him.

The act of Sat Narayan of firing a shot at Rajesh was his individual act and, therefore, the appellant should not have been convicted for murder of Rajesh with the aid of *section 149 IPC*. Since the prosecution has failed to prove that the appellant knew that death of Rajesh was likely to be caused by any member of the unlawful assembly in prosecution of the common object because common object of the unlawful assembly was to teach a lesson to Sanjay the conviction of the appellant under *section 302* with the aid of *section 149 IPC* is not maintainable.

There is no evidence regarding meeting of minds or formation of the common object even at the spur of the moment, when Pohla immediately after reaching the place of incident shot at the deceased Rajesh. There is no evidence suggesting that the appellant said something to indicate that he wanted the deceased to be done away with.

There is nothing to establish that the appellant knew that Pohla would cause fatal injuries to the deceased, though the appellant must have anticipated that Pohla would cause injuries to Sanjay. No overt act is attributed to the appellant. Merely because Pohla had a gun and the appellant was a member of an unlawful assembly,

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

the test for application of *section 149, IPC* cannot be accepted. On the peculiar facts and in the circumstances of the case it can be safely concluded that the appellant did not share common object of one of the members of the unlawful assembly to cause death of Rajesh. The appellant cannot be reasonably attributed with knowledge that there was likelihood of commission of murder of Rajesh, because no altercation or quarrel had taken place between Rajesh and the accused Krishan nor there was any enmity between the appellant and Rajesh.

Under the circumstances, the Court held conviction of the appellant recorded under *section 302* read with *section 149 IPC* for causing death of deceased Rajesh is not well-founded and is liable to be set aside.

- 1 *IPC*, sections 141-145.
- 2 *IPC*, sections 146-148, 152-156.
- 3 *IPC*, section 153A.
- 4 *IPC*, sections 159, 160.
- 56 *Chikkarange Gowda v State of Mysore*, AIR 1956 SC 731 : 1956 Cr LJ 1365 ; *Ram Tahal v State of Uttar Pradesh*, AIR 1972 SC 254 [[LNIND 1971 SC 579](#)] : (1972) 2 SCR 423 [[LNIND 1971 SC 579](#)] : (1972) 1 SCC 136 [[LNIND 1971 SC 579](#)] : 1975 Cr LJ 227 : 1972 SCC (Cri) 80 : 1972 CAR 34 . See for distinction between section 34 and section 149 commentary given under section 34 discussed in Chapter II *supra* pp 38-39.
- 57 *Umesh Singh v State of Bihar*, 2000 (5) Supreme 92 : 2000 (3) BLJR 1766 : JT 2000 (6) SC 508 : (2000) 4 Scale 51 : (2000) 6 SCC 89 [[LNIND 2000 SC 871](#)] : 2000 Cr LJ 3167 . See *Shamshul Kunwar v State of Uttar Pradesh*, (1995) 4 SCC 430 [[LNIND 1995 SC 1388](#)] : 1995 SCJ 446 : AIR 1995 SC 1748 [[LNIND 1995 SC 1388](#)] : 1995 UJ 660 (SC); *Bhajan Singh v State of Uttar Pradesh*, (1974) 3 SCR 891 : AIR 1974 SC 1564 [[LNIND 1974 SC 141](#)] : (1974) 4 SCC 568 [[LNIND 1974 SC 141](#)] : 1974 Cr LJ 1029 : 1974 CAR 200 .
- 58 AIR 2003 SC 1493 [[LNIND 2003 SC 167](#)] : 2003 Cr LJ 1204 : JT 2003 (3) SC 466 : (2003) 1 Scale 719 [[LNIND 2003 SC 167](#)] : (2003) 3 SCC 37 [[LNIND 2003 SC 167](#)] .
- 59 *Umesh Singh v State of Bihar*, 2000 (5) Supreme 92 : 2000 (3) BLJR 1766 : JT 2000 (6) SC 508 : (2000) 4 Scale 51 : (2000) 6 SCC 89 [[LNIND 2000 SC 871](#)] : 2000 Cr LJ 3167 . See *Shamshul Kunwar v State of Uttar Pradesh*, (1995) 4 SCC 430 [[LNIND 1995 SC 1388](#)] : 1995 SCJ 446 : AIR 1995 SC 1748 [[LNIND 1995 SC 1388](#)] : 1995 UJ 660 (SC); *Bhajan Singh v State of Uttar Pradesh*, (1974) 3 SCR 891 : AIR 1974 SC 1564 [[LNIND 1974 SC 141](#)] : (1974) 4 SCC 568 [[LNIND 1974 SC 141](#)] : 1974 Cr LJ 1029 : 1974 CAR 200 .
- 60 “Khalihan” is a place in the village where crops (paddy) are kept after picking from the fields.
- 61 AIR 2012 SC 1030 [[LNIND 2012 SC 86](#)] : 2012 (1) Crimes 167 [[LNIND 2012 SC 86](#)] (SC) : 2012 Cr LJ 1542 : (2012) 3 SCC 221 [[LNIND 2012 SC 86](#)] .
- 62 *Gajanand v State of Uttar Pradesh*, AIR 1954 SC 695 : 1954 Cr LJ 1746 .
- 63 *Shambhu Nath Singh v State of Bihar*, AIR 1960 SC 725 : 1960 Cr LJ 144 .

[s 149] Every member of unlawful assembly guilty of offence committed in prosecution of common object.—

- 64** AIR 1960 SC 725 (727) : 1960 Cr LJ 1144 ; *Jahiruddin v Queen Empress*, 1894 LLR 22 Cal 306; AIR 2012 SC 1030 [[LNIND 2012 SC 86](#)] TS Thakur and Asok Kumar Ganguly JJ.
- 65** (2003) 5 SCC 537 [[LNIND 2003 SC 479](#)] : JT 2003 (4) SC 496 [[LNIND 2003 SC 479](#)] : (2003) 4 Scale 350 [[LNIND 2003 SC 479](#)] .
- 66** See BK Kaul, *Criminal Law*, Annual Survey of India Law, vol XXXIX (2003), pp 141 to 167.
- 67** AIR 2010 SC 2657 [[LNIND 2010 SC 466](#)]
- 68** AIR 2016 SC 4866 [[LNINDU 2016 SC 277](#)] : (2016) 16 SCC 164 [[LNINDU 2016 SC 277](#)] : 2017 Cr LJ 145 .
- 69** AIR 2017 SC 4001 . Ranjan Gogoi J, Nageswara Rao and Navin JJ, delivered the judgment.
- 70** AIR 2019 SC 219 : 2019 (5 SCC 351 : 2019 (2) Scale 613 [[LNIND 2019 SC 85](#)] .
- 71** 2019 SCC OnLine SC 69 : 2019 (1) J.L.J.R. 431 : 2019 (1) N.C.C. 416 : 2019 (1) Scale 721 : (2019) 3 SCC 393 [[LNIND 2019 SC 64](#)] Dhananjaya Y Chandrachud and Vinnet Saran JJ delivered judgment on 24 January 2019.
- 72** AIR 2010 SC 2485 [[LNIND 2010 SC 221](#)] ; VS Sirpurkar and Surinder Singh Nijjar JJ.
- 73** The eight accused persons were namely, Prema, Khilan, Gaindahal, Sangramsingh, Durzan, Kashi Ram, Gyarsia Lal and Bihari.
- 74** *Shivjee Singh v State of Bihar*, AIR 2009 SC 417 [[LNIND 2008 SC 1533](#)] . Criminal Appeal Nos. 1494 of 2004 with Criminal Appeal No. 484 of 2006, dated 30-7-2008. In the two appeals before this court there are five appellants in the Criminal Appeal No. 494/2004 were found guilty of offence punishable under section 302 read with section 149, IPC and section 147 for rioting. Similar was the conviction recorded in case of *Satya Narain Singh*, one of the appellants in Criminal Appeal No. 484 of 2006 was convicted for offence punishable under sections 302 and 148, IPC (rioting armed with deadly weapon) and section 27 of the Arms Act, 1959.
- 75** *Shivjee Singh v State of Bihar*, AIR 2009 SC 417 [[LNIND 2008 SC 1533](#)] : 2008 AIR SCW 7487 : (2008) 11 SCC 631 [[LNIND 2008 SC 1533](#)] : (2008) 3 SCC (Cri) 987 . At sunset time on the day of Holi (i.e., 9 March 1993) Bhagwan Singh (P.W.1.) was sitting at his dalan (Varandah). Satya Narain Singh came there in an inebriated state and started quarrelling with him and abusing him. Bhagwan Singh asked him to stop the abuses and to go away. On this Satya Narain Singh, one of his family members. Ambika Singh, one of his three sons came armed with his gun; other carried sticks, stone and brick pieces in their hands. On hearing the exchange of hot words a number of villagers came there. Some of them were singing Holi songs at the nearby Devi Asthan and on hearing the noise they came to the Dalan of Bhagwan Singh. Others who were neighbours also came. The villagers coming there asked Satya Narain Singh to stop the quarrel and scolded him. Satya Narain Singh then took his relatives to his roof-top and from there they started throwing stones and pieces of bricks at the tiled roof of the house of Bhagwan Singh. Satya Narain Singh urged his son Ambika Singh to open fire from his gun. So ordered by his father, Ambika Singh fired a shot that hit Meghnath Singh on his back and as a result he fell down and died. Ambika Singh fired seven to eight shots that caused injuries to Ram Pran Singh (PW. 3), Sri Ram Singh (PW 10) and Umesh Singh (PW 6). One of the stones thrown to Satya Narain Singh hit Suraj Singh (PW 5) and caused injury to him.
- 76** *Daya Kishan v State of Haryana*, AIR 2010 SC 2147 [[LNIND 2010 SC 388](#)] ; JM Panchal and Deepak Verma, JJ.
- 77** See *Chikkarange Gowda v State of Mysore*, AIR 1956 SC 731 : 1956 Cr LJ 1365 .
- 78** *Jasnami v Emperor*, AIR 1936 All 534 (535); *Abdullah v Emperor*, AIR 1919 All 307 : (1919) 17 ALJR 200; *State of Orissa v Dr RC Chawla*, AIR 1966 Ori 192 [[LNIND 1965 ORI 73](#)] .

[s 150] Hiring, or conniving at hiring, of persons to join unlawful assembly.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 150] Hiring, or conniving at hiring, of persons to join unlawful assembly.—

Whoever hires or engages or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

[s 150.1] Hiring persons to join unlawful assembly

Section 150 enacts a specific offence, while under *section 149, IPC* a person must be a member of an unlawful assembly, and brings within its fold those who hire, engage and employ persons to join or become a member of an unlawful assembly. The object of the section is to bring within the reach of the law those who are the originators and instigators of offences committed by others. Thus, where a person hires or engages another to join or to become a member of an unlawful assembly, he will be liable for the offence committed by any member of that assembly in the same manner as if he had been a member of such an unlawful assembly or himself had committed such an offence.

[s 150] Hiring, or conniving at hiring, of persons to join unlawful assembly.—

-
- 1 *IPC* , sections 141-145.
 - 2 *IPC* , sections 146-148, 152-156.
 - 3 *IPC* , section 153A.
 - 4 *IPC* , sections 159, 160.

End of Document

[s 151] Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 151] Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.—

Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation. — If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

[s 151.1] Joining unlawful assembly with knowledge of command for its dispersal

Section 151 makes wilful joining or continuing in an assembly of five or more persons, which is likely to cause a disturbance of the public peace, after it has been lawfully commanded to disperse, punishable to the extent of six months' imprisonment, or with fine, or with both. Mere warning to two factions pelting stones at policemen to disperse, will not attract this section.

[s 151] Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.—

-
- 1 *IPC* , sections 141-145.
 - 2 *IPC* , sections 146-148, 152-156.
 - 3 *IPC* , section 153A.
 - 4 *IPC* , sections 159, 160.

End of Document

[s 152] Assaulting or obstructing public servant when suppressing riot, etc.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 152] Assaulting or obstructing public servant when suppressing riot, etc.—

Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

[s 152.1] Assaulting public servant in suppressing riot

Section 152 holds a person liable to imprisonment which may extend to three years, or with fine, or with both, if he resists or attempts to resist a public servant in the discharge of his duty to disperse an unlawful assembly, or to suppress a riot, or an affray. The gist of the offence consists of the use of force or threatening to use force against a public servant with a view to deterring such public servant from the discharge of his duty in endeavouring to disperse an unlawful assembly or to suppress a riot or an affray.

[s 152] Assaulting or obstructing public servant when suppressing riot, etc.—

-
- 1** *IPC* , sections 141-145.
 - 2** *IPC* , sections 146-148, 152-156.
 - 3** *IPC* , section 153A.
 - 4** *IPC* , sections 159, 160.

End of Document

[s 153] Wantonly giving provocation with intent to cause riot —

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 153] Wantonly giving provocation with intent to cause riot —

if rioting be committed/if not committed.—Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[s 153.1] Provocation with intent to cause riot

Section 153 punishes mischievous provocation by doing an illegal act which incites another to commit rioting but does not amount to an instigation of rioting, because in that case the person would be liable as an abettor. Punishment under this section extends to imprisonment up to one year, or with fine, or with both, if the offence of rioting is committed in consequence of such provocation, and up to six months, or with fine, or with both if the offence is not committed.

To invoke *section 153, IPC* the provocation given must be such as would be likely to cause the offence of rioting. It depends on the temper and feelings of the person subjected to provocation and the knowledge of this by the accused. The illegality of the act must be ascertained according to the general law governing the rights of person and property. The question of malignity (enmity) or wantonness (recklessness), or intention, or

[s 153] Wantonly giving provocation with intent to cause riot —

knowledge is a question of fact dependent upon the facts and circumstances of each case, and so is a question of the sufficiency of provocation to cause rioting. The accused, a Mohammedan, who killed a cow before sunrise unobserved by Hindus, was held not liable under *section 153, IPC* since the killing was neither (malignantly) maliciously nor wantonly (recklessly) done. The mere fact that it might have hurt the religious sentiments of the Hindus did not make the accused guilty of this offence.⁷⁹

On the other hand, a person who kills or sacrifices a cow in an open place exposed to the view of the public, must obviously be held to have done it recklessly, thoughtlessly and without regard to the sentiments of those who do not approve of such an act and which needlessly offends them. Such an act obviously amounts to a wanton act. Nevertheless, the act is not an offence under this section since such sacrifice would not be illegal in the absence of any provision of law prohibiting the killing of a cow.⁸⁰

¹ *IPC* , sections 141-145.

² *IPC* , sections 146-148, 152-156.

³ *IPC* , section 153A.

⁴ *IPC* , sections 159, 160.

⁷⁹ *Jasnami v Emperor*, AIR 1936 All 534 (535); *Abdullah v Emperor*, AIR 1919 All 307 : (1919) 17 ALJR 200; *State of Orissa v Dr RC Chawla*, AIR 1966 Ori 192 [[LNIND 1965 ORI 73](#)] .

⁸⁰ *Kari v State of Bihar*, AIR 1952 Pat 138 : 1952 Cr LJ 449 .

[s 153A] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

81[s 153A] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.—

(1) Whoever—

- (a)** by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or
- (b)** commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, ⁸²[or]

83[(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason

[s 153A] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to mainte....

whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,]

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

Offence committed in place of worship, etc.—

- (2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]**
-

[s 153A.1] Scope of section 153A

Section 153A, IPC is a latter addition to the Code. It was brought on the statute book in 1898 by the *Indian Penal Code (Amendment) Act of 1898* with a view to prevent breaches of the public tranquility and to prevent various classes coming into conflict by mutual abuse and recrimination.⁸⁴ (quarrelling and blaming one another). In pursuance of the recommendations of the National Integration Council in 1969, *section 153A* and *section 505, IPC* (statements conducing to public mischief) were extensively amended so as to widen the scope and extent of the impugned sections to prevent and remove communal tensions.

The offence was made cognizable⁸⁵ and punishment for offence committed in a place of worship enhanced up to five years and fine. Promoting enmity between different groups on such grounds as place of birth or residence, has been included in the section and the jurisdiction of the provision is widened so as to make promotion of disharmony, enmity, or feelings of hatred or ill-will between different religious, racial, language or regional groups or castes or communities punishable.

In 1972, sub-section (1)(c) was added by the *Criminal Law (Amendment) Act 31 of 1972*⁸⁶ with a view to deal more effectively with communal and divisive forces which cause apprehension, fear, or alarm, or a feeling of sense of insecurity amongst members of the effected group and also affect prejudicially the maintenance of public tranquility by organising drills, exercises and other nefarious activities.⁸⁷

[s 153A.2] Ingredients of section 153A

Section 153A punishes:

- (1) The act of promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, caste, community or any other group; and
- (2) Acts prejudicial to the maintenance of harmony between different groups or castes or communities, if the acts disturb the public tranquillity; and
- (3) Acts causing fear or alarm or a feeling of insecurity amongst members of any religious, racial, language or regional group or caste or community by use of criminal force or violence against them.

[s 153A.3] Constitutionality of section 153A

After the *Constitution of India* came into force, *section 153A, IPC* was struck down in 1951 by the East Punjab High Court in *Master Tara Singh's*⁸⁸ case as it imposed restrictions on the fundamental right set out in *Article 19(1)(a)* on freedom of speech and expression. However, after the insertion of the words "in the interest of

[s 153A] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to mainte....

public order” in *Article 19(2) vide Constitution (First Amendment) Act, 1951*, the scope of the protection envisaged under sub-clause (2) to *Article 19* was widened and section 153A fell within the ambit of protection accorded under the impugned clause⁸⁹ and Thus, the section was saved from the vires of illegality.⁹⁰

[s 153A.4] Applicability of section 153A

A fair and rational criticism of religious tenets, couched in restrained language, does not affect section 153A.⁹¹ Likewise, liability under section 153A does not attach to the thing said or done, but to the manner in which it is said or done. Thus, if words, spoken or written, are couched in temperate, dignified and mild language and do not have the tendency to insult the feelings or the deepest religious convictions of any section of the people, section 153A is not attracted.⁹²

When an impugned article contained healthy and legitimate criticism of the Islamic religion and intended to bring about reformation in that religion in keeping with the modern world, it was held that the article was not offensive and did not amount to an offence under section 153A.⁹³ Again when the views expressed in an article, are purely political in nature, this section would not apply even though they call upon the poor masses to rebel against the capitalist class.⁹⁴

But if a political thesis or historical facts are so presented as to promote feelings of enmity, hatred or ill-will between different religious groups or communities,⁹⁵ section 153A is attracted. Likewise, if the writing is calculated to promote feelings of enmity or hatred, it is no defence to a charge under section 153A that the writing contained a truthful account of past events or is otherwise supported by good authority.⁹⁶

It may be noted that the scope of *section 153A, IPC* is not confined to the promotion of feelings of enmity, etc., on grounds of religion only, but takes in promotion of such feelings on other grounds as well, such as race, place of birth, residence, language, caste or community.⁹⁷ Moral turpitude involves an offence under this section as well.⁹⁸

[s 153A.5] Distinction between section 153A and section 124A, IPC

Section 153A, IPC was enacted to supplement the law of sedition (under *section 124A, IPC*), but the offence under section 153A is quite different from that of sedition. Section 153A punishes stirring up of class hatred, which is an offence against public tranquility, whereas *section 124A, IPC* punishes the offence of sedition, which is essentially an offence against the State falling under Chapter 6 of the Code. The offence under section 153A affects the State indirectly by disturbing the public peace, whereas the offence under section 124A affects the State directly.

¹ *IPC*, sections 141-145.

² *IPC*, sections 146-148, 152-156.

³ *IPC*, section 153A.

⁴ *IPC*, sections 159, 160.

⁸¹ Subs. by Act 35 of 1969, section 2, for section 153A (w.e.f. 4-9-1969). Earlier section 153A was Ins. by Act 41 of 1961, section 2 (w.e.f. 12-9-1961).

⁸² Ins. by Act 31 of 1972, section 2 (w.e.f. 14-6-1972).

[s 153A] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to mainte....

83 Ins. by Act 31 of 1972, section 2 (w.e.f. 14-6-1972).

84 Act IV of 1898, section 5. The original section reads as follows: Promoting enmity between different classes:

Whoever by words, either spoken or written or by signs, or by visible representations, or otherwise, promotes or attempts to promote, feelings of enmity or hatred between different classes of the citizens of India, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Explanation.—It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different classes of the citizens of India.

85 CrPC, 1973, section (2)(c) defines “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, ...arrest without warrant.

86 Subs. by *Criminal Law Amendment Act* 31 of 1972, section 2.

87 *Chida Nand v Emperor*, AIR 1930 Lah 350 .

88 *Tara Singh v State of Punjab*, AIR 1951 Punj 27 : (1951) 53 PLR 22 .

89 *Sheikh Wajih Uddin v State of Uttar Pradesh*, AIR 1963 All 335 [[LNIND 1962 ALL 78](#)] .

90 *Kedar Nath Singh v State of Bihar*, AIR 1962 SC 955 [[LNIND 1962 SC 21](#)] : (1962) 2 Cr LJ 103 : 1962 Supp (2) SCR 769 : 1963 (1) SCJ 18 ; *Gopal Vinayak Godse v UOI*, AIR 1971 Bom 56 [[LNIND 1969 BOM 50](#)] (72).

91 *Lalai Singh v State of Uttar Pradesh*, 1971 Cr LJ 1773 ; Held, criticism of the Hindu religion for inculcation of the doctrine of untouchability and for the sanction, which it has given to apprehensible treatment meted out to the lower classes, has been considered perfectly legitimate, having been sponsored by no less a person than Mahatma Gandhi himself.

92 *Azizul Haq Kausar Naquvi v State of Uttar Pradesh*, AIR 1980 All 149 .

93 *State of Maharashtra v Ganpate Vasudeo Behera*, 1978 CLR 178 (184-85) Maharashtra.

94 *Shiv Kumar Mishra v State of Uttar Pradesh*, 1978 All Cr C 154 (156-157) : 1978 Cr LJ 701 .

95 *Babu Rao Patel v State (Delhi Administration)*, 1980 Cr LJ 529 : AIR 1980 SC 763 [[LNIND 1980 SC 84](#)] : 1980 CLR (SC) 197 : 1980 SCC (Cri) 500 .

96 *GV Godse v UOI*, 1971 Cr LJ 324 (340) : 1971 Bom 56 (SB).

97 *Babu Rao Patel v State (Delhi Administration)*, 1980 Cr LJ 529 : AIR 1980 SC 763 [[LNIND 1980 SC 84](#)] : 1980 CLR (SC) 197 : 1980 SCC (Cri) 500 .

[s 153A] Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to mainte....

98 *Tasadduq Ahmad Khan Sherwani Re*, AIR 1922 All 140 (141) : 23 Cr LJ 128 (FB) : ILR 1922 All 352 . See Nelson's *Indian Penal Code*, 7th Edn, p 448.

End of Document

[[s 153AA] Punishment for knowingly carrying arms in any procession or organising, or holding or taking part in any mass drill or mass training with arms.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

99[[s 153AA] Punishment for knowingly carrying arms in any procession or organising, or holding or taking part in any mass drill or mass training with arms.—

Whoever knowingly carries arms in any procession or organizes or holds or takes part in any mass drill or mass training with arms in any public place in contravention of any public notice or order issued or made under *section 144A of the Code of Criminal Procedure, 1973* shall be punished with imprisonment for a term which may extend to six months and with fine which may extend to two thousand rupees.

Explanation.—“Arms” means articles of any description designed or adapted as weapons for offence or defence and includes fire-arms, sharp edged weapons, lathis, dandas and sticks.]

[s 153AA.1] Scope and Extent of section 153AA

In recent years unfortunately, due to a large-scale criminalization of politics and increase of terrorism in the country threat to public peace, security and tranquility has increased many fold and is multiplying at an alarming pace. Hence, in order to protect the individuals and society from such scrupulous activities and behaviors of undesirable elements both the substantive as well as procedural laws were amended in 2005 *vide* Criminal

[[s 153AA] Punishment for knowingly carrying arms in any procession or organising, or holding or taking part in any mass drill or mass training with arms.—

Procedure (Amendment) Act, 2005. In the *Indian Penal Code*, in Chapter VIII, section 153AA and in the *Criminal Procedure Code, 1973*, section 144A have been added to punish such persons.

The section makes carrying arms in any procession or organizing, holding, or taking part in any mass drill or mass training in any public place in contravention of any public notice or order made under section 144A of the *Criminal Procedure Code, 1973* punishable to the extent of six months and fine of Rs. two thousand.

[s 153AA.2] Nature and punishment

The offence under section 153AA, *IPC* is cognizable, nonbailable non-compoundable, and triable by a Magistrate. In view of the gravity of the offence a police officer has been empowered to arrest a person(s) under section 153AA, *IPC* even without a warrant, if he is satisfied that the activities of an individual or a group of people are in contravention of the provisions of the order of the authorities in accordance with the provisions of section 144A of *Criminal Procedure Code, 1973*.

It is a welcome measure and it is expected that if properly implemented the provisions will be able to curb undesirable activities of unscrupulous elements and help in promoting public peace, stability and tranquility in the country.

1 *IPC* , sections 141-145.

2 *IPC* , sections 146-148, 152-156.

3 *IPC* , section 153A.

4 *IPC* , sections 159, 160.

99 Ins. by Act 25 of 2005, section 44(a). (Date of enforcement yet to be notified).

[s 153B] [Imputations, assertions prejudicial to national-integration.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

¹⁰⁰[s 153B] [Imputations, assertions prejudicial to national-integration.—

- (1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,—
 - (a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the *Constitution of India* as by law established or uphold the sovereignty and integrity of India, or
 - (b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or
 - (c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

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

- (2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]

[s 153B.1] Imputations prejudicial to national-integration

Section 153B, IPC supplements the provision relating to sections 153A¹⁰¹ and 295A, *IPC*.¹⁰² While the latter provides for taking action against individuals for activities promoting enmity or doing acts prejudicial to the maintenance of harmony between different groups on grounds of religion, race, place of birth, residence, language, etc., the former provides for dealing effectively with associations or groups (elements) which have for their object such objectionable activities by making or publishing of any imputation, etc.¹⁰³ against any class of persons by words, either spoken or written, or by signs, or by visible representation, or by any other manner.¹⁰⁴ In view of the sensitive nature of imputation the *bona fide* or intention of the maker or publisher will not exempt the person from liability under this section.¹⁰⁵

[s 153B.2] Ingredients

To invoke *section 153B, IPC* it must be proved that,—

(1) The accused by words, either spoken or written, or by signs or visible representations or otherwise:

- (a) made or published any imputation, that any class of persons by reason of their being members of any religious, social or regional groups cannot bear allegiance to the *Constitution*;
- (b) asserted, counselled, advised, propagated or published that any class of persons by reason of religion, language, caste or community be denied citizenship or deprived of their citizenship rights;
- (c) made or published, asserted, counselled, etc., that by reason of their being members of any religious, social, languages or regional group, caste or community and such communication was likely to cause disharmony, feelings of enmity, hatred or ill-will between them and other members of society.

(2) That the above said offences were committed in a place of public worship or in an assembly engaged in religious worship or religious ceremony.¹⁰⁶

¹ *IPC*, sections 141-145.

² *IPC*, sections 146-148, 152-156.

³ *IPC*, section 153A.

⁴ *IPC*, sections 159, 160.

¹⁰⁰ Ins. by Act 31 of 1972, section 2 (w.e.f. 14-6-1972).

¹⁰¹ Added *vide section 2 of the Criminal Law Amendment Act 31 of 1972*.

¹⁰² Hari Singh Gour, *Penal Law of India*, 11th Edn, Vol II, pp 1464 to 1466.

[s 153B] [Imputations, assertions prejudicial to national-integration.—

103 Added *vide section 2 of the Criminal Law Amendment Act 31 of 1972*, to deal effectively with fissiparous tendencies and anti-national elements.

104 *Section 2 of the Criminal Law Amendment Act 31 of 1972*

105 See *Criminal Law (Amendment) Act 31 of 1972* for the Statement of Objects and Reasons for insertion of *section 153B, IPC*.

106 VV Raghavan, *Law of Crimes*, 3rd Edn, 1984, p 332.

End of Document

[s 154] Owner or occupier of land on which an unlawful assembly is held.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 154] Owner or occupier of land on which an unlawful assembly is held.—

Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

[s 154.1] Liability of owner of land for unlawful assembly

Sections 154, 155 and 156 incorporate the principle of vicarious liability under criminal law. The owner or occupier of land on which a riot takes place, or a person for whose benefit it takes place, and also their agents or managers, if they fail to inform the police of such happening, or if they do not use all means at their command to suppress or avert rioting, are held liable and punished. A master is held criminally liable under sections 154 and 155, IPC for acts committed by his agents or servants, whereas section 156 fixes personal liability on the manager and agents.

Section 154 holds owners or occupiers of land, or persons having or claiming an interest in land, criminally

[s 154] Owner or occupier of land on which an unlawful assembly is held.—

liable for intentional failure of their servants or managers in giving information to the public authorities, or to take adequate measures to stop the occurrence of an unlawful assembly, or riot upon the land of such persons. In other words, the section fixes criminal liability for the following breaches of duty, namely:—

- (1) Omission to give notice to the public authorities about the unlawful assembly or riot;
- (2) Intentional failure to give information to the public authorities;
- (3) Abstention from taking adequate measures to suppress an unlawful assembly or riot.

The liability on the part of owners or occupiers of land has been fixed on the assumption that such persons by virtue of their position as landholders and landlords possess the power of controlling and regulating such type of gatherings upon their property, and to disperse,¹⁰⁷ if the object of such gatherings becomes illegal.¹⁰⁸

Punishment under *section 154, IPC* may extend up to one thousand rupees as fine.

¹ *IPC* , sections 141-145.

² *IPC* , sections 146-148, 152-156.

³ *IPC* , section 153A.

⁴ *IPC* , sections 159, 160.

¹⁰⁷ *Queen v Suroop Chunder Paul*, (1869) 12 WR 75 (76).

¹⁰⁸ See KD Gaur, *Criminal Law: Cases and Materials*, 5th Edn, 2008, pp 197-198.

[s 155] Liability of person for whose benefit riot is committed.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 155] Liability of person for whose benefit riot is committed.—

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land, respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

[s 155.1] Liability of person for whose benefit riot is committed.—

Section 155 is an aggravated form of the offence prescribed under *section 154, IPC*. Section 155 fixes vicarious liability on the owners or occupiers of land or persons claiming interest in land for the acts or omission of their managers or agents, if a riot takes place or an unlawful assembly is held in the interest of such class of persons. Punishment in such a case is left to the decision of the court which may award fine to any extent depending on the facts and circumstances of the case in question.

[s 155] Liability of person for whose benefit riot is committed.—

- 1 *IPC* , sections 141-145.
- 2 *IPC* , sections 146-148, 152-156.
- 3 *IPC* , section 153A.
- 4 *IPC* , sections 159, 160.

End of Document

[s 156] Liability of agent of owner or occupier for whose benefit riot is committed.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > K D Gaur: Textbook on Indian Penal Code, 7th ed > The Indian Penal Code > CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 156] Liability of agent of owner or occupier for whose benefit riot is committed.—

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

[s 156.1] Liability of agent for whose benefit riot is committed.—

Section 156 imposes personal liability on the managers or agents of such owners or occupiers of property upon whose land a riot or an unlawful assembly is committed, if it is proved that no appropriate action was taken by such persons to prevent it. To constitute an offence under this section it must be proved that (i) a riot was committed, (ii) the riot was committed for the benefit of the accused, (iii) the accused had reason to believe that a riot was likely to be committed and (iv) that the accused did not take appropriate steps to prevent such riot.

[s 156] Liability of agent of owner or occupier for whose benefit riot is committed.—

-
- 1** *IPC* , sections 141-145.
 - 2** *IPC* , sections 146-148, 152-156.
 - 3** *IPC* , section 153A.
 - 4** *IPC* , sections 159, 160.

End of Document

[s 157] Harbours persons hired for an unlawful assembly.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 157] Harbours persons hired for an unlawful assembly.—

Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

[s 157.1] Harbours persons for unlawful assembly

Section 157 makes harbouring, receiving or assembling of persons hired, engaged or employed to join as, or become members of an unlawful assembly, an offence.¹⁰⁹ Thus, to convict a person under this section the following ingredients must exist:—

- (1) Persons must be hired;
- (2) The accused must be aware of it; and
- (3) The accused must harbour, receive or assemble, such persons to join or become members of an unlawful assembly.

[s 157] Harbouring persons hired for an unlawful assembly.—

A person found guilty under this section may be punished with up to six months of imprisonment, or with fine, or with both.

1 *IPC* , sections 141-145.

2 *IPC* , sections 146-148, 152-156.

3 *IPC* , section 153A.

4 *IPC* , sections 159, 160.

109 *Radharaman Shaha v Emperor*, 1931 ILR Cal 1401 .

End of Document

[s 158] Being hired to take part in an unlawful assembly or riot.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 158] Being hired to take part in an unlawful assembly or riot.—

Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

or to go armed.—and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

[s 158.1] Hiring persons for unlawful assembly

Section 158 makes it penal to hire oneself out as a member of an unlawful assembly, or to assist any members in an unlawful assembly or riot. The section is divided into two parts. In the first part of the section, where the person hires or attempts to be hired himself as a member of an unlawful assembly, punishment may extend to six months of imprisonment, or fine, or both. On the other hand, if the accused is found armed with a deadly weapon, punishment may extend to imprisonment up to two years, or fine, or both.

[s 158] Being hired to take part in an unlawful assembly or riot.—

-
- 1** *IPC* , sections 141-145.
 - 2** *IPC* , sections 146-148, 152-156.
 - 3** *IPC* , section 153A.
 - 4** *IPC* , sections 159, 160.

End of Document

[s 159] Affray.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

K D Gaur: Textbook on Indian Penal Code, 7th ed > **K D Gaur: Textbook on Indian Penal Code, 7th ed** > **The Indian Penal Code** > **CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY**

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 159] Affray.—

When two or more persons, by fighting in a public place, disturb the public peace, they are said to “commit an affray”.

[s 159.1] “Affray”—Meaning

The definition of affray given in *section 159, IPC* corresponds with its definition given in English law.¹¹⁰ Affray, says Blackstone, is the fighting of two or more persons in some public place, to the terror of His Majesty's objects, while fighting in private is not an affray but an assault, the gist of the offence consists in the terror it causes to the public. The terms “affray” is derived from the French word “*affraier*” which means to terrify, and so in a legal sense it is taken as a public offence that terrorises the people. There can be no affray in a private place. A fight may be an assault or something more, but it is not an affray. An affray is an offence against the public peace, because it is committed in a public place and is likely to cause general alarm and disturbance. No quarrelsome or threatening language whatsoever will amount to an affray.¹¹¹

[s 159.2] Ingredients

To constitute an affray as defined in section 159 there must be:

[s 159] Affray.—

- (1) Fight between two or more persons,
- (2) In a public place, and
- (3) The fight must disturb the public peace.

[s 159.3] Fight

The word “fight” in common language denotes necessarily a contest or struggle in which two or more persons participate. It means and implies actual exchange of blows between two or more persons, each of whom is trying to obtain mastery over the other. But the difficulty arises because the courts are not unanimous about the definition of the term and have construed the word “fight” very divergently in various cases. In one case, the court in absence of an actual “*marpit*” (fight) refused to hold the public disturbance as an affray.¹¹² In another case, while upholding “actual exchange of blows necessary for a fight”, the court considered it sufficient that blows were aimed, regardless of whether proved that successful contact was made or otherwise.¹¹³ In yet another case, wherein one party attacked and the other simply defended,¹¹⁴ and still another wherein one party attacked and the other tried only to escape,¹¹⁵ the courts refused to constitute the attack as a “fight”.

Contrary to this, where two persons attacked one who tried to defend himself but was overpowered by the aggressors,¹¹⁶ an affray was held to have been committed. According to yet another view, “fight” denotes necessarily a contest or struggle for mastery between two or more persons against one another implying therein some violence offered or threatened against one another,¹¹⁷ or an answering challenge or war cry, and even an active non-violent resistance would constitute a “fight”. However, passive submission to beating in no case constitutes a fight when one side is aggressive and the other side is passive.

[s 159.4] Public place

A “public place” in common language is a place where the public can go as of right. A legal right of access is not necessary to constitute a public place. In other words, a public place is one where the public go, whether they have a right to go or not,¹¹⁸ or where the public is allowed access irrespective of any legal right thereto,¹¹⁹ or even a place to which only limited right of access exists.¹²⁰

According to other views, the factual presence of the public at a particular time is considered the determining factor. Thus, to determine a place to be a public place, the court has to consider whether a particular place was at the time public place,¹²¹ or a place where the public undoubtedly were,¹²² or where the public are actually in the habit of going.¹²³ In some cases even privately owned land,¹²⁴ constituting an open piece of ground to which the owner had never given or refused permission of entry, have been held as public places.¹²⁵ Thus, a public place is one where the public go, or where the public are actually in the habit of going, or where the public undoubtedly are or may be, no matter whether they have a right to be there or not.

[s 159.5] Public peace

Similarly, the Code does not define the term “public peace”. In the absence of such definition, it is very difficult to explain the term. According to one view, the gist of the offence consists in the terror it causes to the public,⁹ but at the same time it is not considered necessary that any particular member of the public must give evidence to the effect that he was alarmed or frightened.⁹ Yet another view, holds that there must be persons present to be alarmed at the time of the disturbance.¹²⁶ According to Kenny, it is enough that the disturbance was proved to be such as might very well intimidate or frighten reasonable people, and that it was not necessary to produce a witness who could state that he personally was terrified, so long as it is established that persons appeared to be alarmed.¹²⁷

To support a conviction for an affray each person concerned in it must be proved to have fought with the other.¹²⁸

-
- 1** *IPC* , sections 141-145.
- 2** *IPC* , sections 146-148, 152-156.
- 3** *IPC* , section 153A.
- 4** *IPC* , sections 159, 160.
- 110** See Public Order Act, 1986, section 3 for definition of Affray.
- 111** Public Order Act, 1986, section 3(5). Affray may be committed in private as well as in public place, see Smith and Hogan, *Criminal Law*, 5th Edn, (1983) 738 to 741.
- 112** *Jagannath Sah v Emperor*, AIR 1937 Oudh 425 .
- 113** *M Korga Shetty v State of Mysore*, 1971 Cr LJ 1041 .
- 114** *R v Sharp*, [\(1957\) 1 All ER 577](#) .
- 115** *Balkrishna Shetty v State of Mysore*, 1966 Mys LJ 528 .
- 116** *Baburam v Emperor*, AIR 1931 All 8 .
- 117** *Rami Reddy v Narasi Reddy*, AIR 1938 Mad 924 [[LNIND 1938 MAD 290](#)] .
- 118** *Queen v Wellard*, (1884) 14 QBD 63 .
- 119** *Ramkaranlal v Emperor*, 1917 Cr LJ 650 : (1916) 13 NLR 68 : AIR 1916 Ngp 15 .
- 120** *Musa Re*, AIR 1917 Mad 124 ; *Gawasji M Shroff v GIP Railway Co*, (1902) ILR 26 Bom 609; *Emperor v Govindarajulu*, AIR 1916 Mad 474 .
- 121** *Musa Re*, AIR 1917 Mad 124 .
- 122** *Empress v Madan Mohan*, (1883) 3 AWN 197.
- 123** *Muthuswamy Iyer Re*, AIR 1937 Mad 286 [[LNIND 1936 MAD 370](#)] .
- 124** *Button v DPP*, [\(1965\) 3 All ER 587](#) . Held, an affray can be committed even in a private place.
- 125** *Hari Singh v Jadu Nandan Singh*, 1904 ILR 31 Cal 542; *Queen Empress v Sri Lal*, 1895 ILR 17 All 166.

[s 159] Affray.—

126 *Emperor v Babu Ram*, 1931 ILR 53 All 229.

127 J W C Turner, *Kennys' Outlines of Criminal Law*, 19th Edn, (1966), p 424.

128 *Ratnan Pillai v Emperor*, (1922) 13 Cr LJ 718 .

End of Document

[s 160] Punishment for committing affray.—

K D Gaur: Textbook on Indian Penal Code, 7th ed

K D Gaur

[K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [K D Gaur: Textbook on Indian Penal Code, 7th ed](#) > [The Indian Penal Code](#) > [CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY](#)

The Indian Penal Code

CHAPTER VIII OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter consists of 22 sections (commencing from sections 141 to 160 including 153A and 153B) dealing with a class of offences falling between offences against the State on the one hand, and offences against the person and property on the other. The offences discussed in this Chapter are commonly known as “group offences” and are generally committed by a large number of persons leading to disturbance of public tranquility (harmony) or breach of peace. The offences may broadly be classified into four categories depending on the nature, gravity and magnitude of the act in question, viz.—

- (i) Unlawful assembly;¹
- (ii) Rioting;²
- (iii) Promoting enmity between different classes;³ and
- (iv) Affray.⁴

[s 160] Punishment for committing affray.—

Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

[s 160.1] Punishment

*Section 160 of the Penal Code prescribes imprisonment up to one month, or fine up to one hundred rupees, or both for affray.*¹²⁹

¹ IPC , sections 141-145.

² IPC , sections 146-148, 152-156.

³ IPC , section 153A.

⁴ IPC , sections 159, 160.

[s 160] Punishment for committing affray.—

129 The Law Commission recommended six months imprisonment and fine with no limitation for affray *vide* its 42nd Report on *Penal Code* (1971). Recommendation has not been accepted.

End of Document