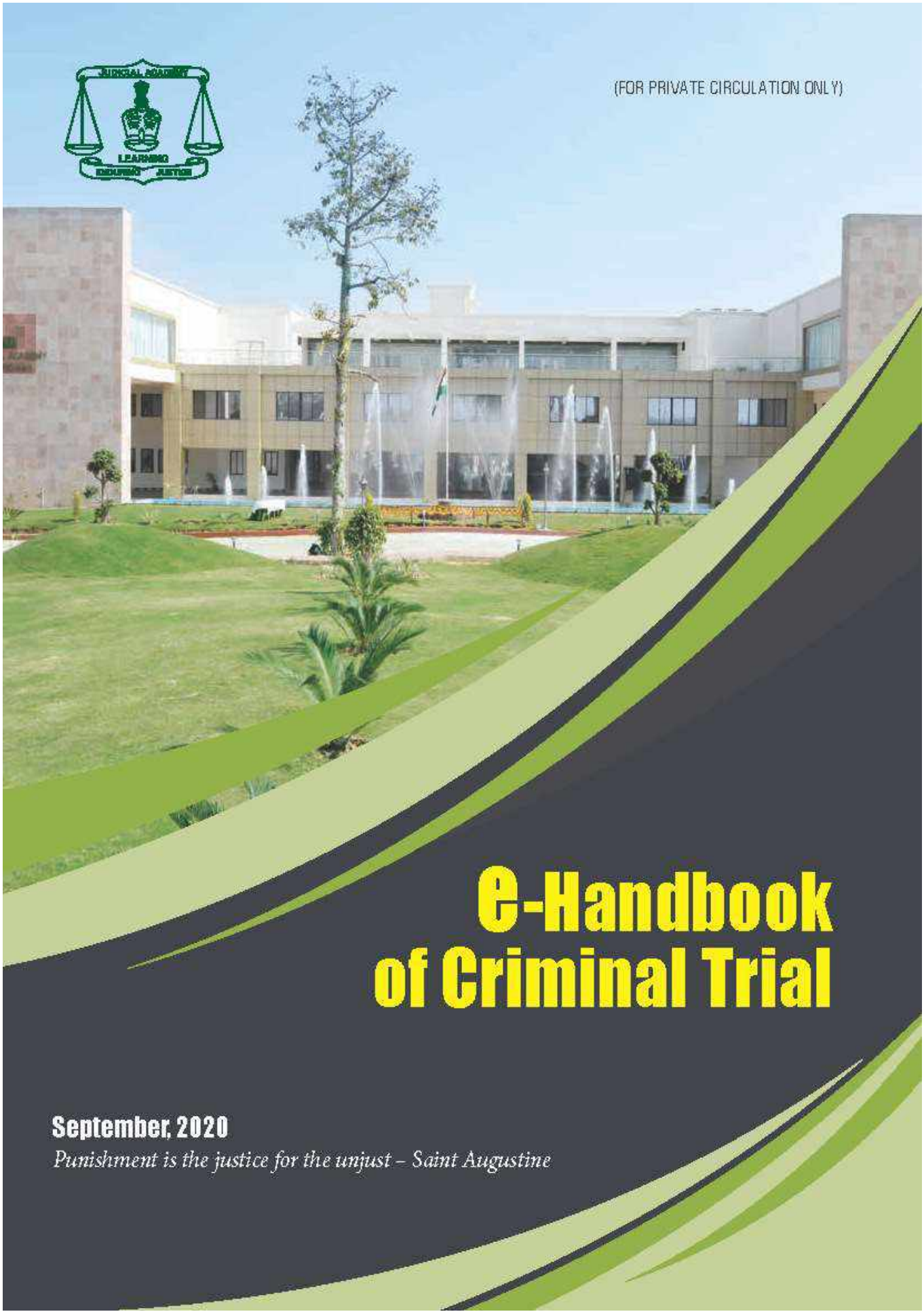

(FOR PRIVATE CIRCULATION ONLY)

e-Handbook of Criminal Trial

September, 2020

Punishment is the justice for the unjust – Saint Augustine

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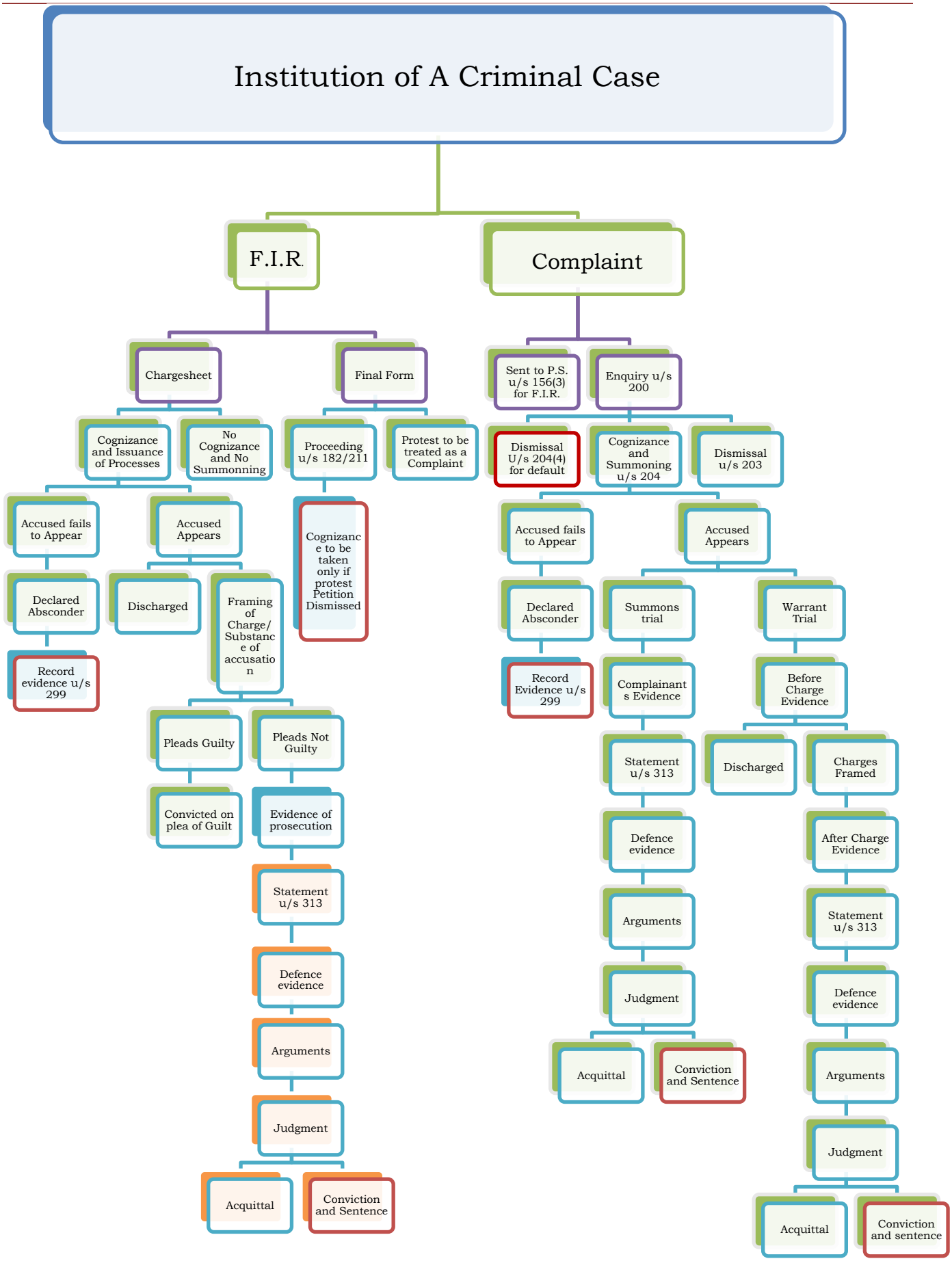
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1. INSTITUTION OF A CRIMINAL CASE:

Criminal law can be set into motion in the following ways :

(i) Information of cognizable offence to police under section 154 Cr.P.C. (FIR)

(ii) Information of non-cognizable offence to police under section 155 Cr.P.C.(Non Cognizable Report)

(iii) Complaint to Magistrate under section 200 Cr.P.C.(Private Complaint)

Jurisdictional Issues:

- **Jurisdiction with respect to taking cognizance of an offence.**
- **Procedure for dealing with information/complaint beyond the jurisdiction of local police station or local court.**

Jurisdiction with respect to taking cognizance of an offence.

Chapter XIII Code of Criminal Procedure, consisting of Sections 177 to 189 deals the jurisdiction of the Criminal Courts in inquires and trials. The word 'offence' is important. It means and implies that provisions of this chapter relating to territorial jurisdiction do not apply to proceedings like maintenance.

Chapter XIII of the Code of Criminal Procedure provides for jurisdiction of the criminal Courts in inquiries and trials. Section 177 provides for ordinary place of enquiry and trial. It has been contemplated that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed. Section 178 provides for place of inquiry or trial in relation to the offences when it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local

areas than one, or where it consists of several acts done in different local areas. It has been provided that in all such cases the offence may be inquired into or tried by a Court having territorial jurisdiction over any of such local areas. Therefore, a conjoint reading of these two sections would show that the rule laid down by section 177 is one of the general applications and governs all criminal trials held under the provisions of the Code, subject to the exceptions provided in the Code. Whereas section 178 governs the exceptions as are provided therein.

From the provisions as contained in Sections 178 and 179 Cr.P.C.it is clear that the normal rule is that the offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178, the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued. Absence of territorial jurisdiction will not prevent the Police from recording information about the cognizable offence and forwarding the same to the police station having jurisdiction over the area in which the crime was said to have been committed. AIR 1993 SC 2644 State of A.P. Versus Punati Ramulu

FIR Can be registered at the place of the offence - As far as the investigation of a cognizable case is concerned, it can be investigated by any officer in-charge of the police station having jurisdiction of the local area within the limit of such police station under Sec.156 of Cr.P.C.

According to Sec.156 of Cr.P.C, '(1) any officer in charge of a police station may, without the order of a Magistrate, ***investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station*** would have power to inquire into or try under the provisions of Chapter XIII.

Sec. 177. Ordinary place of inquiry and trial.—

Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

According to Sec.177, the place where offence is committed is the ordinary place of inquiry and trial. In normal course, it is the court within whose local jurisdiction the offence is committed that would have the power and authority to take cognizance of the offence in question.

When the location of crime is not certain, i.e., when the place of commission of crime is falling under different local areas, according to Sec.178 Cr.P.C, the courts situated in any one local area is competent to try the case.

Sec. 178. Place of inquiry or trial.—

(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

Sec.178 creates an exception to the 'ordinary rule' engrafted in Section 177 by permitting the courts in another local area where the offence is partly committed to take cognizance. If the offence is committed in one local area continued in another local area, the courts in the latter place would be competent to take cognizance. Under Section 179, if by reason of the consequences emanating from a criminal act an offence is occasioned in another jurisdiction, the court in that jurisdiction would also be competent to take cognizance. Thus, if an offence is committed partly in one place and partly in another; or if the offence is a continuing offence or where the consequences of a criminal act result in an offence being committed at another place, the exception to the 'ordinary rule' would be attracted and the courts within whose jurisdiction the criminal act is committed will cease to have exclusive jurisdiction to try the offence. (Rupali Devi v. State of U.P., (2019) 5 SCC 384)

In the recent case of Rhea Chakraborty Versus State of Bihar and Others 2020 SCC OnLine SC 654 The Hon'ble Supreme Court has been pleased enough to hold :

"30. Having regard to the law enunciated by this Court as noted above, it must be held that the Patna police committed no illegality in registering the Complaint. Looking at the nature of the allegations in the Complaint which also relate to misappropriation and breach of trust, the exercise of jurisdiction by the Bihar Police appears to be in order. At the stage of investigation, they were not required to transfer the FIR to Mumbai police. For the same reason, the Bihar government was competent to give consent for entrustment of investigation to the CBI and as such the ongoing investigation by the CBI is held to be lawful."

If the crime is committed in one local area but when the consequences of crime ensue into another local area, the offence may be inquired into or tried by a court within whose local jurisdiction such crime

has been committed or such consequence has ensued. Sec.179 of Cr.P.C provides as follows:

Sec. 179. Offence triable where act is done or consequence ensues.—When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

In cases where crime is abated or conspired at one local area and the other actis committed at another local area, according to Sec.180 of Cr.P.C., trial can be conducted in both the places. Sec.180 Cr.P.C provides as follows:

Sec. 180. Place of trial where act is an offence by reason of relation to other offence.—When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, the first-mentioned offence may be inquired into or tried by a Court within whose local jurisdiction either act was done.

Exceptional circumstances such as dacoity, kidnapping, theft, extortion or robbery, offence of criminal misappropriation or breach of trust and any offence, which includes possession of stolen property are dealt with under Sec.181 of Cr.P.C.

Sec.181. Place of trial in case of certain offences.—

(1) Any offence of being a thug, or murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of dacoits, or of escaping from custody, may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

(2) Any offence of kidnapping or abduction of a person may be inquired into or tried by a Court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained.

(3) Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it or by any person who received or retained such property knowing or having reason to believe it to be stolen property.

(4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

(5) Any offence, which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person who received or retained it knowing or having reason to believe it to be stolen property.

Offences committed through letters are dealt with under Sec.182 of Cr.P.C.

Sec.182 of Cr.P.C: Offences committed by letters, etc.

(1) Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

(2)Any offence punishable under section 494 or section 495 of the Indian Penal Code (45 of 1860) may be inquired into or tried by a Court within whoselocal jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage 1 or the wife by the first marriage has taken up permanent residence after the commission of the offence].

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Procedure for Dealing with Complaint beyond the Jurisdiction of Local Court.

Steps to be taken by the court in the event of inter district, interstate offences – Mahender Goel Vs Kadamba International 2013 SCC OnLine Mad 3508: **2014 Cri LJ 1654 Madras (F.B.)**- Procedure for return of complaint

"24. In the light of our above findings, pending the provision of a procedure by the legislature, we would direct that the following course be adopted:

Upon finding that the case is one not triable within his jurisdiction or within the jurisdiction of the Chief Judicial Magistrate to whom he is subordinate, a Magistrate shall, cause certified copies of the Complaint, Annexures as also record of proceeding, if any, under Section 202, Cr.P.C;

*(i) the originals of the Complaint and Annexures filed therewith as also a certified copy of record of proceedings under Section 202, Cr.P.C., **if any, shall be handed over to the Complainant towards presentation before the appropriate Court. As the cognizance, which stands taken is not bad in law**, there would be no need for the Complainant to seek the aid of Section 14 of the Limitation Act or, Section 417, Cr.P.C. or, for that matter, in cases under Negotiable Instruments Act under Section 142 of such Act. Such position, in itself, makes requisite imposition of a reasonable time frame for presentation of the papers before the appropriate Court. We would direct that Magistrates may, for such purpose, afford a period of not less than one month but not exceeding three months;*

(ii) in effecting return, the Magistrate shall issue a certified copy of record of proceedings before his Court in the case;

(iii) the Magistrate shall hold the certified copies of Complaint, Annexures

as also all connected other original records. A returned case number shall be allotted in seriatim to each case;

(iv) it shall be the duty of the Magistrate to issue certified copies of the records held by it upon due Application therefor by the concerned parties;

(v) a separate register under the nomenclature 'Complaints Returned Register' shall be maintained by Magistrates. Therein, provision is to be made towards informing the following:

Date of presentation of Complaint;

Date of taking on file;

Date of issue of process, if any, to the Accused;

Record of proceedings in the case;

Date of return of the Complaint; and

Reason for return.

Rules of practice for destruction of records shall duly be followed."

While passing the above judgment reliance was placed on the decision of the Hon'ble Apex court in Y. Abraham Ajith v. Inspector of Police, (2004) 8 SCC 100 : 2004 SCC (Cri) 2134 at page 106where in it has been held in the following words:

"The complaint be returned to Respondent 2 who, if she so chooses, may file the same in the appropriate court to be dealt with in accordance with law."

Information of Cognizable Offence to Police UnderSection 154 Cr.P.C. (FIR)

FIR is instituted when police receives information regarding commission of any cognizable offence under section 154 Cr.P.C. on a written report or on a self statement drawn by the Police Officer. When the complaint is filed to the court, the court can proceed for an enquiry under Section 200 by examination of complainant and his witnesses or in the alternative may send the case under the provisions of section 156(3) Cr.P.C. to the concerned police station for investigation and report.

In case the complaint before the police discloses a noncognizable offence the Officer In-charge of the police station will proceed according to section 155 of the Cr.P.C. and investigate the case only after obtaining the permission from the Magistrate.

Hon'ble the Supreme Court of India in the case of Lalita Kumari v. Govt. of U.P., (2014) 2 SCC 1has laid down the following guidelines with regards to institution of FIR:

*"**96**. The underpinnings of **compulsory registration of FIR**is not only to ensure transparency in the criminal justice-delivery system but also to ensure "judicial oversight".Section 157(1) deploys the word "forthwith". Thus, any information received under Section 154(1) or otherwise has to be duly informed in the form of a report to the Magistrate. Thus, the commission of a cognizable offence is not only brought to the knowledge of the investigating agency but also to the subordinate judiciary.*

***97**. The Code contemplates two kinds of FIRs: the duly signed FIR under Section 154(1) is by the informant to the officer concerned at the police station. The second kind of FIR could be which is registered by the police itself on any information received or other than by way of an informant [Section 157(1)] and even this information has to be duly recorded and the copy should be sent to the Magistrate forthwith. The registration of FIR*

either on the basis of the information furnished by the informant under Section 154(1) of the Code or otherwise under Section 157(1) of the Code is obligatory. The obligation to register FIR has inherent advantages:

97.1. (a) It is the first step to "access to justice" for a victim.

97.2. (b) It upholds the "rule of law" inasmuch as the ordinary person brings forth the commission of a cognizable crime in the knowledge of the State.

97.3. (c) It also facilitates swift investigation and sometimes even prevention of the crime. In both cases, it only effectuates the regime of law.

97.4. (d) It leads to less manipulation in criminal cases and lessens incidents of "antedated" FIR or deliberately delayed FIR." (emphasis supplied)

The above ratio has been followed in Lokayukta Police Vs. H. Srinivas, 2018 (3) PLJR 171 SC : (2018) 7 SCC 572and it has been further held:

"17.In our view the procedure adopted against the appellant before the laying of the first information report though not in terms forbidden by law, was so unprecedented and outrageous as to shock one's sense of justice and fair play. No doubt when allegations about dishonesty of a person of the appellant's rank were brought to the notice of the Chief Minister it was his duty to direct as enquiry into the matter. The Chief Minister in our view pursued the right course. The High Court was not impressed by the allegation of the appellant that the Chief Minister was moved to take an initiative at the instance of person who was going to benefit by the retirement of the appellant and who was said to be a relation of the Chief Minister. The High Court rightly held that the relationship between the said person and the Chief Minister, if any, was so distant that it could not possibly have influenced him and we are of the same view. Before a public

servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanor or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. ***The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can of taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner***. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for someone in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge-sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be restored to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code

of Criminal Procedure by lodging a first information report.P. Sirajuddin v. State of Madras, (1970) 1 SCC 595 : at page 601

InPriyanka Srivastava and Anr. Vs. State of U.P, 2015 (6) SCC 287-the Hon'ble Apex Court has given specific directions for filing affidavit in support of averments made in the complaint prior to such complaint being sent for investigation under section u/s 156(3) Cr.P.C.

Law On More Than One FIR

Hon'ble Jharkhand High Court has noted the anomalous practice of drawing about four FIRs arising out of the same incidence leading to multiplicity of cases by institutions of nine sessions trials inArun Bara Vs. The State of Jharkhand, Criminal Appeal (DB) No. 969 of 2018.

This is against the scheme of Cr.P.C. which in normal circumstance envisages one FIR to be drawn with respect to one incident. However, case and counter case are not ruled out.

There can be circumstances where information regarding the same offence is given more than once to the police station. In cases where the investigation is later on directed to be handed over to the CID, CBI or NIA etc. then a second FIR is registered. The question that often arises is regarding the legality of the second FIR and it is argued that the second FIR being a subsequent statement is hit by section 162 of the Cr.P.C. The leading case on this point is T.T. Antony Vs. State of Kerala, AIR 2001 SC 2637 wherein it was held that a second FIR based on the same fact is not permissible. FIR postulated by section 154 Cr.P.C. is the first information and all other information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the FIR will be statements falling under section 162 Cr.P.C. No such information / statement can properly be treated as an FIR and entered in the station house diary again as it will be in effect a second FIR.

The above law as set out in T.T. Antony case applies in same offence or interrelated offences, but where there are two distinct offences it will not apply. It has been held in *Pattu Rajan Vs. State of Tamilnadu 2019 (4) SCC 771* that the aforementioned principle of law may not be applicable to the facts of the incident on hand, as the crimes underlying the two FIRs are distinct and different. The FIR with respect to murder is quite distinct from the FIR relating to abduction.

It has been held in *Ramesh Chandra Nandlal Parikh Vs. State of Gujarat, 2006 (1) SCC 732*that in case where the FIR is not with respect to the same cognizable offence or the same occurrence as the one's alleged in the first FIR, there is no prohibition in accepting second FIR.

Md. Qaumuddin Khan Vs. State of Jharkhand – 2016 (4) JBCJ 311 Jhr. – two FIR lodged with regard to the same incidence but the second FIR was lodged by vigilance department considering discovery of new factual foundation and larger conspiracy part. In such circumstance the second FIR was held not to be illegal. The court relied on *Nirmal Singh Kahlon Vs. State of Punjab, 2009 (1) SCC 441*wherein two FIRs were lodged first at the instance of the state vigilance and second by the CBI. The Apex court held that the second FIR would be maintainable not only because there were different versions but when new discovery is made on factual foundation.

Under what circumstances more than one FIR registration is permissible was discussed in Anju Chaudhary Vs. State of U.P.- 2013 (6) SCC 384and it has been held that where incident is separate, offences are similar or different or even where subsequent crime is of such magnitude that it does not fall within ambit and scope of FIR recorded first, then a second FIR could be registered.

The question at this juncture arises as to what should be the proper course for a court when it receives multiple FIRs/chargesheets relating to the same offence?

Section 220 of the Cr.P.C . provides that if in one series of acts so

connected together as to form the same transaction more offence than one are committed by the same person, he may be charged with, and tried at one trial for every such offence.

This principle is further elaborated in section 223 Cr.P.C. where more than one person are accused of offence committed in the course of the same transaction they may be charged and tried together. This provision lays down altogether seven circumstances wherein accused persons can be jointly tried. The provisions of section 220 and 223 are extracted below for a ready reference.

Section 220.Trial for more than one offence.

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-section (2) of section 212 or in sub-section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860).

Illustrations to sub-section (1)

(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code (45 of 1860).

(b) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code (45 of 1860).

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code (45 of 1860).

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code (45 of 1860). A may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code.

(e) With intent to cause injury to B, A institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding, and also falsely accuses B of having committed an offence, knowing that there is no just or lawful ground for such charge. A may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code (45 of 1860).

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for

such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under section 211and 194 of the Indian Penal Code (45 of 1860).

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code (45 of 1860).

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code (45 of 1860).

The separate charges referred to in illustrations (a) to (h), respectively, may be tried at the same time.

Illustrations to sub-section (3)

(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code (45 of 1860).

(j) Several stolen sacks of corn are made over to A and B, who knew they are stolen property, for the purpose of concealing them. A and B thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain-pit.A and B may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code (45 of 1860).

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be

separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code (45 of 1860).

(l) A dishonestly uses a forged document as genuine evidence, in order to convict B, a public servant, of an offence under section 167 of the Indian Penal Code (45 of 1860). A may be separately charged with, and convicted of, offences under sections 471 (read with section 466) and 196 of that Code.

Illustration to sub-section (4)

(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code (45 of 1860).

Section 223. What persons may be charged jointly.

The following persons may be charged and tried together, namely:

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such

offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate or Court of Session may, if such persons by an application in writing, so desire, and if he or it is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

From the above two provisions it is evident that persons accused of same or different offences arising out of the same transaction may be charged and tried together. In view of these provisions court at the time of taking cognizance or before framing of charge may hold joint trial of different police cases registered on the basis of multiple FIRs arising out of the same transaction to avoid multiplicity of criminal proceedings in the event of such cases having been transferred to different courts and the trial has not commenced such lower court can report the matter to the sessions judge so that power under section 408 Cr.P.C. can be exercised by the Sessions Judge.

Where the two FIRs are instituted into two separate states the cases may be transferred under section 406 Cr.P.C. by the Supreme Court and

where the two FIRs are registered in two districts within the same state it shall be within the powers of High Court to transfer such cases under section 407 of Cr.P.C.

In the event of case and counter case arising out of the same incidence there cannot a joint trial, but such trial should ideally be head and disposed of together by the same court. It has been held in Sudhir and other Vs. State of M.P., 2001 (2) SCC 688It has been held that two different versions of the same incident resulting in two criminal cases are compendiously called case and counter case or cross cases. Where one of the two cases is chargesheeted or complained of, involves offences or offence exclusively triable by a court of session, but none of the offences involved in the other case is exclusively triable by the sessions court. The Magistrate has no escape from committing the former case to the sessions court as provided in section 209 Cr.P.C. Though, the next case cannot be committed in accordance with section 209 of the Code, the Magistrate has, nevertheless power to commit the case to the court of sessions. Section 323 is incorporated in Cr.P.C. to meet similar cases also. Commitment under section 209 Cr.P.Cand Section 323 might be through two different channels, but once they are committed their subsequent flow could only be through the scheme channelized by the provisions contained in Chapter XVIII.

To make it simple it may be added that there is an embargo on the court of Judicial Magistrate up to the rank of Chief Judicial Magistrate that they are competent to try only thosewhich are shown in the first schedule of the Cr.P.C. to be triable by the court of Magistrates, but as per the provisions of Section 26(a)(ii)of the Cr.P.C a court of sessions can try any offence. Further, a conjoint reading of section 209 Cr.P.C. and 323 of Cr.P.C. shows that section 209 puts a duty on the Magistrate to commit all such cases which are ***triable exclusively by the court of sessions*** as per the first scheduled of Cr.P.C. Whereas Section 323 of the Cr.P.C. gives a

discretion to the Magistrate to commit a case to the court of sessions where he is of the opinion that the case is one which ***ought to be tried by the court of sessions.***

Steps When a FIR or a Complaint is Received in Court:-

- The FIR or the Complaint must be registered in the **CIS** (Court Information System) at the filing counter and only then any court should receive it.
- In case of a FIR the Magistrate or the presiding Judge must put date & time and sign it as per section 157 Cr.P.C.

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2. ARREST AND REMAND

"The word arrest is derived from the French word Arreter meaning "to stop or stay" and signifies a restraint of the person. Lexicologically, the meaning of the word arrest is given in various dictionaries depending upon the circumstances in which the said expression is used. The word arrest when used in its ordinary and natural sense means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence." Directorate of Enforcement vs. Deepak Mahajan and another 1994AIR(SC) 1775.

A fair trial requires that the trial proceedings are conducted in the presence of the accused and that he is given a fair chance to defend himself. The presence of the accused at the trial can be ensured by simply arresting him and detaining him during trial. It is time and again stated as a broad principle that the liberty of a person should not be taken away without just cause. Arrest although appears simple and expedient but it should not be resorted to in every case as has been held by the Hon'ble Courts time and again that jail is an exception. If the presence of the accused at the trial cannot be procured except by arrest and detention, the accused should by all means be arrested and detained pending his trial however, if his presence can be reasonably ensured otherwise then by his arrest and detention, he ought not be deprived of his right to liberty. That is the reason why the Code has included provisions regarding the issue of a summons, or of a warrant of arrest and the provisions relating to arrest

without warrant with provisions regarding release of the arrested accused on bail and/ or aimed at ensuring the presence of the accused at trial without unreasonably depriving him of his liberty.

The provision of remand in the Cr.P.C. has been made in sections 167, 209 and 309 of the Cr.P.C. at different stages of investigation, enquiry and trial. As per section 57 Cr.P.C.a person arrested by police cannot be detained more than 24 hours the detention beyond the period of 24 hours needs a special order of a Magistrate under sections 167. The detention under sections 167can be authorized by a Magistrate for a term not exceeding 15 days which may extend to 60 or 90 days depending on the nature of offence. This remand can be only during the period of investigation and the nature of remand changes the moment the police report is submitted. Custody beyond such period can be authorized under section 209 where the offence is triable by the court of sessions by the committing Magistrate or under section 309 by the court competent to try the offence.

Remand May be of two types:

(i) Judicial Remand

(ii) Police Remand

Judicial Remand- sections 167Cr.P.C.

The accused can be remanded to judicial custody either after arrest by police or on surrender before the court. Further, when the accused is in judicial custody in connection with any other case, the remand of the accused in the case pending before the Magistrate can be taken on an application submitted by the Investigating officer or the accused. The first remand however can only be taken by physical production of the accused in the subsequent case. A Full Bench of the Hon'ble Patna High has held that though physical production of the accused before the Magistrate is

desirable, yet the failure to do so would not per se vitiate the order of remand, if the circumstances for the non-production were beyond the control of the prosecution or the police (1987 Cr.L.J. 1489 (Pat) F.B.).However, as a general practice the Magistrate should insist upon physical production at the first remand as required under 167(2) of the Cr.P.C. it has been held in several cases that remand order by the Magistrate without production of the accused before him, is neither safe nor possible. Where the accused is subsequently remanded in other case his remand shall be counted in both the cases.

It may be pointed out in this context that where the accused is in custody in relation with some case and subsequently his production is sought by a petition filed for production by the I.O in connection with another case. The same can be allowed by the Magistrate in the light of the ratio of Joseph Ekka Vs State of Jharkhand 2012(4) Eact Cr. C 207(Jhr) wherein it has been held that there are two courses open for the Magistrate. Either the accused be produced under proper escort before the concerned court or he may be remanded through electronic video linkage in that particular case-- But in no case he will be handed over to the police for producing before the concerned court in which his appearance is required.--If a person is in judicial custody in connection with any case he can be remanded in another case in which his appearance is required in another district through electronic video linkage for further progress of that particular case.

When the accused is produced on strength of a production warrant by the jail authorities in any subsequent case the Magistrate must remand the accused in the subsequent case on the day of his production in such subsequent case if not already released on bail by drawing proper order on the point.

Provision for compensation in cases of illegal arrest.

Hon'ble the Apex Court has laid down guidelines in the case of Dr Rini

Johar Vs State of M.P. 2016(4) supreme 397which may be summarized as follows:

- Procedures of arrest and seizure u/s 41 Cr.P.C and in the guidelines laid down in DK Basu Case are mandatory in nature.
- Violation of Sections 41 and 41-A Cr.P.C and guidelines of **D.K.Basu case** in matter of arrest and seizure attracts public law of remedy entitling the **Court to impose compensation. Compensation** of Rs 5,00,000 to each petitioner directed.
- When the dispute is purely civil in nature , criminal proceedings can not be allowed to proceed.
- Justice Krishna Aiyer has held in Jolly George Varghese Vs Bank of Cochin AIR 1980 SC 470"**No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation"**
- Under Section 41-A CrPC makes it clear that when arrest is not required under Section 41-A CrPC the police officer is required to issue notice to the accused to appear before him at a specified place and time. Law obliges that when such an accused appears before the police officer and the accused complies with the term of the notice he shall not be arrested.

To arrest a person is to restrain of his liberty by some lawful authority. It is to deprive him of personal liberty by legal authority. It consists of seizure or touching of a persons' body with a view to his restraint. How to arrest and essential elements are discussed in D.K. Basu v. State of West Bengal, 1997(1) SCC 416; Joginder Singh v. State, 1994 Cri LJ 1981; Delhi Judicial Service Association v. State, AIR 1991 SC 2176.-When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation is provided in section 41B of Cr.P.C.

Following the mandate given by the Apex Court of India in D.K. Basu v. State of W.B AIR 1997 SC 610., and Jogender Kumar v. State of U.P. AIR

1994 SC 1349., a full Bench of Allahabad High Court in Ajeet Singh v. State of U.P.,2007 Cri LJ 170 (All) FB (Para 31).has held that Section 50A as inserted by Criminal Procedure Code (Amendment) Act, 2005 requires the Police to give information about the arrest of the person as well as the place where he is being held to anyone who may be nominated by him for sending such information. ***It further obliges the Magistrate concerned to satisfy himself about the fulfillment of the requirements of the said provisions when arrested person is produced before him in order to ensure compliance of the said law.*** The aforesaid provisions are mandatory and any violation, thereof, can be a ground available to an apprehended person to question the correctness of the arrest by the aforesaid procedure. This is because the aforesaid section is clearly designed to protect the fundamental right of a person guaranteed under Article 21 of the Constitution, subject to reasonable restriction as placed by the law enacted by the Legislature. The interpretation of the said provision, therefore, makes it imperative for the investigating agency not to apprehend a person and further for the Magistrate to satisfy himself that the investigation agency had proceeded with in accordance with law, which would ensure the safety and liberty of a person from being abused and from preventing any unwarranted arrest .

[53A[1]. Examination of Person Accused of Rape by Medical Practitioner—(1)When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where

1. Ins. by Act 25 of 2005, sec. 7 (w.e.f. 23.6.2006).

the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely—

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused.

(iv) the description of material taken from the person of the accused for DNA profiling and".

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of the commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.]

After the incorporation of Section 53A in the Criminal Procedure Code with effect 23.6.2006, it has become necessary to go in for DNA test in such type of cases facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.PC prosecution would have still resorted to this procedure of getting DNA test or analysis and matching of semen of the accused with that found on the undergarments of the prosecutrix to make it a fool proof

case, but they did not do so, thus the prosecution must face consequences Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130. Siva Vallabhaneni vs State of Karnataka (2015)2 SCC 90.Sunil Vs State of M.P. (2017) 4 SCC 393.

What procedure to be followed for authorizing detention of an accused arrested and produced without a warrant ?

Checklist for Judicial Remand

- Section 167 Cr.P.C. authorises remand of a person to judicial custody only in such cases where the bail is not granted when the accused is produced by the police on **arrest or surrenders**physically before the Magistrate. Further the accused can also be remanded to judicial custody on the basis of a requisition by the Public Prosecutor or the I.O. of the accused being wanted in a pending case before that court.
- The point to be remembered for the court is that when the accused is not granted bail a custody warrant to the jail is issued and in case where the accused is granted bail, he shall be released subject to furnishing bail bonds.
- In case the accused is alreadyin custody in relation with some other case and his attendance is procured on the strength of a production warrant issued by the court, in such cases the accused shall be remanded in the instant case by issuing fresh **custody warrant**and an order of remand be drawn relating to the case in hand as the period of detention is computed from the date of remand by the Jail authorities.
- Where the accused is granted bail in the instant case and is in custody in relation with some other case then the **production warrant** shall be issued after drawing a proper order to that effect.
- The first remand must be by physical production of the accused in terms of section 167 (2)(b) and the Magistrate may extend further

detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage (VC).

Police Remand – Sec.167 Cr.PC

- During the first fifteen days only on satisfaction of good grounds.
- No reliance on general statement of IO.
- Factors to be considered by the Magistrate while granting Police remand has been provided in Satyajit Ballubhai Desai v. State of Gujarat, (2014) 14 SCC 434where in it has been held that the grant of order for police remand should be an exception and not a rule and for that the investigating agency is required to make out a strong case and must satisfy the learned Magistrate that without the police custody it would be impossible for the police authorities to undertake further investigation and only in that event police custody would be justified as the authorities specially at the magisterial level would do well to remind themselves that detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention/police remand can be allowed only in special circumstances granted by a Magistrate for reasons judicially scrutinised and for such limited purposes only as the necessities of the case may require. The scheme of Section 167 of the Criminal Procedure Code, 1973 is unambiguous in this regard and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers which at times may be at the instance of an interested party also. But it is also equally true that the police custody although is not the be-all and end-all of the whole investigation, yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and, has therefore, permitted limited police custody.
- Accused must be produced before the P.O. both before and after the

Police remand.

- Satisfy that accused is sound in mind and body for which the accused shall be brought to court and medical examination on both the above occasions.
- Not more than 48 hours at a stretch, i.e., the accused must be produced before the Magistrate every 48 hours and must be produced for Medical checkup.
- In case of an absconding accused who is arrested after submission of chargesheet in the main case he can be remanded to police custody for interrogation in the light of the judgment passed in Dawood Ibrahim Kaskar 2000(10) SCC 438and followed inAIR 2015 SC 3285, CBI Vs. Rathin Dandapath.It was observed in Rathin case,"Accused if in custody" in Section 309(2) Cr.P.C does not include accused who is arrested on further investigation before supplementary charge".

When and what period for police remand:-

During the first 15 days alone an accused can be sent to police custody. CBI v. Anupam J. Kulkerni AIR 1992 SC 1768Budh Singh v. State of Punjab 2000(9) SCC 266M.P Patel v. State of Gujarat 2009(6) SCC 332Devender Kumar v. State of Haryana 2010(6) SCC 753It is not permissible to apply for police custody along with the 2nd remand application after the expiry of the first remand period of 15 days of judicial custody. Can there be 2 or more spells of police custody during the first 15 days of detention? the answer is in affirmative. Yes, there can be, without exceeding total 15 days. **Anupam J. Kulkerni Case**

There are several persons already arrested and yet to be arrested in connection with an offence. In the remand application of one of the arrested person, the police officer has not disclosed the name and role of a co-conspirator who is yet to be arrested but against whom materials have been collected. Is it not a ground to disbelieving the prosecution case or at

least for treating the prosecution case suspect?—

It is not necessary to mention about the role of co-accused while seeking remand and therefore it cannot be a ground for rejection of remand, **Sushil Kumar And others VS State of Haryana**AIR 1988 SC 586.

How to Pass Order

- Notice of application to the Advocate appearing for the accused is to be given.
- If no Advocate is engaged by the accused court must appoint a legal aid counsel and give notice.
- Court must hear both sides
- Court must ask the accused personally and satisfy that he is sound in mind and body
- Then a reasoned order should be passed.
- The court must ensure that the person who sought for custody is present when the order is passed.
- Court must specify in the order the name and designation of the police officer in whose custody accused is entrusted.
- The order of remand must specifically mention the date and time from which custody begins and ends.
- It must contain a direction to produce the accused, after the period of custody, in court: and
- If police custody for more than 48 hours is granted the court must direct medical examination of accused at every 48 hours.

Remand where accused is in hospital

- Proceed to the Hospital and then verify all the aspects referred above and then make the order of remand.
- For extension of remand of person admitted in hospital, same procedure has to be followed.

Extension of remand without production of accused

The judicial remand period of accused can be extended even without production of accused before the court in exceptional circumstances. But judicial custody cannot be routinely extended without production of accused. Raj Narain v. Supt. Central Jail, New Delhi AIR 1971 SC 178(7 Judges) Followed in M. Sambasivav Rao vs.The Union of India AIR 1973 SC 850,Sandip Kumar Dey vs.The Officer-in-charge, Sakchi P. S., Jamshedpur AIR 1974 SC 871

General Guidelines to be Followed by The Magistrate at the Time Of Remand –

- Peruse the documents produced by the prosecution including extract of entries in the case diary. In normal course police submits only a remand report which contains information as to what investigation has been done and the probable evidences against the accused. The Code mandates the Officer In-charge to produce an extract of case diary.
- Provide free legal aid to the accused in all such cases where the accused is not represented by any lawyer at the time of even remand.The Hon'ble Supreme Court of India has held in Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid -Versus State Of Maharashtra -2012 9 SCC 1

  ".....it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. ***We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear***

that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

485. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the chargesheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the Miranda principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.

486. ***At this stage the question arises, what would be the legal consequence of failure to provide legal aid to an indigent who is not in a position, on account of indigence or any other similar reasons, to engage a lawyer of his own choice?(****emphasis supplied)*

487. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the

court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (Suk Das v. UT of Arunachal Pradesh [(1986) 2 SCC 401]).”

- The accused must be asked “whether the accused has any complain of torture or ill-treatment by the police and inform that he has a right to be examined by a medical practitioner under Sec.54Cr.PC. and the I.O. must produce such medical certificate in the court at the time of remand. *Sheela Barse V. State of Maharashtra AIR 1983 SC 378*
- The signature of the accused in the right margin of the order sheet must be taken.
- Then orders may be passed for remand of the accused to judicial custody not exceeding the statutory limit of 15 days.

  The distinction between offence punishable upto 7 years and more than 7 years must be kept while passing appropriate order as referred here in above in connection with the guidelines inArneshKumar v. State of Bihar AIR 2014 SC 2756.
- The warrant of arrest or proclamation or warrant of attachment as the case may be on the strength of which the accused was arrested must accompany the letter of forwarding with due execution report.
- Memo or arrest must accompany the format showing intimation of arrest was given to the relative or friend of the arrested person and further that the accused was informed about his rights in terms of section 50A.
- *In case of arrest under Section 41(1)(b) of the Code, the arrest memo along with the grounds has to be in writing mandatorily.*Lalita Kumari

v. Govt. of U.P., (2014) 2 SCC 1

- Further in cases under section 498A IPC while passing an order of remand the Magistrate has to see whether the guidelines laid down by Hon'ble the Apex Court in Arnesh Kumar v. State of Bihar AIR 2014 SC 2756.,(2014) 8 SCC 273 : at page 281 has been complied with or not. The guidelines inter alia provides :

"Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. ***The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;***

11.4. ***The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;***

11.5. ***The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;***

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the

accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. ***Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court." (emphasis supplied)***

Remand of Person Arrested Pursuant to Warrant Issued by Another Court (78 To 81 Cr.Pc) (Transit Remand)

The provisions in chapter V and VI of the Code leave us with certain questions for better understanding of the provisions.

Can a police officer execute a warrant issued by his Jurisdictional Magistrate beyond the territorial jurisdiction of the Court concerned?

The Police Officer can execute a warrant beyond the territorial jurisdiction of the court concerned as per the provision of Section 77 to 81 relate to execution of warrant. Section 77 of the Cr.P.C provide that a warrant of arrest may be executed at any place in India.

These provisions lay down two procedures by which such a warrant can be executed. Firstly, the warrant will be taken by the police officer to the concerned police station for endorsement and assistance of the police station concerned. Secondly, in order to prevent delay in execution or possibility of prevention of execution of the warrant it may also directly execute the warrant without such endorsement or information to the police station concerned. Thirdly, the court may forward by post or otherwise the warrant to any other Magistrate or Police Officer for execution instead of directing the warrant to a Police Officer within its jurisdiction.

The provisions of section 78 deserves to be extracted the way it exists which reads as follows:

Section 78: Warrant forwarded for execution outside jurisdiction

(1) When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, instead of directing the warrant to a

police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed; and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner hereinbefore provided.

(2) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under section 81 to decide whether bail should or should not be granted to the person.

There may be a situation that when a warrant is directed to a police officer within the jurisdiction of the court but the warrant is to be executed beyond the local jurisdiction of the court issuing the same. The procedure to be adopted in such a situation has been provided in section 79 of the Cr.P.C. which reads as follows :

S.79: Warrant directed to police officer for execution outside jurisdiction

(1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer in charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

*(3) Whenever **there is reason to believe** that the delay occasioned by*

obtaining the endorsement of the Magistrate or ***police officer within whose local jurisdiction the warrant is to be executed will prevent such execution****, the police officer to whom it is directed* ***may execute the same without such endorsement*** *in any place beyond the local jurisdiction of the Court which issued it.*

It is clear from a simple reading of the bare provisions of section 79 that where the warrant is to be executed beyond the local jurisdiction of the court the police officer should take it to the officer incharge of the police station within the local limits of whose jurisdiction the warrant is to be executed and the police officer to whom such warrant is taken shall endorse his name and assist the officer carrying the warrant in its execution.

There is yet another situation where the officer carrying the warrant may execute the warrant without following the procedure mention under subsection (1) and subsection (2) in terms of subsection (3) of section 79 and directly execute the warrant in the circumstances mentioned therein.

Can a Police Officer arrest an accused without warrant involved in a nonbailable cognizable offence registered in his Police Station from a place beyond the jurisdiction of his Police Station or the State?

Section 41 of the Cr.P.C.does not place any territorial limits on the powers of the police to arrest without warrants. Further, section 48 of the Cr.P.C.gives the power to Police Officer to arrest an accused by pursuing him in any place within country.Section 48 also figures in Chapter V of Cr.P.C. and from the reading of both these provisions in conjunction it will be evident that a warrant of arrest in all cases is not required for arresting a person beyond the territorial limits of the court concerned.

The relevant portions of Section 41 may be extracted for ready

reference herein after:

S.41 : When police may arrest without warrant

(1) Any police officer may ***without an order from a Magistrate*** *and* ***without a warrant****, arrest any person-*

*(a) *******

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:--

(i) the ***police officer has reason to believe*** *on the basis of such complaint, information, or suspicion that such person has committed the said offence;*

(ii) the police officer is satisfied that such arrest is necessary--

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

**********or*

(e) as ***unless such person is arrested, his presence in the Court whenever required cannot be ensured****,*

and the police officer shall record while making such arrest, his reasons in writing.

******

*(i) for **whose arrest any requisition, whether written or oral, has been received from another police officer**, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.*

****

The provisions of section 48 of Cr.P.C. may be quoted as follows :

Section 48 Pursuit of offenders into other jurisdictions. - A police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India.

Procedure for such arrest and remand

It is thus ample clear that arrest without warrant may be made by a police officer beyond his territorial jurisdiction. Section 56 and 57 of the Cr.P.C. are very important when arrest is ***made without warrant which mandates production of the accused before the Magistrate within 24 hours***. The two provisions are interrelated and deserved to be read simultaneously and thus are being produced herein below :

56. Person arrested to be taken before Magistrate or officer in charge of police station—A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer-in-charge of a police station.

Section 57. Person arrested not to be detained more than twenty-four hours. No police officer shall detain in custody a person

arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

In case of arrests without warrant the decision to make arrest is no doubt made by persons other than magistrates and courts i.e. by police officers, private citizens, etc. These persons may because of the exigencies of certain situations detailed in the Code are allowed to make the arrest – decisions themselves without obtaining warrant of arrest from the Magistrates. In a case where a serious crime has been perpetrated by a dangerous person and there is every chance of the person absconding unless immediately arrested, it would be certainly unwise to insist on the arrest being made only after on obtaining a warrant from a Magistrate. Preventive action may sometimes be necessary in order to avert the danger of sudden outbreak of crime, and immediate arrest of the trouble-maker may be an important step in such preventive action. The exigency of the circumstances may require a person to be arrested without warrant if such person is reasonably suspected to have committed a cognizable offence.

Under Section 56 of the Code of Criminal Procedure it is the bounden duty of the police officer arresting a person to produce before a Magistrate having jurisdiction without unnecessary delay. Under Section 57 of the Code there is an embargo on the police officer to detain in custody a person arrested beyond 24 hours excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. The object behind the aforesaid two provisions which are required to be read together is that the accused should be brought before a Magistrate without much delay and that the Magistrate will have an opportunity to apply judicial

mind in the matter within 24 hours. The aforesaid provision in fact is in consonance with the constitutional mandate engrafted under Article 22(2). Article 22 (1) embodies a rule which has always been regarded as vital and fundamental for safeguarding personal liberty in all legal systems where the Rule of law prevails.

The mandatory requirement for production of the arrested person before the Magistrate within 24 hours has been elaborately discussed in Madhu Limaye and others Vs State of Bihar 1969 1 SCC 292, Birbhadra Pratap Singh Vs. D.M. Azamgarh, 1959 Cr.L.J. 685.

It is thus apparently clear that where a Police Officers arrests a person without warrant, the arrested person must be produced before a Magistrate within 24 hours in terms of the provisions contained in section 57 of the Cr.P.C. In yet another case reported in 1981 AIR(SC) 928; 1981 1 SCC 627Khatri and others VersusState of Bihar and others Hon'ble Supreme Court has held that the provisions of section 57 are mandatory.

It is thus ample clear that where the arrest is made without warrant the arrested person must be produced before a Magistrate within 24 hours.

What is the procedure to be followed by the Police Officer arresting an accused with or without warrant beyond the local jurisdiction of the Police Station?

The Police Officer arresting an accused with or without warrant beyond the local jurisdiction of the police station must produce the arrested person before a Magistrate either in terms of section 56 or 57 of Cr.P.C. where the arrest is without a warrant or when the arrest is made on the strength of a warrant the arrested person must be produced in terms of section 80 Cr.P.C.before the Court which issued the warrant or when the place of arrest is not within 30 Kms before the nearest

Magistrate.The contents of Section 80 and 81 of the Code deserves to be extracted the way they exist here in below:

Section 80:- Procedure on arrest of person against whom warrant issued.

When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is *within thirty kilometres* of the place of arrest or is nearer than the *Executive Magistrate or District Superintendent of Police or Commissioner of Police* within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 71, be taken before such *Magistrate or District Superintendent or Commissioner*.

Section 81:- Procedure by Magistrate before whom such person arrested is brought.

(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:

Provided further that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on

consideration of the information and the documents referred to in sub-section (2) of section 78, to release such person on bail.

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 71.

Where any person is arrested without warrant and is produced before the local Magistrate in terms of Section 57 of the Cr.P.C. , the arrested person on verification of the memo of arrest shall be permitted to be taken to the Magistrate having jurisdiction in the matter.

What is the procedure to be adopted by the Magistrate when an accused wanted in a case by any other court having jurisdiction for enquiry and trial is produced before such Magistrate?

- The power of remand upto 15 days may be exercised by the Court before which the accused is produced under section 167(2) Cr.P.C. and subsequent remands can be ordered only by the court having jurisdiction for enquiry or trial. Therefore, whenever an accused arrested in connection with a case pending before any other court having territorial jurisdiction is produced the Magistrate need to remand the accused to custody for production before the court having jurisdiction. This in normal parlance called transit remand.

- The Magistrate before whom such accused is produced at the first instance has to proceed as per the provisions laid down under section 81 of Cr.P.C. which **prescribes the procedure by Magistrate before whom such person arrested is brought.**

- The Magistrate shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

- If the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, or a direction has been endorsed under section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:
- If the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (2) of section 78, to release such person on bail.

Can a Magistrate remand the accused in such cases if he has no jurisdiction to try the offence?

Once the person arrested with or without warrant in connection with a case outside the local jurisdiction of the court is produced the Magistrate in terms of sections 167 (2) read with section 56 and 57 shall forward the accused to the Magistrate having such jurisdiction.

It is interesting to note that Hon'ble Apex Court in State of Punjab v. Ajaib Singh AIR 1953 SC 10 (CB) in para 20 has drawn a distinction in cases of arrest made on the strength of the warrant and those made without warrant. It has been pointed out that the mandate of production before the Magistrate within 24 hours is mandatory in cases of arrest without warrant but same is not the case when the accused is arrested on the strength of a warrant of arrest issued by a court of competent jurisdiction. The reason being that in the former case the judicial mind has already been applied, whereas in the latter case the arrest the judicial mind has not been applied. The relevant observation of the Hon'ble Court is extracted below:

" 20. Turning now to Art. 22 (1) and (2), we have to ascertain whether its protection extends to both categories of arrests mentioned above, and, if not then which one of them comes within its protection There can be no manner of doubt that arrest without warrants issued by a Court call for greater protection than do arrests under such warrants, The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a court the Judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right. It is also perfectly plain that the language of Art 22 (2) has been practically copied from Ss. 60 and 61, Criminal P.C. which admittedly prescribe the procedure to be followed after a person has been arrested without warrant. The requirement of Art. 22 (1) that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest indicates that the clause really contemplates an arrest without a warrant of Court, for, as already noted, a person arrested under a Court s warrant is made acquainted with the grounds of his arrest before the arrest is actually effected. There can be no doubt that the right to consult a legal practitioner of his choice is to enable the arrested person to be advised about the legality or sufficiency of the grounds for his arrest. The right of the arrested person to be defended by a legal practitioner of his choice postulates that there is an accusation against him against which he has to be defended. The language of Art. 22 (1) and (2) indicates that the fundamental right conferred by it gives protection against such arrests as are effected otherwise than under a warrant issued by a Court on the

allegation or accusation that the arrested person has, or is suspected to have, committed, or is about or likely to commit an act of a criminal or quasi-criminal nature or some activity prejudicial to the public or the State interest. In other words, there is indication in the language of Art. 22(1) and (2) that it was designed to give protection against the act of the executive for other non-judicial authority. The Blitz case (Petn. No. 75 of 1952) on which Sri Dadachanji relies, proceeds on this very view, for there the arrest was made on a warrant issued, not by a Court, but by the Speaker of a State legislature and the arrest was made on the distinct accusation of the arrested person being guilty of contempt of the Legislature. It is not, however, our purpose, nor do we consider it desirable, to attempt a precise and meticulous enunciation of the scope and ambit of this fundamental right or to enumerate exhaustively the cases that come within its protection. Whatever else may come with the purview of Art. 22 (1) and (2), suffice it to say for the purposes of this case, that we are satisfied that the physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature or of any act prejudicial to the State or the public interest and delivery of trial person to the custody of the officer in charge of the nearest camp under S. 4 of the impugned Act cannot be regarded as arrest and detention within the meaning of Art. 22 (1) and (2). In our view, the learned Judges of the High Court over-simplified the matter while construing the Article, possibly because the considerations hereinbefore adverted to were not pointedly brought to their attention."

Section 77 of the Cr.P.C. provides that the warrant of arrest may be executed at any place in India and sections 78 and 79 of the Cr.P.C. further provide the procedure for forwarding the warrant of arrest for execution outside the jurisdiction of the court. Secs 56 and 57 apply only

to cases of arrest without warrant. The provision that the arrested person should within 24 hours be produced before the nearest Magistrates particularly desirable in the case of arrest without a warrant issued by a Court. Such insistence is to ensure the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a court the Judicial mind has already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right.

What is the procedure to be followed by the Magistrate where such accused is produced before him on being arrested? Can a Magistrate in such cases refuse remand on the ground that the accused has been arrested without a warrant of arrest issued by any competent court?

If arrest of a person is made within the jurisdiction of the court by a police officer in respect of a crime committed beyond its jurisdiction, without a warrant, then Sec.167 would apply. The provisions of section 167 Cr.P.C.are extracted for a ready reference as below:

S.167 : Procedure when investigation cannot be completed in twenty-four hours

(1) *******

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and ***if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction***:

Provided that- ******

The case would be different when the arrest is made outside the jurisdiction of the court issuing warrant of arrest then in that case the Magistrate may issue transit warrant. There is no separate 'Form' in the CrPC for the same but the procedure mentioned under section 80 and 81of the Cr.P.C. shall be followed.

Surrender before Magistrate having no Jurisdiction

As discussed above while passing an order of remand the court has to satisfy itself on certain facts as required under section 167 on the basis of the extracts of case diary produced before the court regarding the name, identity of the accused, the offence and the case in which he is to be remanded. The question arises if an accused suo motu surrenders before a before a Magistrate having no jurisdiction to take cognizance of the offence, what should be the course to be followed by the said court?

Logically and practically since there is no material before the court for remand any such order should be uncalled for and the accused should be asked to surrender before the Magistrate having jurisdiction over the pending case concerned.

Surrender of person against whom warrant is issued by a court

If an accused surrenders before a Magistrate other than the Magistrate who issued the warrant, he cannot be dealt with under Sec.167.Ranveer Singh v. Desh Raj Chauhan 1983 SCC OnLine All 368further held in following words that

"The following observations in the case of ***State v. Sajjan Singh (AIR 1953 Pepsu 146)*** *(Para 18) are important:—*

"For the decision of the second point urged by Mr. Har Prashad we have to find out whether the word 'Court' appearing in S. 497 means any Court or the Court which, has jurisdiction to try the accused for the

offence alleged to have been committed by him. Mr. Mehra admitted that in the case of a person who is arrested or detained by the Police without warrant an application for bail under S. 497 can only be made to the Court who can take cognizance of the offence for which the accused is arrested or detained, but he maintains that when he appears of his own accord he can apply to any Court. He has not been able to it any authority to support his contention and ***I do not think the contention can be correct, because it would mean that when a case for a cognizable or a non-bailable offence is registered against a person in one District it is open to him to go to any Magistrate in any other District in India and apply to him for bail whether or not he can take cognizance of the offence or he has jurisdiction to try the case that may result therefrom".***(emphasis supplied)

Surrender by a person whose name and address is not in the FIR- How to be dealt with

The court shall call for a report from the I.O. to ascertain whether surrendered person is an accused. If he is an accused, he may be considered to have submitted to the custody of the court. In appropriate cases he may be released on bail or his custody can be authorised by the Magistrate. If no report is filed on the same day or it is reported that the person surrendered is not an accused, the application to surrender filed by the accused has to be rejected.

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3. BAIL

Whether an offence is bailable or non-bailable is determined as per the 1st Schedule of the Cr.P.C.

Schedule-I Part II Cr.P.C – Offences against Other Laws

All offences punishable with imprisonment for 3 years or more are classified as non-bailable

All offences punishable with imprisonment for a period of less than 3 years are bailable.

All offences punishable with fine only are Bailable.

This is subject to any contrary provision in the Special Statute. If the accused is arrested with respect to an offence under Special Statute always verify the provisions of the statute.

Bailable Offence

Mandatory bail under Sec.436 Cr.P.C

(i). Persons other than a person accused of a non-bailable offence.

(ii). Persons arrested, but not an accused; he can be a person arrested under Secs 42, 41 and 151 Cr.P.C.(Ahmed Noor Mohmed Bhatii v. State of Gujarat AIR 2005 SC 2115).Such persons can claim bail as a matter of right.

In bailable offence no condition can be imposed. Time and place for appearance in the bail bond is only a term of bail. Accused can be released on bail on executing personal bond also. The court shall not insist on for cash security. No police custody can be granted in bailable offence.

As per explanation to the 436 Cr.P.Cwhere a person is unable to give bail within a week of his arrest, it shall be sufficient ground for the court to release such person on executing a bond without sureties.

Provisions for Bail Summarized

BAIL

Pre-conviction bail	Post-trial bail	Post-sentence bail
Section 436 Cr.P.C *436 A* *437 (1), (2), (6)* *438* *439 (1) (a)*	*Section 437 (7) (after conclusion of trial but before judgment)*	*Section 389 (3). If the convict satisfies the convicting Court that he intends to file an appeal, then that Court **shall** grant bail to the convict in case the sentence of imprisonment is not exceeding 3years.*
436 Cr.P.C*Apersonotherthan"apersonaccus edofa non-bailableoffence".* *436 A- Where the offence is a non-capital offence & ½ of the maximum sentence has been undergone.* *437- A person accused of a non-bailable offence*		

B A IL

Mandatory bail (Bail can be claimed as of right)	Discretionary bail (Court has the discretion to grant bail)	Default or compulsive bail (Bail due to default in completing investigation or trial)
Section 436 Cr.P.C *Persons who are covered by Section 436* *i) Persons accused of bailable offences.* *(i) Persons who are arrested in a matter in which no offence is involved (e.g. Ss.41 (1) (b)to (i) and S.151Cr.P.C* *Release on bond without sureties Section 436 (1) proviso The police officer / Court – i)may if he think fit, or ii)shall if such person is indigent & unable to furnish surety, release him on his executing a bond without sureties.* ***Explanation:**Apersonunableto give bail within a week ofarrest can be presumed to beindigent.*	**Section 81(1)** *2nd proviso Transit Bail* **187(1)** *When offence committed beyond jurisdiction* **395(3)** *Bail when Reference is made to High Court* *437* **(1), (2), (6)** **438** *439* **(1) (a)**	**Section 167 (2) proviso-** *default in filing final report.* **Section** *436 A***–** *Accused under detention up to ½ of the maximum period of imprisonment prescribed for the offence, other than capital offence.* **Section***437***(6) –** *Under trial in custody for 60 days from the first date fixed for evidence, but trial not concluded.*

Is it correct to say that bail is a form of detention ?

Bail is a form of detention by other means. Instead of being detained in prison, the accused is transferred to the custody of his bailor who are his jailers of his own choosing, and the Court still retains its inherent power to deal with him (See 8 Corpus Juris Secundum Bail S. 31). Similarly, the authors of ***Halsbury's Laws of England***, Third Edn. Vol. 10, page 373 state that the effect of granting bail is not to set the accused free, but to release him from the custody of the law and to entrust him to the custody of his sureties, and the sureties may discharge themselves by handing him over to the custody of the law.

Earl Jowitt in ***Jowitt's Dictionary of English Law*** (Second Edn.) is of the same opinion (page 173) that the accused is said to be admitted to bail when he is released from the custody of officers of the law and is entrusted to the custody of persons known as his sureties. Our own law is no different. A person released on bail is considered in our law, to be detained in the constructive custody of the Court through his sureties. A Division Bench of the Patna High Court held in Krishna Singh v. State of Bihar 1967 Cri LJ 1118, that a person released on bail remains in the constructive custody of the Court through surety and his liberty is thus subject to restraint. S. 444 of the New Code lays down that the sureties may apply to the Magistrate to discharge the bond, and, on such application being made the Magistrate shall cause the accused to be arrested and brought before him. (Mahesh Chand v. State of Rajasthan, 1984 SCC OnLine Raj 43 : AIR 1986 Raj 58 : (1985): 1985 Cri LJ 301)

If no bail is offered, the accused can be remanded stating that no bail offered by the accused. (The meaning of bail is release on the guarantee of surety)

A person who has failed to comply with the condition to appear in

accordance with the bond, and arrested and produced subsequently cannot claim bail as a matter of right. But the court has the discretion to grant bail again. The discretion has to be exercised consistent with liberty of individual which cannot be easily interfered with on the ground that he failed to appear on one occasion. The reason for non-appearance has to be borne in mind.

Bail granted in bailable offence cannot be cancelled by the Magistrate.

Release on personal bond

A person may be released on personal bond in a bailable offence, considering the length of his residence in the community, by looking into his employment status, financial status, family status, reputation, prior criminal records, nature of offence etc.

Guiding Principles are enunciated in Hussainara Khotoon v. Home Secretary, State of Bihar AIR 1979 SC 1360

Mandatory Release on personal bond

Sec.436provides that a person accused of a bailable offence can be released on personal bond if he is in custody for more than 7 days. If the person fails to take bail within 7 days, he is presumed to be an indigent person.

Non-bailableOffence –Discretionary Bail -Sec.437

A Magistrate ought to have jurisdiction to try the offence or to commit the case for trial for exercising the jurisdiction to grant bail. If a Magistrate without jurisdiction finds further detention unnecessary, he shall forward the accused to a Magistrate having jurisdiction **(Sec.167 (2)).**

A Magistrate who has no jurisdiction to take cognizance can grant bail in the circumstance covered under Sec.187.

How To Consider The Application

When bail not to be granted by a Magistrate :

(a) No bail can be granted by a magistrate if the offence is punishable with death or imprisonment for life (437(1) (i) or cases covered by Sec. 437(1) (ii), except in cases covered by the proviso 1 and 2.

The expression 'offence is punishable with death or imprisonment for life'mentioned above will depend on the facts and circumstances of the cases as reflected in the case diaryor from the materials collected during enquiry in complaint cases. If such a case is not made out then bail can be granted. It has been held inMahipal Vs. Rajesh Kumar & Anr. 2019 SCC online SC 1556- the determination of whether a case is fit for grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and prima facie view of the involvement of the accused are important.

The mere fact that the court issued only summons in a case covered by Sec. 437 (1) (i) or (ii) does not give a right to the accused to claim bail as of right. This proposition would apply equally to any case triable exclusively by a Court of Session Suresh M. R. v. State of Kerala 2011 0 Supreme(Ker) 731; Santosh Bhaurao Raut . Versus State of Maharashtra

Magistrate cannot entertain bail application in respect of offences under POCSO Act **(**Prasad v. State of Kerala 2013 0 Supreme(Ker) 292)**.**Similar will be the case for offences cognizance of which is to be taken by any special court e.g. NDPS, SC and ST Prevention of Atrocities Act etc.

Remand is permissible in bailable offence only if no bail is offered by the accused.

While granting bail, the court has to keep in mind the nature of accusation, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being threatened and the evidence being tampered with, the larger interests of the public/State and other similar considerations. For the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. (CBI v. Vijay Sai Reddy, AIR 2013 SC 2216)

At the stage of granting bail, a detailed examination of all the materials and elaborate documentation of the merits of the case is not to be undertaken. While granting or refusing the bail, the reasons for prima facie concluding why the bail was granted or refused must be indicated in the order.

Checklist for Magistrates :

(i) The bail application must be heard only after the surrender of the accused in court or his remand on any prior date.

(ii) Whether earlier bail application of the accused has been moved and rejected to be verified from para 2 of the bail application.

(iii) Whether earlier bail application of the petitioner is pending or has been rejected by any superior court and any direction with regard to its renewal.

(iv) In case of multiple accused, fate of bail of other similarly situated co-accused need to be verified from record.

(v) The Court must mention the date of arrest / surrender of the accused and also the details of the accused, if there are two or

more accused in a crime in the order.

(vi) **Hearing the APP -** In an offence punishable with death, imprisonment for life or imprisonment for 7 years or more, the public Prosecutor is entitled to an opportunity of being heard.

The following authorities deal with factors to be taken into account for granting or refusing bail.

Kalyan Chandra Sarkar vs. Rajesh Ranjan alias PappuYada AIR 2004 SC 1866, CBI v. Vijay Sai Reddy, AIR 2013 SC 2216, Neeru Yadav vs. State of Uttar Pradesh AIR 2015 SC 3703, Niranjan Singh v. Prabhakar Rajaram Kharote AIR 1980 SC 785.

Where bail has been granted by the court of Magistrate at the time of investigation and after investigation charge sheet is submitted for an offence punishable with death or imprisonment of life, can the Magistrate cancel the bail?

It has been held in Pradeep Ram Vs. State of Jharkhand, 2019 (3) JLJR 287 SC:2019 SCC OnLine SC 825-In a case, bail application of the accused for newly added offences is rejected, the accused can very well be arrested. In all cases, where accused is bailed out under orders of the Court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the Court before granting permission to arrest an accused on the basis of new offences. The power under Sections 437(5) and 439(2) are wide powers granted to the court by the Legislature under which Court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the accused and commit him to custody can only be passed by the Court after cancelling the earlier bail.

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the

accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under Section 437(5) or 439(2) of Cr.P.C. for arrest of the accused and his custody.

(iii) The Court, in exercise of power under Section 437(5) or 439(2) of Cr.P.C., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) These sections do not mandatorily provide that the court before directing arrest must necessarily cancel his earlier bail."

Bail to Foreigners

Court be circumspect in granting bail to the foreigners accused of involved in serious offences (Union of India v.Abdul Momin2005 (13) SCC 144).

A foreigner is entitled for statutory bail **Joshua v. State of Kerala 2014 SCC OnLine Ker 28767 :2015 Cri LJ (NOC 121) 37, 2007 SCC OnLine Del 450 (Tunde Gbaja Versus Central Bureau of Investigation)** Whereas the Hon'ble Madras high court has held in **2005 SCC OnLine Mad 719 (Janarajan @ Krishnamurali v. State of Tamil Nadu)** that a foreigner is not entitled to statutory bail.

Conditions to be imposed

The mandatory conditions mentioned in Sec.437 (3) and discretionary conditions which can be imposed while passing the order of bail need to be kept in mind.

Solvency certificate cannot be insisted on **Hussainara Khotoon v.**

Home Secretary, State of Bihar AIR 1979 SC 1360

Accused and sureties are from other state is not a ground for refusing bail (Moti Ram v. State of MP AIR 1978 SC 1594).

Meaning of "other condition" and "any condition" that can be imposed while granting bail under section 437 Cr.P.C.:

the Court shall impose the conditions,---(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence,and may also impose, in the interests of justice, such other conditions as it considers necessary.]

Honb'le the High Court Of Jharkhand while dealing with a matter relating to grant of bail on the condition of depositing Cash has held **Vide order dated 20.04.2020**in Cr. M.P. No. 342 of 2020 - Jitendra Oraon – versus The State of Jharkhandthat the Court cannot impose **'any condition'** he likes while granting bail. **'Any condition'** or **'other condition'** has to be in consonance with the object and purpose of grant of bail and as per the judgment of the Hon'ble Supreme Court in the case of **Sumit Mehta** and other cases cited above. The court is not conferred with absolute power to impose **'any condition'** which he feels and chooses to impose, rather the same has to be reasonable and pragmatic.

The court placed reliance on the judgment ofthe Hon'ble Supreme Court in the case of *Munish Bhasin & Others versus State (Government of NCT of Delhi) & Another reported in (2009) 4 SCC 45* at paragraph 10

thereof has held as under: -

"10. It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all."

In the aforesaid judgment of ***Munish Bhasin***, at paragraph 11 thereof, the Hon'ble Supreme Court has held that normally conditions can be imposed

(i) to secure the presence of the accused before the investigating officer or before the court,

(ii) to prevent him from fleeing the course of justice,

(iii) to prevent him from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or court, or

(iv) restricting the movements of the accused in a particular area or locality or to maintain law and order, etc.

Paragraph 11 of the judgment further dictates that to subject an accused to any other condition would be beyond jurisdiction of the power conferred on court under Section 438 of the Code. It is also necessary to note that the Hon'ble Supreme Court in the aforesaid judgment has held that the conditions should not be harsh, onerous or excessive, so as to frustrate the object of grant of bail.

Conditions for the grant of bail ought not to be so onerous to be incapable of compliance, thereby making the grant of bail illusory (Dataram Singh v. State of Uttar Pradesh AIR 2018 SC 980**).**

When regular bail shall not be considered

Regular bail applications filed during the pendency of an application for pre-arrest bail before a superior court shall not be entertained by a Magistrate, even if interim bail during the pendency of application is granted by superior court. (Rukmani Mahato v. State of Jharkhand 2017 (15) SCC 574)

When a person accused of a non-bailable offence is arrested or detained without a warrant, the officer in-charge has also the power to release him on bail, but the power is subject to the two exceptions given in section 169 and subsection 2 of 437 of the Code that there should be no charge sheet against such accused under any non-bailable section or the accused be not sent up for trial.

Surrender and bail

Accused can be stated to be in judicial custody when he surrenders before the court and submits to its directions. (Niranjan Singh v. Prabhakar Rajaram Kharote AIR 1980 SC 785, Sundeep Kumar Bafna v. State of Maharashtra AIR 2014 SC 1745

Bail On First Appearance:

Where the accused has been granted bail during investigation, summons may be issued for appearance of accused after cognizance of the offence is taken against him. If the accused appears after due service of summons he shall be permitted to remain on the previous bail during the trial provided his bail has not been cancelled after due service of summons and issuance of NBW.

Cancellation Of Bail

Provisions : Section 437 (5) Cr.P.C.- The need for Cancellation of bail of an accused may arise broadly in two circumstances **firstly** where he commits a breach of condition of bail as laid down in the bail order for instance non-appearance on the date fixed in the case, then the bail is cancelled under section 437(5) Cr.P.C. for misuse of the privilege of bail.

Secondly,*the bail can be cancelled under section 439(2) Cr.P.C. if the accused after being enlarged on bail threatens the witness or fails to cooperate with investigation of the case.*It has been held in Kanwar Singh Meena Vs. State of Rajasthan reported in 2013(1) JCR (SC) 57that High Court and court of sessions can cancel bail in cases of temper with evidence or attempt to interfere with due course of justice. When such an allegation is laid on behalf of the prosecution or the complainant the court in order to satisfy itself about the veracity of the allegation of misuse may call for a report from the concerned police station. Further, in case of any threat to any person to give false evidence is also punishable u/s 195 A of the IPC and in appropriate cases proceedings may be drawn u/s 340 Cr.P.C. or even the witness concerned may file a complaint under section 195A Cr.P.C.Raghubir Singh v. state of Bihar1986 (4) SCC 481 (Simran jit Singh Mann Case), Aslam Babalal Desai v. State of Maharashtra AIR 1993 SC 1, Pradeep Ram Vs. State of Jharkhand, 2019 (3) JLJR 287 SC:2019 SCC OnLine SC 825

Factors to be taken into consideration while cancelling the bail has been dealt with elaborately in the case of NeeruYadav v. State of Uttar Pradesh AIR 2015 SC 3703, and Myakala Dharmarajam v. State of Telangana, (2020) 2 SCC 743 : 2020 SCC OnLine SC 11 at page 745 which deserves to be extracted as below

"8. **In Raghubir Singh v. State of** Bihar [Raghubir Singh v. state of Bihar 1986 (4) SCC 481: **1986 SCC (Cri) 511]** this Court held that bail can be cancelled where (i) the accused misuses his liberty by indulging in

similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. The above grounds are illustrative and not exhaustive. It must also be remembered that rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the liberty of the individual and hence it must not be lightly resorted to.

Witness present for examination. Accused is absent. Bail can be cancelled State of U.P v. Shambhu Nath Singh AIR 2001 SC 1403

When accused misused the liberty and violated the conditions, bail can be cancelled. Mehboob Dawood Shaikh v. State of Maharashtra (2004) (2) SCC 362

Default bail can also be cancelled under Sec.437 (5) Abdul Basit @ Raju v. Md. Abdul Kadir Chaudhary 2014 (10) SCC 754

Notice

Notice to accused is mandatory before cancellation of bail. --Rakesh Kumar Paul v. State of Assam AIR 2017 SC 3948)

Default Bail – Sec.167(2) Proviso

Under Sec.167 (2) accused gets an indefeasible right to be released on bail if final report is not filed within the statutory period of 60 or 90 days, as the case may be. The case in which the maximum prescribed punishment is imprisonment for ten years or more, the time period to apply is 60 days. (See Rakesh Kumar Paul v. State of Assam AIR 2017 SC 3948)

The period of 90 days or 60 days shall be computed from the date of remand and not from the date of arrest **(CBI v. Anupam J. Kulkarni AIR**

1992 SC 1768). Date of remand to be excluded in computing the period of 60/90 days but then the date of filing of application of Default Bail be included or vice versa.Ravi Prakash Singh v. State of Bihar (2015) 8 SCC 340 (Two Judges) State of M.P v. Rustam1995 Sppl. 3 SCC 221

Suitable conditions can be imposed as it is deemed to be a bail granted under Chapter XXXIII. Default bail can be granted only on the 91stday/61stday, if no police report under section 173 Cr.P.C. is filed. **On the 91stday/61stday both bail Application and Charge sheet filed**- Bail can be granted if the accused has availed of the opportunity of bail prior to filing of Charge Sheet. Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 SCC 453

Punishment for the Offence	**Maximum Days**
Death	90 days
Life Imprisonment	90 days
Imprisonment for a term up to 10 years	60days **Explained in Rakesh Kumar Paul v. State of Assam2017 SC 3948** Minimum 10 years not to be considered (AIR 2001 SC 2369)
Any other case	60 days

Default bail can be availed by an accused arrested and produced by a non-police Officer like Customs, Excise, Forest etc.(Directorate of Enforcement v. Deepak Mahajan AIR 1994 SC 1775 and Jeewan Kumar Raut v. CBI AIR 2009 SC 2763)

Where the accused is in custody in a case under investigation by the police and after submission of police report under Section 173, further investigation by the CBI is directed, Period of custody shall be computed from the date of the FIR by the CBI and not from the initial detention under the Police case. In this case it was held that the benefit of default bail was not available to the accused Vipul Sithal State of Gujrat (2013) 2 SCC (Cri) 475

A person accused of an offence under section 3 read with section 4 of

Money Laundering Act 2002 could not get the benefit of provisions of section 167 (2) Cr.P.C.2010 (2) JCR 415 Hari Narayan Vrs. Union of India

Has the accused an indefeasible right to "compulsive bail" i.e. "default bail" under the proviso to Section 167 (2) Cr.P.C. on the expiry of the period of 90 days or 60 days whichever is applicable? –Yes--AIR 2001 SC 1910, Uday Mohan Acharya Case, Sanjay Dutt case, Pragya Singh Thakur case and Nirala Yadav Case.

In a case where the accused has been released on compulsive bail under the proviso to Sec. 167 (2) Cr.P.C. during the crime stage, is it not permissible for the Court to cancel the bail by examining the case on merit upon the filing of the charge sheet?--No, the court is not justified to cancel the bail once granted. Filing of charge sheet is attributable to police and not the accused. Power to Cancel Bail is under S. 437 (5) CrPC. The Code does not give the ground to cancel bail. Post bail conduct is very relevant in canceling the bail. If he threatens / intimidated the witnesses, if he absconds, gone abroad without informing, committed another offence, misuse the provision on bail. AIR 1996 SC 2897Bipin Shantilal Panchal (Dr) v. State of Gujarat, (1996) 1 SCC 718

After the accused has been released on compulsive bail under the proviso to Sec. 167 (2) Cr.P.C., one of the sureties is discharge by recourse to Sec. 444 Cr.P.C. The accused is unable to furnish fresh surety immediately. Should not the accused be remanded to custody by invoking Sec. 309 (2) Cr.P.C. ? -- He should be given reasonable time to find another surety**. AIR 1991 SC 149**

In a case where the default period is 90 days and no charge sheet is filed till the expiry of 90 days, the investigating officer files the charge – sheet on the 93rd day. The accused approaches the High Court and seeks compulsive bail alleging that even though he had orally represented to the

Magistrate that he has prepared to offer bail the Magistrate did not suo motu grant compulsive bail which was an indefeasible right which had accrued to him. What is the legal position? --Readiness to offer for bail should be in **writing AIR 2001 SC 1910Uday Mohanlal Acharya**

If within the period of expiry of the default period no charge-sheet is filed by the police, is there any obligation on the part of the Magistrate to inform the accused that the accused has got an indefeasible right to apply for default bail (compulsive bail) and to ensure that the accused is provided with free legal aid for the purpose of filing the necessary bail application? – Yes, is it the duty of the Magistrate to inform the accused about this right to default / compulsive bail.--**Hussain Ara Khatoon v. State of Bihar**

The default period applicable for the offence is 90 days. The accused is arrested on 2-09-2012. He is remanded to judicial custody on 3-09-2012. Charge sheet is filed before the Magistrate on 2-12-2012. How is the period to be computed ? Is the charge sheet filed within time ?---Time should be computed from date of remand and not date of arrest. Exclude first day and add the last day in calculating the period as per S. 9 and S. 10 of GC Act**AIR 1995 SC Suppl. 221**

Is a Magistrate or a Special Judge obliged to release an accused on compulsive bail under the proviso to Sec. 167 (2) Cr.P.C. in a case where the arrest and production before Court were made by a non-police officer?--- **Police officer is not necessary,** police officers for the purpose of conducting investigation is also included. Non-police officer also covered.

Example – **Customs Officer cannot file a charge sheet but only a complaint although he has limited powers such as to conduct investigation**.--Directorate of Enforcement v. Deepak Mahajan 1994 SC (Very Important) – Jivan Kumar Raut AIR 2009 SC 2763

Does the provision for compulsive bail under the proviso to Sec. 167 (2) Cr.P.C. override Sec. 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (N.D.P.S. Act) ? – Yes, because in the matter of S. 167 CrPC is a special law and it is not on the case of merit. Notwithstanding clause – S. 37 NDPS is applicable only to regular bail granted on merits of the case.AIR 1993 SC 1403Two statutory grounds: Court should be satisfied that he is not guilty of the offence and not commit any offence while on bail.

Checklist while considering compulsive bail under section 167(2) Cr.P.C.:

(i) When the court receives an application for grant of default bail it must call for a report from its office in writing mentioning date and time of calling such report regarding status of police report under section 173 Cr.P.C.

(ii) The office must immediately report the status as to whether police report under section 173 Cr.P.C. has been submitted till the submission of report or not. It shall be incumbent upon the court as well as the Magistrate to call for report from the e-Filing Counter regarding the status of filing of Police report

(iii) The court should then hear the APP as well as the applicant and decide the application on the same day. No adjournment to be granted to the prosecution for hearing of the bail application, if any adjournment is granted and in the mean time after the right of statutory bail is exercised by filing an application for bail, the said right or bail cannot of indefeasible bail cannot be extinguished by granting of adjournment.

(iv) However, where the fault does not lie with the court in granting any adjournment for hearing and there has been delay in

submitting of bail application or furnishing of bail bond by the petition accused then such an indefeasible right of bail cannot be claimed if the chargesheet has been filed in the mean time. The accused must therefore, furnish the bail bonds immediately thereafter in case bail is granted failing which his right of getting bail shall be extinguished as non-sustainable. In Kunal @Kunal Kumar Mahto Vs. State of Jharkhand, SLP (Cri) 7537 of 2016, order dated 22/11/2016-the Hon'ble Apex Court in its judgment has observed "Since it is not a matter of dispute, that when the challan was presented on 08.07.2015, the petitioner had not furnished bail bonds, for the acceptance of the Court, in compliance of the order passed (by the trial court) on 07.09.2015. The claim of the petitioner under Section 167(2) of the Criminal Procedure Code, after the presentation of the challan was just not sustainable."

(v) Before furnishing of the bail bond if the police report is received then as per the ratio **Nirala Yadav case and Kunal @ Kunal Kumar Mahto** the right for default bail shall be extinguished.

Bond & Its Forfeiture

Sec.446 mentions the procedure for forfeiture of the bond. It applies to all bonds taken under the Code. If a Magistrate takes a bond from the accused to appear before another Magistrate, the bond is not invalid, and can be forfeited under this Section.

Steps to be followed in cases of breach of bond/ bail bonds

(i) The wording in the bond be constructed strictly. Regarding forfeiture is concerned, once there is a breach by the accused by not appearing before the court, the forfeiture is not automatic. The court has to pass a clear cut order of **forfeiture of bail bond** and **cancellation of bail** followed by notice to the

sureties.

(ii) Notice has to be issued under Sec.446after forfeiture calling upon the surety to pay the penalty or to show cause why penalty not be imposed on him. What the Section requires is that the Magistrate satisfies himself that the conditions of the bond having been violated, the bond stands forfeited.

(iii) There is no need to issue notice before the forfeiture and the notice need be sent under Sec.446only after forfeiture of the bond. Subsequent to service of notice distress warrants for the realization of sum forfeited from the surety can be issued. Once the surety is produced before the court on the strength of distress warrant with an execution report that the surety has no sufficient means to pay the forfeited amount which is mentioned as a penalty in Sec.446, the court can proceed as per provision under sections 421 or 431 of the Cr.P.C. If the bond amount is not recovered by the above process the surety shall be liable to imprisonment in civil jail for a term which may extend to six months under Sec.446(2). It may be clarified that in a police case since state is the party therefore any amount to be deposited for civil imprisonment shall be made by the government. In case of insolvency or death of the surety recourse can be taken to section 447.

(iv) The records of the court must reflect the satisfaction of the judge about the absence of the accused. Forfeiture of the bond without formal order about the satisfaction of the court that bond has been forfeited is bad in law. Before forfeiture the court has no jurisdiction to issue notice.

(v) The satisfaction of the court must be based upon some proof. If the accused executed bond for his appearance, non-appearance itself is sufficient proof about the forfeiture.

(vi) On the next day of the forfeiture of the bond surety produces the accused still it is a breach of condition of the bond. But the court may, in such cases take a lenient view in the matter of recovery of the bond amount from the accused and sureties.

(vii) Before imposing penalty it is mandatory that the sureties are heard. The notice issued itself is for paying the penalty or to show cause why it not be paid. If the sureties are present in pursuance of notice they be heard and order has to be passed.

(viii) If the accused is arrested in connection with some other crime and the sureties are unable to produce the accused that may be a ground not to forfeit the bond. In other words, if the accused is in a jail then the sureties can plead their inability to produce the accused.

(ix) Once bond is forfeited, it is no longer valid and if the accused is to be released on bail again, a fresh bond has to be executed. It cannot be argued that the liability of the sureties is co-extensive with that of the accused. Such a principle is not applicable in criminal cases.

(x) The Magistrate can impose penalty on the accused as well as sureties for the breach. Bond of accused and sureties are independent and therefore, when the bail is cancelled and the bond is forfeited, logically the accused is also supposed to pay the forfeited amount on his subsequent surrender or arrest unless it is remitted under Sec.446(3).(Ramlal v. UP AIR 1979 SC 1498).

(xi) As discussed above it may be pointed out further that the court has the power not only to realize the bond amount from the surety but also from the accused on whose non appearance the bail has been cancelled. The is abundantly clear from Form number (M81) of the Criminal Court Rules Vol. II of Hon'ble

High Court of Jharkhand wherein the accused and the sureties separately undertake and bind themselves under the bond to forfeit to government the sum of rupees for which they have stood surety. Meaning thereby the court can practically ask the accused when he reappears before the court after the cancellation of his earlier bail to deposit the amount of earlier bond which had been forfeited on account of his non-appearance / misuse.

(xii) The court has ample power to remit the penalty, penalty here means the bond amount, which was forfeited. There is no rule that entire bond amount be imposed as penalty. But remitting of penalty can be done only at the time of imposing the penalty. Subsequently penalty can be remitted only by the appellate court. (Jameela v. State of Kerala 2004 Cri LJ 3389 :2004 SCC OnLine Ker 436)

(xiii) As per Sec.446A of the Code, if the bond is for appearance of a person in a case and it is forfeited for breach of condition, the bond executed by the accused as well as sureties, if any, shall stand cancelled. Thereafter such a person cannot be released on personal bond, if the court is satisfied that there is no sufficient cause for non-compliance with the condition.

(xiv) Even if the bond is executed as per the direction of any superior court, this provision is applicable. In case of the sureties becoming insolvent or dead the accused be given an opportunity to produce sufficient solvent sureties.

(xv) The court has power to initiate prosecution for offence punishable under section 229A of IPC for failure by person released on bail or bond to appear in court.

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4. COMPLAINTS TO MAGISTRATE AND COMMENCEMENT OF PROCEEDINGS (CHAPTER – XV& XVI)

When a complaint is filed in the court the court can initiate an enquiry under section 200 and examine the complainant and his witnesses on oath and if satisfied, can according to the material brought before it issue processes under section 204 Cr.P.C. But if the Magistrate is of the opinion that there is no sufficient ground for proceeding the complaint be dismissed under section 203 Cr.P.C.

Where the chargesheet is submitted and cognizance is taken on its basis, the processesare issued against the accused under section 204 Cr.P.C.in summons cases the summons are issued and in warrant cases he may issue a warrant, or if he thinks fit a summons, for causing the accused to be brought before the court.

In case the police submits final form either on the ground that no accused can be sent up for trial or no offence took place etc. a notice is to be issued to the complainant before acceptance of final form and after affording the complainant adequate opportunity of being heard may accept the final form and drop further proceedings. The court may differ from the finding of the Investigating officer and take cognizance on the basis of material available in the charge sheet and proceed further for commitment or trial. If the informant appears and files a protest petition the protest petition may be registered as a complaint and the court may proceed with enquiry of the complaint case.

- **In complaint cases during enquiry apart from the SA of the complainant how many witness need to be examined?**

  The Magistrate may record evidences of witnesses on oath in terms of section 200(2) and where it appears that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

  Shivaji Singh Vs. Nagendra Tiwari, 2010 (3) East. Cri. Case 226 SC-

Complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. Only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process.

Acceptance of FF and protest.Vasanti Dubey Vs. State of Madhya Pradesh, (2012) 2 SCC 731 : 2012 (1) JLJR 459-

The enquiry under section 200Cr.P.C. cannot be given a go-bye if the Magistrate refuses to accept the closure report submitted by the investigating agency as this enquiry is legally vital to protect the affected party from a frivolous complaint and a vexatious prosecution in complaint cases. The relevance, legal efficacy and vitality of the enquiry enumerated under section 200 Cr.P.C., therefore, cannot be undermined, ignored or underplayed as compliance of enquiry under section 200 Cr.P.C. is of vital importance and necessity as it is at this stage of the enquiry that the conflict between the finding arrived at by the investigating agency and enquiry by the Magistrate can prima facie justify the filing of the complaint and also offer a plank and a stage where the justification of the order of cognizance will come to the fore. This process of enquiry under section 200 Cr.P.C. is surely not a decorative piece of legislation but is of great relevance and value to the complainant as well as the accused.

It is no doubt possible to contend that at the stage of taking cognizance or refusing to take cognizance, only prima facie case has to be seen by the Court. But the argument would be fit for rejection since it is nothing but mixing up two different and distinct nature of cases as the principle and procedure applied in a case based on Police report which is registered on the basis of First Information Report cannot be allowed to follow the procedure in a complaint case. A case based on a complaint cannot be allowed to be dealt with and proceeded as if it were a case based on Police report. While in a case based on Police report, the Court while

taking cognizance will straightaway examine whether a prima facie case is made out or not and will not enter into the correctness of the allegation levelled in the F.I.R., a complaint case requires an enquiry by the Magistrate under section 200Cr.P.C. if he takes cognizance of the complaint. In case he refuses to take cognizance he may either dismiss the complaint or direct the investigating agency to enter into further investigation. In case, he does not exercise either of these two options, he will have to proceed with the enquiry himself as envisaged and enumerated under section 200 Cr.P.C. ***But, he cannot exercise the fourth option of directing the Police to submit a charge-sheet as such a course is clearly not envisaged under the Cr.P.C. and more so in a complaint case.***

Whether reasons need to be recorded while accepting Final Form?

Sections 173(1), and 190(1)Criminal Procedure Code, 1973- Police Report Exercise of Judicial discretion- When a report u/s 173(1) submitted to the effect that no case had been made out and complainant raising objections to the acceptance of police report which recommends discharge of accused, the Court overruling such objections has to record reasons. However, recording of reasons not necessary when Court accepts such police report without any objection from complainant.Mrs. Rupan Deol Bajaj & Anr. – versus Kanwar Pal Singh Gill & Anr 1996 0 AIR(SC) 309; 1995 6 SCC 194

Second Complaint

It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204 CrPC may take cognizance of an offence and issue process if there is sufficient ground for proceeding. As held in Pramatha Nath Talukdar case AIR 1962 SC 876 : second complaint could be dismissed after a decision

has been given against the complainant in previous matter upon a full consideration of his case. Further, second complaint on the same facts could be entertained only in exceptional circumstances, namely, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced.

Case Not True: Final Form Submitted by Police Along with Application Under Section 182 and 211 Of IPC.

Where at the time of submission of final form the Investigating officer has submitted application under section 182/211 of I.P.C. as the case may be for taking cognizance against the informant the court may take cognizance on such application treating it to be an official complaint. But, the case would be different if the complainant appears and files a protest against the final form.

Can Magistrate accept FF without entering into inquiry on the basis of the protest petition?

It has been held in *Vishnu Kumar Tiwari Vs. State of U.P. reported in 2019 (3) PLJR 334 SC : 2019 (8) SCC 27* –that Magistrate can not be compelled to take cognizance by treating the protest petition as a complaint . He may without considering the complaint apply his mind to the facts emerging from investigation and take cognizance under section 190(1)(b) and is not bound to follow the procedure under sections 200 and 202 Cr.P.C . It is incumbent upon Magistrate to go through the materials and after hearing the complainant and considering the contents of protest petition, finally decide the future course of action to be, whether to continue with the matter or to close the case.

Thus, when he proceeds to take action by way of cognizance by disagreeing with the conclusions arrived at in the police report, he would be taking cognizance on the basis of the police report and not on the complaint. And, therefore, the question of examining the complainant or his witnesses under sections 200of the Code would not arise.

Once a complaint has been forwarded to the police U/S 156(3), and FF has been submitted by the police after investigation, can the Magistrate proceed as per the original complaint?

In H.S. Bains (1980 4 SCC 631 H. S. Bains, Versus The State), there was a private complaint within the meaning of Section 190(1)(a) of the Code. The matter was referred to the Police U/S 156(3). The Investigating Officer filed a final report. Therein, the court took the view that apart from the power of the Magistrate to take cognizance notwithstanding the final report, under Section 190(1)(b), he could also fall back upon the private complaint which was initially lodged but after examining the complainant and his witnesses, as contemplated under Sections 200 and 202 of the Code. In regard to taking cognizance under Section 190(1)(b) of the Code of a final report, undoubtedly, it is not necessary to examine the complainant or his witnesses though he may do so.

In Mahesh Chand (2003 1 SCC 734 Mahesh Chand – versus B. Janardhan Reddy & Anr.), it has been further held that no doubt the matter was commenced by a First Information Report and followed up by the complainant in the court under Section 190(1)(a) of the Code. On the First Information Report, after investigation, a final report was filed. The final report came to be accepted and it was closed. This is despite the fact that there was the protest petition. A third complaint, as it were, came to be filed by the complainant. ***The Court went on to hold that acceptance of the final report would not stand in the way of taking cognizance on a protest/complaint petition.***

In Kishore Kumar Gyanchandani (*2001 10 SCC 59 Kishore Kumar Gyanchandani versus G. D. Mehrotra*), after the final report was accepted on a protest petition which was treated as a complaint, evidence was taken within the meaning of Section 200 of the Code. There is no bar to enter into inquiry on protest petition being filed even after the acceptance of Final Form.

In Rakesh Kumar (*2014 13 SCC 133 Rakesh & anr versus State of U.P. & anr.*), the final report was filed which was accepted by the Magistrate but he simultaneously directed the case to be proceeded as a complaint case and statements under Sections 200 and 202 of the Code came to be recorded. **Acceptance of final report would not stand in the way of taking cognizance on a protest / complaint petition**.

Steps to Be Taken by The Magistrate On Receipt of a Closure Report / FF with A Recommendations for Prosecution 182 / 211 IPC Against the Informant

As discussed earlier, the first step to be taken after receipt of a closure report is to issue notice to informant before accepting the said report. However, protest petition can be entertained even after the acceptance of the final report in the light of the ratio discussed above. Thereafter, on considering the entire material on record the Magistrate has two options. First either to accept the final report as per the ratio in Vishnu Tiwari case and proceed on the application of the I.O. for initiating prosecution under section 182/211 as official complaint. Secondly, he can proceed in enquiry on the protest petition as a complaint case. In the later course further steps on the recommendation for prosecution under 182/211 can be taken only if the protest petition is dismissed under section 203 of the Cr.P.C. Where the court takes cognizance against the accused on the basis of protest petition the application under section 182/211 of Cr.P.C. may be dropped as both the trials cannot proceed

together.

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5. COGNIZANCE (CHAPTER –XIV- Section 190 - 199)

Criminal proceedings are in fact not instituted until the Magistrate has taken cognizance of the offence alleged under section 190 of the Cr.P.C. While sections 190 to 194 are enabling provision for taking cognizance, section 195 to 199 are disabling provisions restricting and regulating the power of taking cognizance. It is a settled position of law that cognizance is taken of offence and not of offenders on any of the three cases mentioned in clause (a) to (c) of section 190. In N.I. Act cases however, the cognizance is taken against a particular accused. It has been held in N. Harihara Krishnan Vs. I. Thomas, 2018 (13) SCC 663 that "by the nature of the offence under section 138 of the N.I.Act, the first ingredient constituting the offence is the fact that a person drew a cheque. The identity of the drawer of the cheque is necessarily required to be known to the complainant and needs investigation and would not normally be in dispute unless the person who is alleged to have drawn a cheque disputes that very fact.**Therefore, in the context of a prosecution under section 138, the concept of taking cognizance of the offence but not of the offender is not appropriate."**

Meaning – "Cognizance" and "commencement of proceedings" are not synonyms in their connotation. Cognizance is something prior to, and does not necessarily mean the commencement of judicial proceeding against anyone. The apex court has been pleased to hold in *2015 9 SCC 609 S.R. Sukumar versus S. Sunaad Raghuram*that Section 200 Cr.P.C. provides for the procedure for Magistrate taking cognizance of an offence on complaint. The Magistrate is not bound to take cognizance of an offence merely because a complaint has been filed before him when in fact the complaint does not disclose a cause of action. The language in Section 200 Cr.P.C. "a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any…" clearly suggests that for taking cognizance of an offence on complaint, the

Court shall examine the complainant upon oath. The object of examination of the complainant is to find out whether the complaint is justifiable or is vexatious. Merely because the complainant was examined that does not mean that the Magistrate has taken cognizance of the offence. ***Taking cognizance of an offence means the Magistrate must have judicially applied the mind to the contents of the complaint and indicates that Magistrate takes judicial notice of an offence.*** Mere presentation of the complaint and receipt of the same in the court does not mean that the Magistrate has taken cognizance of the offence. In Narsingh Das Tapadia vs. Goverdhan Das Partani & Another., AIR 2000 SC 2946, it was held that the mere presentation of a complaint cannot be held to mean that the Magistrate has taken the cognizance. In Subramanian Swamy vs. Manmohan Singh & Another, (2012) 3 SCC 64, the Apex Court explained the meaning of the word ***'cognizance'*** holding that "…*In legal parlance cognizance is taking judicial notice by the court of law, possessing jurisdiction, on a cause or matter presented before it so as to decide whether there is any basis for initiating proceedings and determination of the cause or matter judicially"*. Proceedings commence only when the accused person is made a party before the court.

At this stage the Court, after application of mind to the evidence of witnesses has to satisfy itself that a prima facie case is made out.

The Apex Court in Darshan Singh Ram Krishna VS. State of Maharastra, 1971 (2) SCC 654held that word "cognizance" is used in the Code to indicate the point when the Magistrate or Judge takes notice of an offence.

With regard to cognizance on the basis of a complaint the law has been laid down in S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd., 2008 (2) SCC 492"Before it can be said that any Magistrate has taken cognizance of any offence under section 190(1)(a) Cr.P.C., he must not only have applied his mind to the contents of the

petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this chapter, proceeding under section 200, and thereafter sending it for enquiry and report under section 202, When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to be taken cognizance of the offence."

In Gopal Das Sindhi Vs. State of Assam, AIR 1961 SC 986it has been held that before a Magistrate can be said to have taken cognizance under section 190(1)(a) must have applied his mind for the purpose of proceedings under various sections of Chapter- XV.

No power to take cognizance of an offence where sanctioned etc. wanting under sections 132, 188, 195 to 199, 345, 349 of the Cr.P.C.

Can a Magistrate take cognizance of an offence committed beyond its territorial jurisdiction?

It has been held in Trisuns Chemical Industry Vs. Rajesh Agarwal, 1999 Cr.L.J. 4325 SCthat it is an erroneous view that Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. The jurisdiction of aspect may crop up only after taking cognizance and the Magistrate may have to decide as to the court which has jurisdiction to enquire into or try the offence and that situation would reach only during post cognizance stage and not earlier.

When the charge sheet is submitted by the Investigating Officer under section 173 of Cr.P.C. the court may take cognizance and issue processes for appearance of the accused sent up for trial. The court may differ with the findings of the Investigating Officer and as per the judgment of Hardeep Singh Vs. State of Punjab – 2014 (3) SCC 92may take cognizance against the accused persons not sent up for trial. Where the offences are triable exclusively by the court of sessions it shall be within

the power of the court of sessions to invoke section 193 of Cr.P.C. and take cognizance against any additional accused under section 193 Cr.P.C. on the basis of material collected with charge sheet.

The court may direct further investigation of the offence under the provisions of section 173(8) read with section 156(3) of Cr.P.C. It shall also not be beyond the powers of Magistrate where it is of the opinion based on material brought before it not to take cognizance of any of the offences mentioned in charge sheet or to summon any of the accused sent up for trial in the charge sheet.

Mahesh Chand v. B. Janardhan Reddy, (2003) 1 SCC 734 **: 2003 SCC (Cri) 425 at page 740**

Cognizance Order

There is no definite form for such an order but considering the principles, it is an important order as this is the first stage for judicial application of mind on the facts and materials brought on record in a case. The legal mandate as can be culled out from the different authorities of the Hon'ble Court is that the order should reflect judicial application of mind but no detailed reason need to be assigned at this stage while taking cognizance. However where the court differs with the findings of investigation a definite reason needs to be given. Further, although the cognizance is taken of the offence and not the offenders, but the name of the accused who have been sent up for trial need to be mentioned along with the provisions under which the cognizance is being taken. Further, the Presiding Officer also need to scrutinize the record where the sanction is required for cognizance,as to whether a proper sanction has been submitted by the Investigating Officer.

In complaint cases the cognizance may be taken under section 192 Cr.P.C. where the case is made over for enquiry and trial by the Magistrate. The cognizance taking court in complaint case is deemed to

have taken cognizance when after perusing the complaint it decides to enter into enquiry himself or orders the investigation to be made by a Police Officer or such other person as he thinks fit under section 202Cr.P.C. However, where the complaint is forwarded to the concerned police station for investigation under section 156(3) Cr.P.C. the cognizance is not deemed to have been taken and that stage arrives only after conclusion of investigation and submission of the police report under section 173 Cr.P.C. The difference between investigation ordered under section 202 and 156(3) is that the former relates post cognizance stage and the later to pre cognizance stage.

It will be desirable to follow the principle of taking cognizance in the cases referred herein after:

The Leading Authorities On The Issue Are :

2020 (1) JLJR 199 of Hon'ble High Court of Jharkhand, Amresh Kumar Dhiraj and others Vs. State of Jharkhand:

"The order taking cognizance under section 190 Cr.P.C. and order issuing process under Section 204 Cr.P.C., can very well (sic) a composite order but as observed, the application of mind would be different in both cases. This application of mind must be reflected in the order itself. The order should not be mechanical. Magistrate has to mention at least that there are sufficient materials to proceed against the persons and what are the prima-facie materials to proceed against them. He need not pass a detail judgment evaluating the materials, which are before him. The detail reasons as to why he is taking cognizance or issuing process re not to be mentioned but at least what are the bare minimum prima facie materials against the accused- petitioners should be mentioned in the order issuing summon and prima facie what offence is alleged, in the order taking cognizance."

Cognizance in complaint cases:

1. *2015 9 SCC 609 S.R. Sukumar versus S. Sunaad Raghuram*where in it has been held that Section 200 Cr.P.C. contemplates a Magistrate taking cognizance of an offence on complaint to examine the complaint and examine upon oath the complainant and the witnesses present, if any. *Then normally three courses are available to the Magistrate. The Magistrate can either issue summons to the accused or order an inquiry under Section 202 Cr.P.C. or dismiss the complaint under Section 203 Cr.P.C. Upon consideration of the statement of complainant and the material adduced at that stage if the Magistrate is satisfied that there are sufficient grounds to proceed, he can proceed to issue process under Section 204 Cr.P.C. Section 202 Cr.P.C. contemplates 'postponement of issue of process'. It provides that the Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance may, if he thinks fit, postpones the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or have an inquiry made by any Magistrate subordinate to him, or an investigation made by a police officer, or by some other person for the purpose of deciding whether or not there is sufficient ground for proceeding.* ***If the Magistrate finds no sufficient ground for proceeding, he can dismiss the complaint by recording briefly the reasons for doing so as contemplated under Section 203 Cr.P.C.*** A Magistrate takes cognizance of an offence when he decides to proceed against the person accused of having committed that offence and not at the time when the Magistrate is just informed either by complainant by filing the complaint or by the police report about the commission of an offence.
2. "Cognizance" therefore has a reference to the application of judicial mind by the Magistrate in connection with the commission of an

offence and not merely to a Magistrate learning that some offence had been committed. Only upon examination of the complainant, the Magistrate will proceed to apply the judicial mind whether to take cognizance of the offence or not. Under Section 200 Cr.P.C., when the complainant is examined, the Magistrate cannot be said to have ipso facto taken the cognizance, when the Magistrate was merely gathering the material on the basis of which he will decide whether a prima facie case is made out for taking cognizance of the offence or not. "Cognizance of offence" means taking notice of the accusations and applying the judicial mind to the contents of the complaint and the material filed therewith. It is neither practicable nor desirable to define as to what is meant by taking cognizance. Whether the Magistrate has taken cognizance of the offence or not will depend upon facts and circumstances of the particular case.

3. **It has been earlier held in** 2005 7 SCC 467*CREF Finance Ltd. versus Shree Shanthi Homes Pvt. Ltd. & Anr*that ***the cognizance is taken of the offence and not of the offender*** and, therefore, once the Court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. ***One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the Court decides to proceed against the offenders against whom a prima facie case is made out.*** It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process

only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the Court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the Court may consider it appropriate to send the complaint to police for investigation under Section 156(3) of the Code of Criminal Procedure. We can conceive of many other situations in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that Court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority etc. etc.

4. In *Ajit Kumar Palit vs. State of West Bengal, (1963) Supp. 1 SCR 953*,the Supreme Court has observed:-

   "The word "cognizance" has no esoteric or mystic significance in criminal law or procedure. It merely means — become aware of and when used with reference to a Court or Judge, to take notice of judicially. It was stated in ***Gopal Marwari v. Emperor (AIR 1943 Pat. 245)*** by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in *R.R. Chari v. State of Uttar Pradesh (1951 SCR 312)* that the word, `cognizance' was used in the Code to indicate the point when the Magistrate or Judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the same sense. As observed in *Emperor v. Sourindra Mohan Chuckerbutty (1910 ILR 37 Cal. 412)*, "taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." Where the statute prescribes the

materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled."

5. *In yet another case of Jagdish Ram VS State Of Rajasthan2004 4 SCC 432it has been held that a*t this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. ***It is well settled that notwithstanding the opinion of the police, a magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons***. *(Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal & Ors. (2003) 4 SCC 139).*
6. If the trial Court decides to frame a charge there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so. Framing of charge itself is prima facie order that the trial Judge has formed the opinion, upon considering the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial. *Kanti Bhadra Shah*

& Anr. Versus The State of West Bengal 2000 1 SCC 722

7. *In U.P. Pollution Control Board versus M/s. Mohan Meakins Ltd. & Ors.2000 3 SCC 745*the provisions of Section 204 relating to Issue of process was discussed and it has been held that a detailed speaking order not required while issuing summons-Process cannot be quashed for want of speaking order.

8. In *Tula Ram VS Kishore Singh 1977 4 SCC 459 the court relying on Devarpalli Lakshminarayana Reddy v. V. Narayana Reddy, 1976 Supp SCR 524*observed as follows:

"The power to order police investigation under S. 156 (3) is different from the power to direct investigation conferred by Sec. 202 (1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage, when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under S. 190 (1) (a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156 (3)."

9. In the case of *Gopal Das Sindhi v. State of Assam, AIR 1961 SC 986* the Hon'ble Supreme Court while approving the observations of Justice Das Gupta in the case referred to above observed as follows (at p. 989):"It would be clear from the observations of Mr. Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under S. 156 (3) or issuing a search warrant for the purpose of

investigation, he cannot be said to have taken cognizance of any offence."

10. To the same effect is the decision of this Court in *Jamuna Singh v. Bhadai Sah (1964) 5 SCR 37* at p. 41 :"It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offence mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under S. 156 (3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence." In these circumstances the inescapable conclusion is that in the present case the Magistrate had not taken cognizance of the case and ordered investigation by the police under S. 156 (3) before applying his mind to the complaint. This being the position it was always open to the Magistrate to take cognizance of the complaint and dispose it of according to law, that is to say according to the provisions of Ss. 190, 200 and 202.

Thus on a careful consideration of the facts and circumstances of the case the following legal propositions emerge:

1. That ***a Magistrate can order investigation under S. 156 (3) only at the pre-cognizance stage***, that is to say, before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156 (3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Sec. 202 of the Code.

2. Where a Magistrate chooses to take cognisance he can adopt any of the following alternatives:

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

4. Where a Magistrate orders investigation by the police before taking cognizance under S. 156 (3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above.

It will be desirable at this stage to discuss the principles for the required materials for taking cognizance under section 190, dismissal of complaint under section 203 issuance of process under section 204.

Cognizance On Police Report Under Section 190(1)(b):

2019 SCC OnLine SC 132 State of Gujarat State of Gujarat v. Afroz Mohammed Hasanfatta – Hon'ble Apex Court has held:

"23. In para (21) of Mehmood Ali Rehman, this Court has made a fine distinction between taking cognizance based upon charge sheet filed by

the police under Section 190(1)(b) Cr.P.C. and a private complaint under Section 190(1)(a) Cr.P.C. and held as under:—

"21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected."

24. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 Cr.P.C. is not the same at the time of framing the charge. For issuance of summons under Section 204 Cr.P.C., the expression used is "there is sufficient ground for proceeding....."; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is "there is ground for presuming that the accused has committed an offence.....". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 Cr.P.C., detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 Cr.P.C.

25. In so far as taking cognizance based on the police report, the Magistrate has the advantage of the charge sheet, statement of witnesses and other evidence collected by the police during the investigation.

Investigating Officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Criminal Procedure Code and in accordance with the rules of investigation. Evidence and materials so collected are sifted at the level of the Investigating Officer and thereafter, charge sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before filing the charge sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190(1)(b) Cr.P.C., where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding, the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the accused. Such an order of issuing summons to the accused is based upon subject to satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused. In a case based upon the police report, at the stage of issuing the summons to the accused, the Magistrate is not required to record any reason. In case, if the charge sheet is barred by law or where there is lack of jurisdiction or when the charge sheet is rejected or not taken on file, then the Magistrate is required to record his reasons for rejection of the charge sheet and for not taking on file. In the present case, cognizance of the offence has been taken by taking into consideration the charge sheet filed by the police for the offence under Sections 420, 465, 467, 468, 471, 477A and 120B IPC, the order for issuance of process without explicitly recording reasons for its satisfaction for issue of process does not suffer from any illegality."

Sanction

Rakesh Mishra Vs. State of Bihar, 2006 1 SCC 557

Section 197(1) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, or the State Government.

No sanction required for prosecution under section 409 IPC – Pubjab State Warehousing corporation Vs. Bhushan Chandar, 2016 (4) JBCJ 54 SC -there has to be reasonable connection between the omission or commission and the discharge of official duty or the act committed was under the colour of the office held by the official. If the acts omission or commission is totally alien to the discharge of the official duty, question of invoking Section 197 CrPC does not arise. The Court observed that the requirement of the sanction by competent authority or appropriate Government is an assurance and protection to the honest officer who does his official duty to further public interest. However, performance of official duty under colour of public authority cannot be camouflaged to commit crime. The Court further stated that to proceed further in the trial or the enquiry, as the case may be, it has to apply its mind and record a finding that the crime and the official duty are not integrally connected.

Sanction is required when proceeding under section 319 —2018 SCC OnLine Jhar 1546 Dhruva Prasad Ojha Versus The State of Jharkhand through the C.B.I.

In the case of *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, (1997) 7 SCC 622*, the Apex Court held that the grant of sanction is not an idle formality or acrimonious exercise, but a solemn and sacrosanct act which affords protection to Government servants against frivolous prosecution. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution. It is a safeguard for the innocent but not a shield for the guilty. Sanction would therefore be dependant upon the material placed before the sanctioning authority and the fact that all the relevant material facts and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other materials placed before it. Since the validity of sanction dependent upon applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, sanctioning authority has to apply its independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not.

Devendra Singh & others versus State of Punjab through CBI [(2016) 12 SCC 87, the Apex Court examined the principles emerging from its earlier decisions on the question of sanction for prosecution and summarized them at para-39, reproduced hereunder:

"39. The principles emerging from the aforesaid decisions are summarised hereunder:

39.1. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further

public duty. However, authority cannot be camouflaged to commit crime.

39.2. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner.

39.3. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under Section 197 Cr PC. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor is it possible to lay down such rule.

39.4. In case the assault made is intrinsically connected with or related to performance of official duties, sanction would be necessary under Section 197 Cr PC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.

39.5. In case sanction is necessary, it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.

39.6. Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of court at a later stage, finding to that effect is permissible and such a plea can be taken first time before the appellate court. It may arise at inception itself. There is no requirement that the accused must wait till charges are framed.

39.7. Question of sanction can be raised at the time of framing of charge

and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.

39.8. Question of sanction may arise at any stage of proceedings. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and it would be open to the accused to place material during the course of trial for showing what his duty was. The accused has the right to lead evidence in support of his case on merits.

39.9. In some cases it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial."

Om Prakash Vs. State of Jharkhand, 2012 (4) JLJR 166 SC :2012 12 SCC 72Requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. Plea regarding sanction can be raised at the inception.–*relied on Matjoq Dubey Vs. H.C. Bahri, AIR 1956 SC 44.*

*Birla Corporation Vs. Adventz Investments, 2020 (1) PLJR 109 SC:2019 SCC OnLine SC 682*Under the amended sub-section (1) to Section 202 Cr.P.C.,

it is obligatory upon the Magistrate that before summoning the accused residing beyond its jurisdiction, he shall enquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for finding out whether or not there is sufficient ground for proceeding against the accused.

AIR 2013 SC 426: (2012) 13 SCC 1 – Indra Kumar Patodia v. Reliance Industries Ltd-The court does not contemplate joint complaintand a complaint without signature is maintainable -

Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, (2012) 10 SCC 517 in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any right of hearing.

K. M. Mathew Vs. State of Kerala (1992) 1 SCC 217– Discharge after taking cognizance- the power of the Magistrate to drop proceedings against an accused in a summons case after process is issued.-held-It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused.

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6. ISSUANCE OF PROCESS AGAINST THE ACCUSED UNDER SECTION 204 Cr.P.C.

Once the court proceeds with the trial and issues processes against the accused persons either in a case instituted on the basis of FIR or on the basis of a complaint the accused shall appear in the court or the accused may fail to appear before the court issuing processes.

Non-appearance of accused :

The court will record its satisfaction in writing regarding non-appearance of the accused despite proper service of processes against him. The satisfaction is normally to be recorded after execution report of the process issued against the accused under section 82 is received and the court finds that the accused is deliberately avoiding the process. The materials for record this satisfaction will be:

(a) Service report of summons in terms of 68 of Cr.P.C.

(b) Execution report of warrant

(c) The due publication of proclamation under section 82 to be certified by the court under 82(3)

(d) On these materials the court to record a finding that the accused person have absconded and that there is no immediate prospect of arresting him and proceed to examine the witnesses produced on behalf of the prosecution in terms of section 299 of Cr.P.C.

(e) It is to be noted that once an accused is declared be proclaimed offender he is liable to be proceeded under section 174A of the IPC and in other cases of not appearing in terms of section 82(1) can also be charged under section 174A.

(f) In case the accused was earlier released on bail and had absconded then he can be charged under section 229A of IPC.

(g) Steps to be taken against the absconding accused and sureties

(i) Where the accused fails to appear fresh processes need to be issued after cancelling the bail and forfeiting the bail bond.

(ii) Notices be issued against the sureties to either produce the accused or to explain why the bail amount be realized.

(iii) After his appearance the court may realize the bail bond amount for which the accused has earlier given undertaking in form (M)81(bail bonds). The course is premised on the fact that any bail bond is executed by the accused for his appearance and Form (M) 81 lays the primary responsibility of payment on the accused. In any case it is the basic principle that liability of the surety arises only after the default of the principal debtor once the bail is cancelled and the bond amount is forfeited the same is to be realized from the surety if the accused does not appear and from the accused when he appears. The procedure when the bond has been forfeited is prescribed in section 446 of Cr.P.C. It has been held in Md. Kunju Vs. State of Karnataka, AIR 2000 SC 6that forfeiture of a bond would entail the penalty against each surety for the amount which he has undertaken in the bond executed by him. Both the sureties cannot claim to share the amount by half and half as each can be liable to pay.

(h) The procedure for the court concerned will be as follows:

The Court after declaring the accused absconder has two options the first is to institute a official complaint for the offence punishable under section 174A of the IPCand the other is to accept any additional charge sheet submitted by the police for the offence under section 174A of the IPCalong with the main offences. The matter came up before Hon'ble Delhi High Court in the matter of *A. Krishna Reddy Vs. CBI, reported in 2017 SCC Online Delhi 7266* Where the Hon'ble Court has been pleased to observe "Offence under section 174A of the IPC, though independent in nature is an off-shoot of the initial charge-sheet pending trial before the CBI Court. No separate investigation is required to be conducted as the orders of the Court declaring the petitioner to be Proclaimed Offender are part of the record in the main

challan. Object and purpose to incorporate section 174A of the IPCprimarily is to ensure that the accused/suspects do not scuttle investigation or trial by remaining absconding without valid or sufficient reasons. In such a scenario, when the suspects or accused abscond, possibility of valuable evidence to be washed away cannot be ruled out. Since CBI had jurisdiction to investigate the main offence, cognizance by the Court for commission of offence under section 174A of the IPC, its fall out, cannot be termed illegal or without jurisdiction."

Where the accused fails to appear before the court concerned despite due service of processes he shall be declared absconder and appropriate proceedings under section 299 Cr.P.C. may be initiated against him.

But when the accused appears depending on the nature of offences the further proceedings shall be initiated.

Where the offences are bailable in nature he shall be released on bail (section 436 Cr.P.C.)and where the offences are non bailable he may or may not be admitted on bail (section 437 Cr.P.C.).

Supply of Police Papers

After appearance of the accused one most important step is to supply copies of such evidences which the complainant or the prosecution is going to use against him hence the compliance of section 207/208 Cr.P.C. is mandatory.

In Citizen's Cause v. State of Jharkhand, 2012 SCC OnLine Jhar 87 : (2012) 2 AIR Jhar R 609 Hon'ble High Court of Jharkhand has directed the state to prepare copies for supply to the accused in the following terms:

"17. In view of the above, we direct the Director General of Police of the State of Jharkhand to see that Sections 172, 173, 207 and 208 of Cr.P.C. be complied with strictly and whenever the challan is filed in the

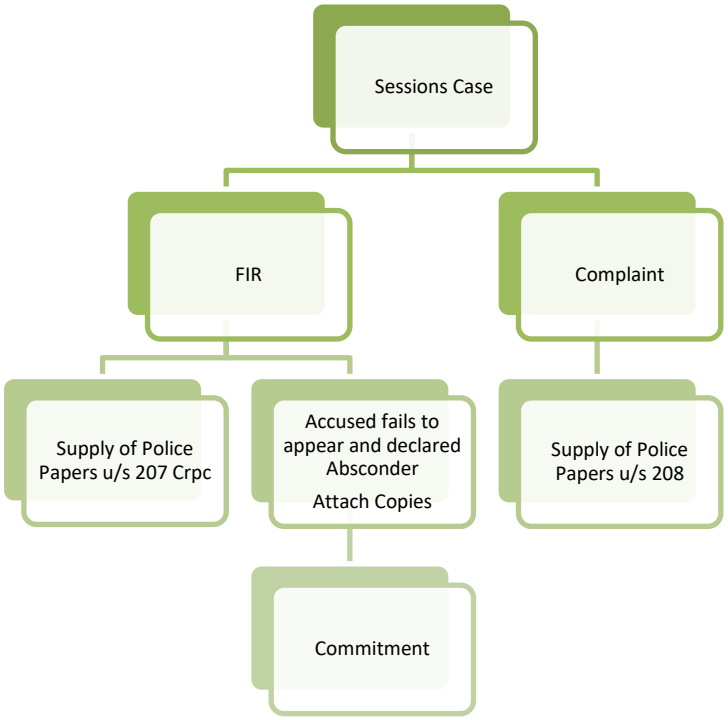
Court of Magistrate that must be filed with the documents as referred under Section 173 of Cr. P.C. which have already been referred to above, at the time of filing of the challan. The copy of the police report and Other documents as referred under Sections 207/208, be provided to the accused, free of cost. In case of noncompliance of Sections 173, 207 and 208 of Cr. P.C, the trial Court will be free to refuse to accept the challan with note on the police report or in order-sheet that the documents are not complete and in that situation, the Investigating Officer and the State Government shall be responsible for serious consequences which may occur. Every police officer making an investigation shall maintain case diary separately as is required under Section 172 of Cr.P.C."

In P. GopalKrishnan alias Dileep Vs. State of Kerala, 2020 (1) JLJR 30 SC :2019 SCC OnLine SC 1532it has been held that "In conclusion, we hold that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides."

COMMITMENT

Where the cognizance of offence has been taken under sections exclusively triable by the court of sessions the Magistrate will commit the case to the court of sessions under the provisions of section 209 Cr.P.C. Where there are more than one accused persons against whom cognizance has been taken and at least one of them is present at the time of commitment of the case the entire case shall be committed to the court of sessions. The court committing the case will not split up the case for

appearance of absconding accused, if any rather shall get the police papers prepared for such absconding accused and commit the case by attaching the police papers for such absconding accused. Gagan Thakur Vs. State of Jharkhand, 2004 Cri.L.J. 1910, AIR (Jhar.) 2004 (0) 1104.



Checklist for commitment

- Accused must be physically present on the date fixed for commitment. If not on bail he will be remanded into custody for commitment.
- If there are more than one accused and at least one is present case can be committed. The case record need not be split up in such a case and the police papers for service to the absent accused shall be attached with the case record. Gagan Thakur Vs. State of Jharkhand, 2004 Cri.L.J. 1910.
- If no accused is present the case cannot be committed on that date. Issue warrants of arrest for appearance of absent accused persons.
- After service of Police papers case to be committed
- Notify Commitment to the P.P. and Bar after fixing date of appearance before the court of Sessions.

- Send the Entire case records to the Court of sessions after arranging according to rules.
- Accused may be permitted to remain on the previous Bail.

Dealing with A Juvenile in Conflict with Law

When A Juvenile is either produced or appears before a court of law he shall be dealt with in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act 2015. Section 9 of the Act prescribes the procedure to be followed by a Magistrate who has not been empowered under the Act.

(1) When a Magistrate, is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) If there are more than one accused persons in the case in hand and at least one of them is a Juvenile the record shall be split up for the Juvenile and the record relating to the Juvenile shall be sent to the Board forthwith.

(3) For sending the Split up record the Court will get the copies of the FIR and other documents available on the records prepared and after drawing an order to that effect shall transmit the record to the Board.

(4) When Charge-sheet is received it shall be copied for the Juvenile and shall be sent to the Board for taking further action on it.

(5) In case a person alleged to have committed an offence claims that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, ***the said court shall make an inquiry***, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

(6) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(7) In case a person under this section is required to be kept in protective custody, while the persons claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

APPLICATION OF SECTION 205 CR.P.C. –

Section 205-*Magistrate may dispense with personal attendance of accused.*

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.

Scope : Section 205 which comes under chapter XVI, deals with the powers of the Magistrates to dispense with personal attendance of accused. It would be apparent from the reading of the provision that it confers discretionary powers on the Magistrate to decide as to whether personal attendance of the accused in a given case may or may not be dispensed with. Normally such attendance can be dispensed only when summons have been issued in the first instance under section 204 of the Cr.P.C. Section 205 is limited to the stage of commencement of proceedings and applied to summons issued by a Magistrate. Whereas under section 317 the appearance is dispensed with on any particular day where the accused is required to present in person. In what cases the application under section 205 is allowed will depend upon the facts and circumstances of the case. The requirement of summon being issued is not an inflexible rule as will be evident from the ratio of the case cited herein below:

In Dr. Prakash Amrut Modi Vs. State of Jharkhand 2007 (3) JLJR 17- it was held that the test basically is the assurance that the courts proceeding would not be hampered by allowing the personal attendance of the accused to be dispense with. It would no doubt also depend upon the gravity of offence. The approach of the Magistrate should be to see whether personal attendance is absolutely necessary for the purpose of case. While considering prayer for protection under Section 205 Cr.P.C., the Magistrate should not adopt too technical or stringent approach though the discretion should not be used liberally for the mere asking of it. Regard should be had to exceptional special circumstances and the inconvenience which the accused is likely to suffer on account of distance or physical disability or for any such good reason, if his personal attendance is insisted upon on each and every date till the conclusion of the trial. The test basically is the assurance that the courts proceeding would not be hampered by allowing the personal attendance of the accused to be

dispense with. It would no doubt also depend upon the gravity of offence. The approach of the Magistrate should be to see whether personal attendance is absolutely necessary for the purpose of case. While considering prayer for protection under Section 205 Cr.P.C., the Magistrate should not adopt too technical or stringent approach though the discretion should not be used liberally for the mere asking of it. Regard should be had to exceptional special circumstances and the inconvenience which the accused is likely to suffer on account of distance or physical disability or for any such good reason, if his personal attendance is insisted upon on each and every date till the conclusion of the trial.

Rajiv Lochan Jain Vs. The State of Jharkhand, 2003 (2) JLJR 732 -As a matter of fact issuance of warrant of arrest is no bar in exercising of power under section 205 of Cr.P.C. if the court finds it to be a fit case in which exemption should be allowed.

Patna High Court in *Ram Harsh Das Versus State Of Bihar 1998 1 PLJR 502*held that where a warrant has been issued at the first instance, the power under Sec. 205 of the Code cannot be exercised.

Special Procedure in Cases Relating To Negotiable Instruments.

Cognizance can be taken in a case under the Negotiable Instruments Act only on a complaint in writing made to a court. Thus neither there can be a FIR in case relating to Negotiable Instruments Act nor the complaint can be sent the Police under the provisions of section 156 (3) Cr.P.C.

DIRECTIONS were given in the case of Indian Bank Association and others Versus Union of India and others (2014) 5 SCC 590in the following terms:

"DIRECTIONS

1) Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take

cognizance and direct issuance of summons.

2) MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. Court, in appropriate cases, may take the assistance of the police or the nearby Court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back un-served, immediate follow up action be taken.

3) Court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, Court may pass appropriate orders at the earliest.

4) Court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for re-calling a witness for cross-examination.

5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant ***must be conducted within three months*** *of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.*

22. We, therefore, direct all the Criminal Courts in the country dealing with Section 138 cases to follow the above-mentioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act."

Maintainability of second or subsequent complaints, joint complaints – Neelam Verma Vs. State of Jharkhand, 2010 (4) JCR 446: 2010 (4) JLJR 75-It has been held that when no order of cognizance was passed on earlier complaint petition which was dropped the second

complaint petition is maintainable despite the fact that filing of earlier complaint petition was suppressed

As far as cases under N.I. Act is concerned it has been held in K.S. Joseph Vs. Philips Carbon Black Ltd. & Anr. 2016 (11) SCC 105 – that the nonobstante clause in section 145 (1) is self-explanatory and overrules requirement of examination of complainant on SA under section 200 Cr.P.C.

Whether a complaint can be filed by the power of attorney holder in N.I. Act cases?–

Yes,as per the guidelines laid down in A.C. Narayanan Vs State of Maharastra, 2015 (12) SCC 203.

Whether a private complaint can be filed against a public servant under section 200 Cr.P.C. under Prevention of Corruption Act?

It has been held in Anil Kumar & Ors. Vs. M.K. Aiyappa, 2013 (10) SCC 705 that the special Judge cannot order of investigation by police in exercise of power conferred under section 156(3) Cr.P.C. on a private complaint without the production of a valid sanction order under section 19 of the P.C. Act.

Once a process has been issued can it be recalled by the court concerned?

It has been held in Iris Computers Ltd. Vs. Askari Infotech -2015 (14) SCC399that once process is issued and accused appears, the Magistrate cannot go back on previous stage to dismiss or return complaint and to recall his order of issuance of process.

Steps That Magistrate Can Take While Disagreeing with The Police Report as Submitted Under Section 173 (2) CR.P.C.

The court cannot direct submission of charge sheet –It was held M.C. Mehta (Taj Corridor scam) v. Union of India, (2007) 1 SCC 110That the Supreme Court had categorically stated in H.N. Rishbud v. State of Delhi AIR 1955 SC 196that, the final step in the investigation, namely, the formation of the opinion as to whether or not there is a case to place the accused on trial is to be of the officer in charge of the police station and this function cannot be delegated. This Court unequivocally observed that there is no provision for delegation of the above function regarding formation of the opinion but only a provision entitling the superior officers to supervise or participate under Section 551 (corresponding to Section 36 of the present Code). This Court further held that, a police report which results from an investigation as provided for in Section 190 of the Code (corresponding to Section 173 of the present Code)is the material on which cognizance is taken. But from that it cannot be said that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance.The classical law in this point has been set out in Abhinandan Jha v. Dinesh Mishra AIR 1968 SC 117, the question arose whether a Magistrate to whom a report under Section 173 (1) Cr. P.C. had been submitted to the effect that no case had been made out against the accused, can the Magistrate direct the police to file a charge-sheet on his disagreeing with that report?

In answering the question Hon'ble Apex Court held that a report submitted by the Police may have to be dealt with judicially and it is open to the Magistrate to take cognizance of an offence on the basis of material on record and proceed according to law. But the Hon'ble Court refused to concede the power of the Magistrate to direct the police to file chargesheet as it was observed "we do not find any such power under section 173(3) as is sought to be inferred in some of decisions cited above.

- **The court can direct further investigation** -Abhinandan Jha is silent as to whether the court of Magistrate can direct further investigation in such a situation, but such a power has been held in subsequent judgment of Sakiri Basu case. The similar view was taken by the Hon'ble Apex Court in Union of India Vs. Prakash P. Hinduja, AIR 2003 SC 2612. If he agreed with the report that there was no case made out for issuing process to the accused he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3). It was further held that if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance thereof, notwithstanding contrary opinion of the police expressed in the report.

The Magistrate has a power to some extent to monitor the investigation under section 156(3) which was first emphatically laid down in the landmark judgment on this issue Sakiri Vasu v. State of Uttar Pradesh (2008) 2 SCC 409 in the following words:

"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section 154 CrPC, then he can approach the Superintendent of Police under Section 154(3) CrPC by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3)CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation. The above view has been followed in Sudhir Bhaskarrao

Tambevs.Hemant Yashwant Dhage(2016) 6 SCC 277.

It has been held in Vinubhai Haribhai Malaviya and Others vs.State of Gujarat and Another (2019 SCC OnLine SC 1346) that such a narrow and restrictive view of the powers of the Magistrate is not warranted, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding.

Section 156(3)CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation, if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation. M. Subramaniam and Another VersusS. Janaki and Another 2020 SCC OnLine SC 341.

- As discussed in chapter Cognizance, the court can take Cognizance differing with the findings of the investigation.

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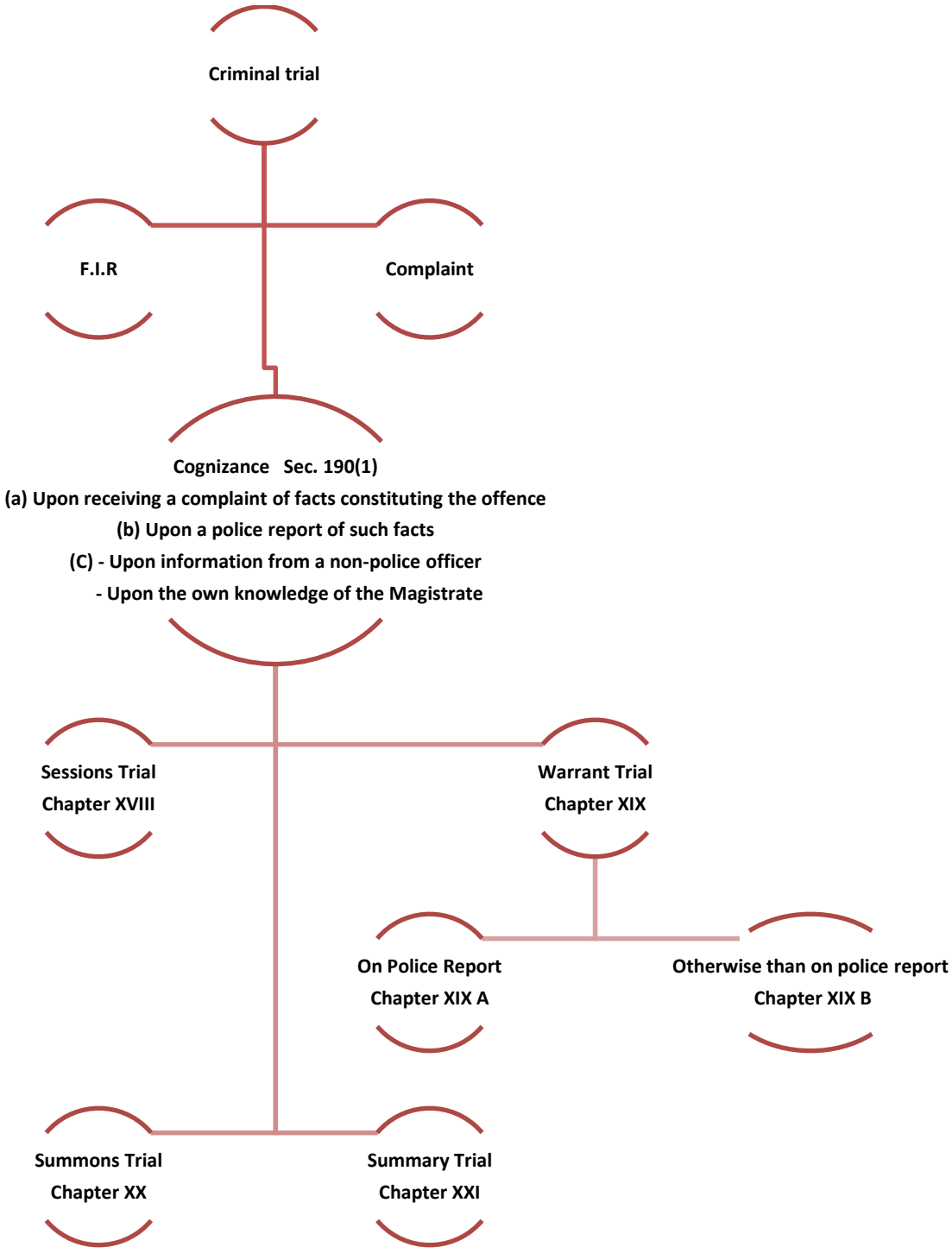
7. TYPES OF CRIMINAL TRIAL



Depending on the gravity of the offences and the punishment prescribed therefor, criminal trial under the Cr.P.C. has been classified into two viz., Magisterial Trial and Sessions Trial. Schedule I to the Cr.P.C. gives a "**classification of the offences**". A judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge

also presides to see that a guilty man does not escape. The object of criminal trial is thus to render public justice by punishing the criminal. (Surya Baksh Singh v.The State of U.P. (2014) 14 SCC 222). It is also important to remember that the trial should be concluded expeditiously before the memory of the witnesses fades out.If unmerited acquittals become the general rule, they tend to lead to a cynical disregard of the law. A miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent. (Gangadhar Behera v. State of Orissa –(2002) 8 SCC 381)

Accused is presumed to be innocent till the charges against him are proved beyond reasonable doubt:-

a. Willie (William) Slaney v. State of M.P – AIR 1956 SC 116(Innocence of accused is presumed unless there is a statutory provision against him).

b. Kali Ram v. State of H.P – (1973) 2 SCC 808(Burden of proving the guilt of the accused who is presumed to be innocent, is on the prosecution).

c. Babu Singh v. State of Punjab – 1964 (1) Cri.L.J 566 (SC) –(The principle of presumption of innocence is of cardinal importance. Guilt of the accused must be proved beyond reasonable doubt).

d. Sunil Kumar Sambhudayal Gupta v. State of Maharashtra – (2010) 13 SCC 657 Presumption of innocence is a human right.

Another golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused is to be accepted. (Kaliram v. The State of H.P. AIR 1973 SC 2773, Sheo Nandan

Paswan v. State of Bihar AIR 1983 SC 194; Nisar Ali v. State of U.P. AIR 1957 SC 366)

The law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. Our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic - (Shivaji Sahebrao Bobade v. State of Maharashtra (1973) 2 SCC 793 : AIR 1973 SC 2622) Doubts must be actual and substantial as to the guilt of the accused person arising from the evidence or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt; but a fair doubt based upon reasons and commonsense. Uninformed legitimisation of trivialities would make a mockery of administration of criminal justice.(State of U.P v. Krishna Gopal (1988) 4 SCC 302 : AIR 1988 SC 2154).

Various stages leading to the trial of a case before a criminal Court can be shown as below:-

A. Conditions requisite for initiation of proceedings - Chapter XIV Sections 190 to 199 starting with cognizance of offences

There is a misconceived notion that it is only when the Magistrate issues process under Section 204 Cr.P.C that he can be said to have taken cognizance of the offence. The issue of process is at a subsequent stage and after taking cognizance of the offence (CREF Finance Ltd V. Shree Shanti Homes (P) Ltd- (2005) 7 SCC 467; State of Karnataka V. Pastor P. Rajan (2006) 6 SCC 728).

B. Commencement of Proceedings - Chapter XVI Sections 204 to 210 relating to issuance of process

C. The trial proper.

The trial in a criminal case commences with framing of charge and depending on the nature of the case –

i) Substance of accusation/Particulars of the offence, to be read over and explained to the accused and his plea to be taken, if it is a summons trial or a summary trial. Since no charge is framed, there cannot be any discharge. OR

ii) If it is a Warrant trial or Sessions trial, charge is to be framed against the accused and his plea is to be taken or the accused is to be discharged.

The leading case on the framing of charge and the irregularities attending the same is Willie (William) Slaney v. State of M.P. AIR 1956 SC 116 = 1956 Cri.L.J. 291.

Provisions for framing of Charge Depending on the nature of the case following are the provisions for framing of charge-

Warrant Trial - Sec. 240 (based on FIR case)

-Sec. 246 (complaint case)

Sessions Trial - Sec. 228

Charge **-** Chapter – XVII, Section 211 to 224 relates to framing of charges. Section 221 provides that where it is doubtful what offence has been committed alternative charges may be framed. If a single act or a series of act is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of the offences, and any number of charged may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Alteration of charge – Section 216 of the Cr.P.C. gives sufficient powers to a court to alter or add to any charge at any time before judgment is

pronounced. The provision further prescribes that such alteration or addition shall be read and explained to the accused and it is further provided :

- If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely in the opinion of the Court to prejudice the accused in his defence or the prosecutor in the conduct of the case the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.
- If the alteration or addition in such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutors as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.
- **When sanction is required and when not required-** If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.
- **Requirement of recall of witness when essential –** It is thus apparent that recall of witness is essential only in such cases where in the opinion of the court such alteration or addition of charge would prejudice either the accused or the prosecution.
- **When mandatory –** In case either of the parties make an application that the witness be recalled either for his further examination or cross examination as the case may be the recall of such witness shall be mandatory.

- **When can be dispensed with-** When the court is of the opinion that the material on the basis of which the charges are being altered was well within the notice of the accused there is no need of recalling any witness already examined and in such cases the recall of witnesses may be dispensed with.

The various types of trials are depicted in the chart above and can be arranged in the table below

1.	Sessions Trial	Chapter XVIII
2.	Warrant Trial –Case instituted on a Police Report	Chapter XIX-A
3.	Warrant Trial –Case instituted otherwise than on a Police Report	Chapter XIX-B
4.	Summons Trial	Chapter XX
5.	Summary Trials	Chapter XXI

Summary Trial(Section 260 -265) –A magistrate can try a case summarily only if specially empowered in this behalf.

a) Magistrate can follow summary procedure for Trial in respect of the 9 categories of offences enumerated under Section 260 (1) Cr.P.C.

b) A Special Summons in Form 30 of the Second Schedule to Cr.P.C. giving the option to the accused to plead guilty in absentia and to transmit his plea and fine through post or through messenger only in the case of "petty offences"as defined under Section 206 (2) Cr.P.C. (i.e. punishable with only fine and that too, not exceeding Rs. 1000.00)

c) The procedure for trial of "petty offences" under Section 206 (1) Cr.P.C. can be resorted to by a Magistrate (if specifically empowered by

notification issued under Section 206 (3) Cr.P.C. by the State Government) in respect of the following offences:-

I. Offences which are compoundable under Section 320 Cr.P.C, or

II. Offences punishable with imprisonment not exceeding 3 months with or without fine where the Magistrate is of opinion that imposition of fine only would meet the ends of justice.

Summons Trial.

Summons trial procedure is provided by the Cr.P.C. for trial of offences punishable with imprisonment for 2 years or below. In summary and summons trial, the trial begins with the stating of the substance of accusation (particulars of the offence). In summons trial once the trial starts the case can only end in conviction or acquittal. There is no via media in between enabling the Magistrate to terminate the proceedings. If the Magistrate goes back to an earlier stage it will amount to review for which there is no power. (Adalat Prasad v. Rooplal Jindal - AIR 2004 SC 4674).

Can there be any amendment of substance of accusation?

Can a summons case be tried like a warrant case?

As per the provisions of section 259 of Cr.P.C. the trial of a summons case relating to an offence punishable with imprisonment for a term exceeding six months, the trial may be converted into a warrant case by the Magistrate.

Warrant Trial & Sessions Trial-

In warrant and sessions trial, the trial starts with the framing of charge (Ratilal Bhaji v. State of Maharashtra - AIR 1979 SC 984)

Trial of warrant case (Instituted on a Police Report(Chapter XIX, Secs 238-243 and 248)

- Satisfaction of compliance of 207- (Sec.238)
- Hear both sides, peruse records, discharge with reasons, if groundless- Sec.239. Only Prosecution records have to be looked into by the court Supdt. And Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja AIR 1980 Sc 52, State Orissa v. Debendrananth Padhi 2005 SC 359. Nitya Dharmananda @ K. Lenin and Another v. Gopal Sheelum Reddy aka Nithya Bhaktananda AIR 2017 SC 5846 —Explaining Debendra Nanth Padhi the Supreme court held that the power of the court to summon document under Sec.91 may be exercised to bring on record all relevant prosecution records even at the stage of framing charge.
- If grounds for presuming commission of offence, frame charge, read over and explain the charge to accused and ask whether he pleads guilty or not (Sec.240).
- Plea of not guilty once recorded does not bar the accused to again request the court to record his plea
- If pleads guilty the accused may be convicted. (if convicted, hear on the question of sentence- Sec.241). Acceptance of plea of guilty is discretionary.
- If accused pleads guilty and claims benefit of probation, grant him if not assign reason u/s 360 Cr.P.C or Probation of Offenders Act.
- If pleads not guilty, or not pleaded, the trial begins. Trial begins when accused is called upon to plead to the charge
- Prosecution evidence has to be recorded- Sec.242.

Important check list for trial

a) The court to draw the order sheet in his own pen while framing charge detailing the accused set up for trial those who are absconding and whose trial has been split up.

b) Ensure that accused received copy of police papers in terms of section 207 Cr.P.C. in case of voluminous documents instead of furnishing it to the accused with a copy thereof direct that he will only be allowed to inspect it either personally or through his Advocate either in court or in Office of the court as per rules for Inspection of Records.

c)Check whether sanction/Chemical Examination Report/MOs, etc. have been received in court.

d) Ensure that charge framed by the court is available with the records

Trial proper

- Evidence is to be taken in the presence of the accused- Sec.273Cr.PC.
- Adjournment - strictly follow Sec.309 Cr.P.C
- Marking of Documents- There are only three ways to mark a document in evidence.

  a) With consent - Sec.294 Cr.PC

  b) Formal proof by witness.

  c) When the document forms part of evidence by virtue of a statutory provision (Sec.293 Cr.PC).

Cases instituted otherwise than on a police report(Secs 244 to 250)

- When complainant is present, hear the prosecution and take evidence in support of prosecution (pre-charge evidence). Accused has a right to cross

examine the complainant and witness, if any. Sec.244.(Ajoy Kumar Ghose v. State of Jharkhand 2009 (14) SCC 115)

- Preliminary evidence against accused is sufficient to frame chargeState of Bihar v. Baidnath Prasad alias Baidyanath Shah AIR2002 SC 64.
- Examination of limited number of witnesses is enough-Ajoy Kumar Ghose v. State of Jharkhand 2009 (14) SCC 115)
- It is desirable to examine only detecting officer in a complaint under forest and wild life prosecution.
- Hearing on framing charge- Check whether the allegations if unrebutted would warrant a conviction.
- If no case is made out against the accused, court may record reason and discharge the accused- Sec.245 (1).
- At any previous stage if the Magistrate considers the charge to be groundless, with reason, Magistrate can discharge (Sec.245 (2)). It does not mean a stage where no witness is examined. It only means without examining all the witnesses for prosecution court may decide to whether charge has to be framed or not.
- If not discharged, frame charge, read over, explain and ask the accused whether he pleads guilty or not. If pleads guilty convict on discretion. If convicted, hear on the question of sentence (Sec.246 (1), (2) and (3) Cr.PC).
- If not pleaded guilty or not accepted plea of guilt, proceed with cross-examination of the prosecution witness who are already examined, if required so, re-examination, then examination of remaining witnesses for the prosecution. Sec.246 (4), (5) and (6). No application of section 311 Cr.P.C at this stage.

- The remaining procedure is same as cases instituted on a police report.
- In a proceedings instituted upon a complaint if the complainant is absent on a day fixed for hearing and the offence may be lawfully compounded or the offence is not a cognizable offence, Magistrate may discharge the accused, if charge is not framed (Sec.249).
- Compensation may be awarded if the accusation was without reasonable cause -Sec.250.

Summons case(Secs 251-258)

- Furnish copies of records.
- Particulars of offence to be stated to accused.
- If there is no material to read over the particulars of offence, then court may invoke Sec.258 in a case instituted on a police report.
- No formal charge need be framed.
- If pleads guilty, convict, on discretion.
- Conviction can be in absence as per provisions of Sec.253 – The Section is applicable only to a summons issued under Section 206 specifying the fine amount. – Sec.353 enables to pronounce sentence in the absence of accused, if sentence is fine only.
- If not pleaded guilty, or not accepted the plea of guilty, proceed with prosecution evidence
- Then examination under Sec 313 Cr.PC
- Defence evidence (Sec.254-accused need not be called upon to enter the evidence.)

- Argument under Sec 314

- Acquittal under Sec 255(1) or Conviction, sentence Sec.255(2). Hearing on question of sentence is not mandatory. There is no prohibition in hearing the accused on sentence even in a summons case.Considerthe **Probation of Offenders Act** and invoke the same in deserving cases.

- Absence of complainant or death of complainant- accused may be acquitted (Sec.256). The power under Sec. 256 can be exercised by the court when the complainant remained absent on a day when case is posted for evidence or when presence of the complainant is absolutely essential and he is absent. But court may dispense with the appearance of the complainant, if proper representation is there - Sec.256.Permission can be granted to withdraw the complaint at any stage before final order. Withdrawal may be against one or more of the several accused. Sec.257.

- Summons Case instituted on a police report - may stop proceedings at any stage –Sec.258.Reasons be recorded for passing an order under Sec. 258. If evidence of the principal witness is recorded, judgment of acquittal. Any other case, release the accused.

Intermediate Stages in A Trial

Pleading Guilty-Cases where the accused pleads guilty are instances of judicial confession. Hence, the Magistrate is bound to follow the safeguards provided under Sec. 164 (2) Cr.P.C. If the Magistrate is satisfied that the accused has voluntarily pleaded guilty, he can in his discretion straightaway convict the accused. The appropriate provisions are given below :-

Provision in Cr.P.C.	Type of trial
Sec. 252	in summons cases
Sec. 241	in warrant cases instituted on a police report
Sec. 246 (3)	in warrant cases instituted otherwise than on Police Report.
Sec. 229	in Sessions Cases.

The power to convict in all these cases is in the discretion of the Court.

In a nutshell in a case instituted on the basis of an FIR relating to warrant triable offences the procedure under chapter XIX of the Cr.P.C. shall be followed and when the accused is not discharged under section 239 Cr.P.C. the charges shall be framed and if the accused pleads guilty he may be convicted on such plea being recorded. But if the accused claims to be tried evidences for the prosecution shall be recorded under section 242 Cr.P.C.

Where the offences are triable as summons cases under Chapter XX of the Cr.P.C. as soon as the accused is brought before the court substance of accusation shall be stated to him and where the court does not convict him either on the plea of guilty under section 252 or section 253 the court will proceed to record evidence under section 254 of Cr.P.C.

Where the case is instituted otherwise than on a police report that is a complaint case, the court will proceed to record the before charge evidence for the complainant under section 244 of Cr.P.C. and subsequently if the accused is not discharged under section 245 Cr.P.C. the court will proceed under section 246 Cr.P.C. for recording after charge evidence on behalf of the complainant that will include cross examination of the witnesses examined at the before charge stage of trial and examination of the remaining witnesses if any.

Recording of Evidence

As per section 5 of Evidence Act evidence is to be given only of **"facts**

in issue"as defined under section 3 and **"relevant facts"** falling under section 5 to 55 of the Evidence Act. Going by the definition of expression "**evidence**" in section 3 of the Evidence Act,

"**Evidence.**"-- "Evidence" means and includes--

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2)[all documents including electronic records produced for the inspection of the Court;] such documents are called documentary evidence.

Thus evidence includes oral as well as documentary evidences. The provisions pertaining toproof of "oral evidence" are contained in Sections 59 and 60 of theEvidence Act. Section 59 of the Evidence Act enjoins that all facts,except the contents of documents or electronic records, may beproved by oral evidence. Section 60 insists that a fact which could beperceived by the senses can be proved only by the evidence of thewitness who perceived the said fact and if it is the opinion or thegrounds on which such opinion is held, it must be proved by theevidence of the person who holds that opinion on those groundsexcept where it is the opinion of an expert expressed in any treatisecommonly offered for sale.**Hearsay evidence** is ordinarily not admissible and exceptions to the same are *res gestae* evidence and dying declarations. The provisions pertaining to proof of documentary evidence are contained in section 61 to 100 of the Evidence Act.

The court will record the evidence of any witness present before it in the manner described in section 137 Evidence Act. The order of examination shall be as per section 138 Evidence Act.

- Examination of limited number of witnesses is enough (Ajoy Kumar Ghose v. State of Jharkhand 2009 (14) SCC 115)

"Contradictions" "Omissions Amounting to Contradictions" And

"Leading Questions"

Sections 161, 162 Cr.PC and 145 of Indian Evidence Act and Section 143 of the Indian Evidence Act

What exactly is a "contradiction", "inconsistencies" or "an omission amounting to a contradiction" and the extent of admissibility and sustainability of such contradictions and omissions etc. are certain areas which are of significant importance in appreciating the evidence. A definite procedure has been laid down under Cr.P.C. for drawing attention of witness towards his previous statements made under section **161** at the time of recording of evidence which need to be followed during trial.

Contradictions:

If the statement before the Police under section**161 Cr.PC** and the statement in the evidence before court are so inconsistent that both of them cannot co-exist, then it can be said that one contradicts the other (Tahsildhar Singh v/s State of U.P. – AIR 1959 SC 1012).

The basic principle is that in the event of inconsistency/ contradiction appearing between the statement being given by a witness before the court and his earlier statement recorded under section **161** Cr.P.C, the witness should be given an opportunity to explain such inconsistency and therefore, the defence is required to draw attention of the witness to the previous statement. Further, such previous statement need to be proved by the I.O only then there will be two statements duly proved before the court for appreciation.

When a witness turns Hostile towards the prosecution and not the defence legally two permissions are required:

Section 154 – Permission to put questions which might be put in cross examination.

Section 162 (1) Proviso CrPC – By the accused without any permission of court and if used by the prosecution then permission of court needed.

Contradiction U/s 145 of the Evidence Act should be between what a witness asserted in the witness-box and what he stated before the Police Officer, and not between what he said he had stated before the Police Officer and what he actually stated before him. In such a case the question could not be put at all. Only questions to contradict can be put (Tahsildhar Singh v/s State of U.P. – AIR 1959 SC 1012).The ratio of this judgment has been incorporated in explanation to section 162 Cr.P.C.

Contradiction means the setting of one statement against another and not the setting up of a statement against nothing at all Shashidhar Purandhar Hegde v/s State of Karnataka (2004) 12 SCC 492 = AIR 2004 SC 5075. Hence it is not permissible for a cross–examining counsel to ask the witness something which is not there in his 161 statement to the Police and if the witness replies in the affirmative, then to come out with an argument that the statement made in Court is an omission amounting to a contradiction.

The statement made by a witness in the course of investigation may, if duly proved, be used to contradict that witness and if it is intended to contradict the witness under the second part of Section 145 of the Indian Evidence Act, he should be confronted with the concerned portions of the writing**.**

The statement of a witness under Section 161 Cr.PC is recorded by a police officer by "**examining him orally**." Such a statement need not be an encyclopedia of everything that the witness knows about the case. Any and every omission in such statement will not become a contradiction for the purpose of discrediting the witness. The question is whether the

omission is on a vital aspect which the witness was normally bound or expected to disclose along with other answers even without a question and whether the new version given in the box on a vital aspect militates against what he already said and operates as an embellishment. That is a question of fact to be decided in each case.

Procedure

1). The exact portions sought to be contradicted must be put to the witness and recorded in the deposition and it will have to be marked subject to proof by the investigating officer. Then it must be put to the investigating officer and proved.

2). Entire portions of the statement with which the witnesses are sought to be confronted, should be put to the witnesses.

3). Relevant extracts of the alleged **Section 161** statements should be put to the witness. The witness should be given an opportunity to affirm or deny the exact portions of the alleged previous statements to the police. If the witness **admits** the part intended to contradict him, it stands proved and there is no need for further proof of the contradiction. If the witness denies having made that part of the statement, his attention must be drawn to that statement and the same must be mentioned in the deposition. By this process the contradiction is merely brought on record. Thereafter the contradiction is to be proved through the investigating officer (V.K. Mishra V. State of Uttarakhand- (2015) 9 SCC 588=AIR 2015 SC 3043).

The explanation of the witness should be noted. In the event of denial by the witness, he should be given an opportunity to explain the contradictions, if any. To condemn the evidence of a witness on the basis of contradictory previous statements alleged to have been made by him,

without specifically drawing his attention to those statements, is wholly improper.

The attention of the witness should be drawn to those parts of his previous statement which are required to be used for the purpose of contradicting him (Rajender Singh v/s State of Bihar (2000)4 SCC 298 = AIR 2000 SC 1779; Major Som Nath v/s Union of India (1971) 2 SCC 397 = AIR 1971 SC 1910.

If the witness disowns having made any statement to the police which is inconsistent with his version in court, merely asking questions in cross-examination with reference to such statement is not enough. His testimony in Court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Sec.145. (Binay Kumar Singh v/s State of Bihar (1997) 1 SCC 283 = AIR 1997 SC 322).

4). A prior statement by way of an admission by a **party** is substantive evidence if it fulfills the requirements of Section 21 of Evidence Act and there is no need to put to the **party** the statement containing the admission because it is evidence ***proprio vigore***. But in the case of a prior statement by a **witness**he cannot be disbelieved unless the prior statement has been put to him as required by Section 145 of the Evidence Act. (Bishwanath Prasad v/s Dwaraka Prasad (1974) 1 SCC 78 = AIR 1974 SC 117, Bharat Singh v/s Bhagirathi AIR 1966 SC 405)**.**

5). Effect of marking the entire case diary statements of witnesses without incorporating the same in the depositions and without putting to the witnesses portions sought to be contradicted, explained. The witness must get an opportunity of admitting or denying the contradictory part of his case diary statement or to give his own explanation which will have to be considered by the court. If denied, then the statement will have to be

duly proved also. Then only it becomes admissible though the admissibility is only for the limited purpose of using it for contradicting, discrediting or for considering the veracity of that witness and not otherwise to be used as substantive evidence. A contradicted and denied statement, even if dulyproved, cannot be used as substantive evidence against the accused. It cannot be said that admitting in evidence of the case diary statement is an illegality which vitiates the trial. It is only a curable irregularity which will vitiate the trial only if there is prejudice. Portions of the statements with which the witnesses were not specifically contradicted nor properly proved through the investigating officer, cannot be used even for discrediting the witnesses because the witnesses were not specifically confronted with those statements and an opportunity to either admit or deny or give an explanation for such statements, was denied to them.

In Ram Chandra v/s State of Maharashtra – 1968 SCD 790it was held that confronting the witness with the entire statement, though procedurally defective, is not improper if no prejudice is caused.

6). What is required under Section 145 of the Evidence Act is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. The matter is one of substance and not of mere fun. In the instant case, the entire portions of the statement which the witnesses were sought to be confronted with were not seen put to the witnesses. The inverted comas contained only the beginning and end of the statements with dotted lines in between. So also, portions of the statements with which the witnesses were sought to be confronted, were not put to the investigating officer who was only asked whether Pws 2 to 4 had stated as contained in Exts.P2, P3 and P4. This can hardly be treated as proof of the statements.

7). What is really necessary is substantial compliance of the requirements of Section 145 of the Indian Evidence Act and the purpose of the second part of Section 145 is to treat the witness fairly by giving him an opportunity to explain the contradictions after his attention has been drawn to them in a fair and reasonable manner. The ideal procedure would be to record and extract in the deposition the relevant previous statement, whether it be a long or short passage. What is necessary is that the deposition shows that the marking of the previous statement is proved by him and that statement is seen recorded in the case diary. When the relevant portion is marked and the investigating officer refers to that portion or exhibit, ordinarily that is sufficient to show that he has proved the previous statement which is part of the case diary statement in writing.

Omission Amounting to Contradiction

For an omission to be treated as a contradiction, it should be a significant or material omission (See Explanation to Section 162 and Francis Joy V. State of Kerala 1988 0 Supreme(Ker) 511

1. Where the witness deposed before Court that the deceased had made a dying declaration to him, but in his statement recorded under Section 161 Cr.P.C. , he did not state about any such dying declaration. (State of Punjab Vs. Praveen Kumar(2005) 9 SCC 769 = AIR 2005 SC 1277; Khalil Khan Vs. State of M.P. (2003) 11 SCC 19 = AIR 2003 SC 4670).

2. Witness stating that he had gone to the spot on hearing the sound of gunshot and tried to snatch away the gun from the accused. But in his police statement he not stating anything regarding the snatching of the gun. This is omission amounting to contradiction causing serious doubt about the truthfulness of the witness. (State of Rajasthan Vs. Rajendra Singh(2009) 11 SCC 106).

3. Version of the prosecution witnesses (also shown to be inimical to the accused) that the accused used lathis, does not find a place in their police statements. Prosecution case not upheld State of U.P.Vs. Banne (2009) 4 SCC 271.

4. Father of deceased alleging in Court for the first time about torture of his daughter by the accused mother-in-law. There was no mention of such torture in the statement of the father recorded by the police one year after the occurrence. Father was disbelieved. (Meera Vs. State of Rajasthan (2004) 11 SCC 231 = AIR 2004 SC 1879).

5. Witnesses in their statements under Section 161 Cr.P.C. attributing a clear intention to the accused to commit murder of his wife, stating before the Sessions Court that the accused was insane (behaving like a mad man). It is an omission amounting to contradiction.(Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat = AIR 1964 SC 1563)

Instance of omission not amounting to contradiction

Prosecutrix subjected to rape stating in Court that the place of occurrence was 2 feet away from the road. But in the FIR lodged by an Advocate after hearing the narration of the Prosecutrix (whom he had found to be scared, nervous and hesitant) mentioned the road as the place of occurrence. Held that under the circumstances of the case there was no major discrepancy amounting to contradiction especially when her statement under Section 161 Cr.P.C. would show that the occurrence took place at a spot 20 feet away from the road.(State of H.P. Vs. Lekh Raj(2000) 1 S.C.C. 247 = AIR 1999 SC 3916)

Leading Questions

Leading questions which may be asked in cross-examination – sec 143 of Evidence Act

Leading questions must not be, **if objected to by the adverse party,** be asked in an examination–in-chief or in a re-examination, **exceptwith the permission of the Court**. As per the former part of Sec. 142.

Court shall permit leading questions as to maters which are:.

introductory , or

undisputed, or

which have, in its opinion, been already sufficiently proved. As per the the latter part of Section 142.

Thus,leading questions can be put even without the permission of the Court during examination-in-Chief, if the opposite side does not object to it.Need to obtain permission of the Court to put leading questions would arise only where the opposite party objects to it.Even if the opposite party objects, Court has a wide discretion in allowing leading questions to be put.

With regard to matters covered by the latter part of Section 142, the Court has no discretion but should allow leading questions to be put. **(See State of Kerala Vs. Rajan – 1991(2) KLT SN 63 - Case No- 71 – K.T. Thomas – J)**

It is thus clear that where the witness of a party fails to support the case of the party producing him or her the witness may be declared hostile by the party producing the witness. Where the witness is declared hostile by the prosecution the witness may be cross examined under the provision of section 145 of the Evidence Act. Here section 162 of Cr.P.C. comes into play. The earlier statement of the witness recorded under section 161 of Cr.P.C. during the course of investigation may be used by the prosecution with the permission of the court to contradict the witness.

When the contradiction in the above manner is taken by the prosecution by drawing attention of the witness to his earlier statement

recorded under section 161 of Cr.P.C. and his denials to such previous statements, if any is recorded it shall be incumbent upon the prosecution to get such previous statement proved by the I.O. or the person who recorded it under the provisions of section 161 Cr.P.C. as the witness himself is not competent to prove such previous statement for two reasons. The first that such statement under section 161 need not be signed and thus the second that the person recording such statement alone is competent to prove it.

Introductory question and leading question –Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question. As per section 142 of Evidence Act leading questions must not, if objected to by the adverse party, be asked in an examination in chief, or in a reexamination, except with the permission of the court. It is further provided in the same provision that the court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion, been already sufficiently proved. Leading questions are permissible to be asked in cross examination.

Child Witness- The question of competency is dealt with in Section. 118 Every witness is competent unless the court considers he is prevented from understanding the question put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. There is always competency in fact unless the court considers otherwise.

It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can be gathered from the circumstances when there is

no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness did not under-stand the nature of an oath and so did not administer oath but despite that went on to take her evidence.*1952AIR(SC) 54 Rameshwar S/o Kalyan Singh Versus The State of Rajasthan*

It was further held in *Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64* at page 67

The Indian Evidence Act, 1872 does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease — whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States [159 US 523 : 40 L Ed 244 (1895)]* . The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (*Suryanarayana v. State of Karnataka [(2001) 9 SCC 129 : 2002 SCC (Cri) 413 : (2001) 1 Supreme 1]* .)

This extract is taken from *Ratansinh Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 : 2004 SCC (Cri) 7 at page 67*

"7. In *Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685]* it was held as follows: (SCC p. 343, para 5)

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other

words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single **witness** itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a **child witness**, or of a **witness** whose evidence is that of an accomplice or of an analogous character.

Deaf and Dumb witness –Section 119 of the Evidence Act provides that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible as by writing or by signs; but such writing must be written and the signs made in open court. The law further provides that the evidence so given shall be deemed to be oral evidence. Hon'ble Supreme Court in the case of *State of Rajasthan v. Darshan Singh, (2012) 5 SCC 789* held that "When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law requires that there must be a record of signs and not the interpretation of signs. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that the witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath."

Criminal Court Rules on Marking of Exhibits – Rule 102 to 112 relates to exhibits in a criminal case. As per Rule 102 the documents admitted in evidence on behalf of the prosecution shall be marked with numerals like Exhibit 1, Exhibit 2 etc. and the documents admitted on behalf of defence with capital letters like Exhibit A, Exhibit B etc. Where there are a number of documents of the same nature admitted in evidence they shall be marked in series like Exhibit 1/1, Exhibit 1/2 etc. on behalf of the prosecution and Exhibit A/A, Exhibit A/B on behalf of the defence.

The electronic evidences shall be market as per note 3 to Rule 103 fo the Criminal Court Rules and the articles admitted in evidence shall be market exhibit with capital numerals like Exhibit I, Exhibit II etc. Whenever a document or an article is admitted in evidence list shall be prepared in terms of Rule 104 and Rule 110 as the case may be.

Evidence is to be taken in presence of the accused as per section 273 Cr.P.C. but where the personal attendance of the accused has been dispensed with under section 205, 317 Cr.P.C. or when the accused has absconded and the evidence is recorded under section 299 Cr.P.C. the bar of section 273 Cr.P.C. will not operate. The bar created by section 273 Cr.P.C. is not impermeable.

The documents may be marked evidence in the following manners:

(a) Under section 293 Cr.P.C. being report of government scientific expert.

(b) 291A – report of a Magistrate without calling the Magistrate as a witness.

(c) With consent of the party under section 294 Cr.P.C.

(d) By tendering through a witness during the course of his examination.

(e) The electronic evidences may proved in terms of section 65A and 65B of the Evidence Act. But where original electronic record itself

is available in the court it will be a primary evidence under section 62 of the Evidence Act (Vikram singh Vs. State of Punjab, AIR 2017 SC 3227) The law is settled in terms of the ruling in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 3 SCC 216 which referred the matter to a larger Bench and ultimately the Hon'Ble Apex Court in a decision given on 14/07/2020has upheld the verdict given in Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473

(f) It was held in State of Maharashtra Vs. Praful B. Desai (AIR 2003 SC 2053)that evidence may be recorded through video conferencing. So long as the accused and / or his pleader are present when evidence is recorded by video conferencing that would fully meet the requirements of section 273 and recording of such evidence would be as per "procedure established by law".

The accused may lead defense evidence subsequent thereto and subsequent to conclusion of evidences on behalf of the parties the final argument shall be heard and the judgment shall be pronounced and the trial will conclude either in acquittal or conviction of the accused. The court will before conclusion of trial make the accused to execute a bail bond required under section 437A Cr.P.C. to appear before the next appellate court.

- A prosecution witness cannot be examined again as a defense witness to elicit anything which have been elicited when he was examined as a prosecution witness. State of M.P. Vs. Badri Yadav (AIR 2006 SC 1769)

If any witness is cited by defense and summons is requested, court may issue summons.

Entering the Defence

- Call upon the accused to enter upon his defence. Written statement can be filed. Sec. 243(1).

- A prosecution witness cannot be examined as a defence witness for anything which have been elicited when he was examined as a prosecution witness. State of M.P. v. Badriyadav (AIR 2006 SC 1769)

- If any witness is cited by defence and summons is requested, court is bound to accept and issue summons.

Argument and argument notes (See- Sec 314).

- Acquittal under Sec 248(1) or If found guilty, hear the accused on sentence, then sentence him according to law under Sec.248(2) again subject to Section 360 or Probation of Offenders Act as the case may be.

- Consider Probation of Offenders Act in appropriate cases. It is mandatory to consider the report of probation officer before invoking the Probation of Offenders Act.MCD v. State of Delhi AIR 2005 SC 2658

Larger Punishment -- Sec.325 Cr.P.C.

- This Section applies to cases where the Magistrate is of opinion that the accused is guilty and that he ought to receive a punishment different in kind or more severe than which the Magistrate is competent to inflict. Therefore, there are two conditions to apply the provisions:

  a) The punishment must be different in kind or more severe and

  b) The punishment must be more severe than what the Magistrate can inflict.

- Only in such cases he can send the records to the Chief Judicial Magistrate empowered to act under this Section.

Enhancement of punishment –Sec.75 IPCmay not be understood as obligating a criminal court to impose enhanced sentence invariably in all circumstances whenever an accused who is a previous convict repeats any

offence under Chapter XII or XVII of the IPC. The court has, nevertheless, a duty to ensure that punishment for the subsequent offence is commensurate with gravity thereof and the sentence is neither too lenient nor very excessive being disproportionate to the nature of the crime. Sec.75 thus comes into play only when the court is compelled by the gravity of the offence in question to exceed the maximum limit of the punishment prescribed for the offence on the first occasion and not otherwise (Sayad Abdul Sayad Imam v. Emperor AIR 1926 Bom 305**).**

- When a previous convict is again accused of offences punishable under Chapters XII and XVII of IPC, the Magistrate before whom the final report is filed is bound to follow the procedure prescribed by Sec. 324 Cr.PC.

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8. Recall of Witness SECTION 311 Cr.P.C. - Court may, *suo-motu* or on application:

- Summon any person as witness
- Examine any person present, even though not summoned
- Recall or re-examine any person.
- Court shall summon and examine or recall and re-examine any person if it is essential for the just decision of the case. Examination can be done at any stage of enquiry, trial or proceedings.

A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny. *Zahira Habibulla H. Sheikh & Anr.VersusState of Gujarat & Ors. 2004 4 SCC 158*

*In 2016 8 SCC 762 State of Haryana VersusRam Mehar & Others*The Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 CrPC. We think it seemly to reproduce some of them:-

- The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

- If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.
- The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
- The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
- The wide discretionary power should be exercised judiciously and not arbitrarily.
- The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
- Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.
- The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

- The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

  In *Hanuman Ram v. State of Rajasthan, (2008) 15 SCC 652* it has been held that ***once the witness was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court,*** even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him.

Section 165 of the Evidence Act provides that the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he deems fit, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant; and may order production of any document or thing. Section 311 CrPCempowers a court, at any stage of an inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance or recall and re-examine any person already examined. In fact, it casts a duty on the Judge to summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. Every trial being an effort to discover the truth, the Judge should play an active role within the parameters defined by the procedural law.

In *Mohanlal Shamji Soni v. Union of India* (1991 Supp (1) SCC 271) referring to Section 165 of the Evidence Actand Section 311 CrPC, the Supreme Court stated that the said two sections are complementary to

each other and between them, they confer jurisdiction on the Judge to act in aid of justice.

The provisions contained in section 311 of the Code has been further clarified in *Iddar v. Aabida, (2007) 11 SCC 211* to mean that the section is manifestly in two parts. Whereas the word used in the first part is 'may', the second part uses 'shall'. In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of

the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of any inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short 'the Evidence Act') are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes

the examination of witnesses as directed by the court may result in what is thought to be 'filling of loopholes'. That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant.

It has been further held in *Rajendra Prasad v. Narcotic Cell, (1999) 6 SCC 110*that it is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not ***"fill the lacuna in the prosecution case"***. *A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses*. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the

case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

Hon'Ble the Supreme court in *Manju Devi v. State of Rajasthan, (2019) 6 SCC 203*held that Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at **"any stage"** of **"any enquiry"**, or **"trial"**, or **"any other proceedings"** under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

It has been further held in *Mannan Shaikh v. State of W.B., (2014) 13 SCC 59*that the aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the

Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the section uses the word "shall". It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words "essential to the just decision of the case" are the keywords. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be guided only by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill up the lacuna. Whether recall of a witness is for filling up of a lacuna or it is for just decision of a case depends on the facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

Other important Judgements on the point areMohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 : Mina Lalita Baruwa v. State of Orissa, (2013) 16 SCC 173, Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461, and Natasha Singh v. CBI, (2013) 5 SCC 741 :

Sec 311 A - Magistrate can direct any person including accused to give specimen signature or handwriting, (for investigation or other proceedings under Cr.P.C) if such person is arrested in connection with such investigation.

Statement of accused under section 313

In all the criminal trials the proceedings subsequent to recording of prosecution evidences is similar and where there are evidences which are likely to be used against the accused he shall be afforded an opportunity to explain the evidences coming against him by examining the accused under the provision of section 313 Cr.P.C. The statement of the accused shall be recorded as per the procedure mentioned under section 281 Cr.P.C. The age assessed by the court in the statement under section 313 may differ from the age disclosed by the accused and the same is mentioned in the cause title of the judgment, therefore, it should be recorded carefully. While section 313(1)(a) is optional 313 (1)(b) is mandatory. Any incriminating circumstance which has not been put to the accused as a question under section 313 Cr.P.C. cannot be used against the accused for his conviction (Sharad Birdhichand Sarda Vs. State of Maharastra, AIR 1984 SC 1622,Lallu Manjhi Vs. State of Jharkhand, 2003 (2) SCC 401)

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9. JUDGMENTS AND SENTENCES WHICH COURTS MAY PASS.

The Judgment must be pronounced by the Court exercising Powers under the Cr.P.C. in terms of the provisions of Section 353 and 354 of the Code of Criminal Procedure as well as in terms of the Rules contained in Chapter X (Rule 53 to 57) of the Criminal Court Rules of the High Court of Jharkhand

What is a judgment?

In its broader sense, it is defined as the faculty of being able to make critical distinctions and achieve a balanced viewpoint. In law, it refers to the verdict pronounced by a court of law; a judicial determination or decision of a court; an adjudication of rights and obligations; and the reasons in support of an order or a decree. Rendering judgments is deciding the rights and obligations of parties, or the guilt or innocence of an accused, and in many cases, the fate of persons. A Judge renders justice through his decisions. The decision-making culminates in the judgmentwhich is the heart and soul of the judicial process. Rendering a judgmentinvolves two processes. The first is arriving at the decision. The second is giving expression to such decision in the form of a written opinion supported by reasons.

Decision-making is not about writing a judgment. Nor does it begin when a Judge starts hearing final arguments. It pervades every stage of the case — in making interim orders, in framing issues or charges, in allowing or disallowing questions in oral evidence, in admitting or rejecting documents, in hearing arguments, in analysing the material and reaching a decision, and even in granting or refusing adjournments. In short, it is the way the Judge hears, behaves, conducts and decides a case.

A judgment written well with clarity and consistency, even a common man would be able to figure out the contours of law. courts should only

deal with the subject-matter of the case and issues involved therein. A court may express its views on a particular issue in appropriate cases only where it is relevant to the subject-matter of the case. *Som Mittal v. Govt. of Karnataka, (2008) 3 SCC 574*

The main functions of a reasoned judgment are:

(1) to inform the parties (litigants) the reasons for the decision;
(2) to demonstrate fairness and correctness of the decision;
(3) to exclude arbitrariness and bias; and
(4) to ensure that justice is not only done, but also seen to be done.

The very fact that a Judge has to give reasons that will have to stand scrutiny by the Bar and the public as also by the higher courts, brings in certain amount of care and caution on the part of the Judge and transparency in decision-making. Unless the evidence placed by the parties and the contentions urged by them are considered and dealt with in the judgment, the litigant and the world at large cannot know whether the decision is based on facts or law, or whether it is a result of prejudice or ulterior motives.

Judgmentwill have to be understood by: (a) the parties and their counsel; (b) the authorities who are required to comply with it or implement it; (c) the members of the Bar and public who may like to rely on it, where it has a precedential value; and (d) the appellate/revisional court which has to find whether it is right or wrong.

Therefore, a goodjudgment, apart from being fair, reasonable and correct on facts and law, should be self-contained, precise, clear and analytical. The relief granted or directions issued should be specific and not vague. Thejudgmentshould be capable of being easily understood and demonstrate fairness in trial and decision.

Section 354 CrPC requires that every judgment shall contain the points for determination, the decision thereon and the reasons for the decision. It also requires that the judgment should specify the offence for which the accused is being convicted and the section under which he is being convicted and the punishment to which he is sentenced. If the judgment is one of acquittal, it has to state the offence of which the accused is acquitted and direct that he be set at liberty.

Thejudgmentshould set out the particulars of the offence, the prosecution case, the plea of the accused, the evidence of the prosecution witnesses, the case of the defence, discussion of the evidence and conclusions. Thejudgmentshould show whether the evidence shows proof beyond reasonable doubt as contrasted from civil cases, where the decision is based on preponderance of probabilities.

It is worthwhile to keep the following basic rules in mind while writing a judgment:

a. Reasoning should be intelligible and logical.

b. Clarity and precision should be the goal. Prolixity and verbosity should be avoided. At the same time, brevity to an extent where reasoning is the casualty should be avoided.

c. Use of strange and difficult words and complex sentences should be avoided. The purpose of a judgmentis not to showcase the Judge's knowledge of English, or legal erudition, but to decide disputes in a competent manner, and state the law in clear terms.

d. A Judge cannot use his personal knowledge of facts in a judgment.

e. If a Judge wants to rely on precedents or decisions unearthed by the Judge by his own research, he has to give an opportunity to the parties to comment upon or distinguish the same.

f. Recording findings on issues or matters which are unnecessary for disposal of the matter should be resisted.

g. Findings of fact should be based upon legal testimony. The decision should rest upon legal grounds. Neither findings of fact nor the decision should be based on suspicions, surmises or conjectures.

h. All conclusions should be supported by reasons duly recorded. The exceptions are where an action is undefended or where the parties are not at issue, or where proceedings are summary or interlocutory or formal in nature.

i. The findings and directions should be specific and precise.

j. A judgmentshould avoid use of disparaging and derogatory remarks against any person or authority whose conduct arises for consideration. Even when commenting on the conduct of the parties or witnesses, a Judge should be careful to use sober and restrained language. It should be remembered that the Judge making the remark is also fallible.

k. Before making any adverse remarks, court should consider: (i) whether the party or the person whose conduct is being discussed has an opportunity of explaining or defending himself against such remarks; (ii) whether there is evidence on record bearing on the conduct justifying the remark; (iii) whether it is necessary to comment or criticise or censure the conduct or action of the person, for the decision of the case.

Sentences Which Courts May Pass

A **High Court** may pass any sentence authorised by law.-**Sec. 28.(1)Cr.P.C**

A **Sessions Judge or Additional Sessions Judge** may pass any sentence authorised by law; but any sentence of death passed by any such

Judge shall be subject to confirmation by the High Court.-**Sec.28.(2)Cr.P.C**

An **Assistant Sessions Judge** may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.-**Sec.28.(3)Cr.P.C**

The Court of a **Chief Judicial Magistrate** may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.-**Sec.29.(1)Cr.P.C**

The Court of a **Magistrate of the first class** may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding ten thousand rupees, or of both.-**Sec.29.(2)Cr.P.C**

The Court of a **Magistrate of the second class** may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding one thousand rupees, or of both.-**Sec.29.(3)Cr.P.C**

When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore, which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently. **Sec.31.(1)Cr.P.C**

In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that-

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence. **Sec.31.(2)Cr.P.C**

For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence. **Sec 31.(3)Cr.P.C**

The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term-

(a) is not in excess of the powers of the Magistrate under section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine. **Sec 30(1) Cr.P.C**

The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 29. **Sec 30(2)Cr.P.C**

Sentence of imprisonment for non-payment of fine - In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable [with imprisonment or fine, or] with fine only, in which the offender is sentenced to a fine,] it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.**IPC Section 64**.

Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable -The term for which the Court directs

the offender to be imprisoned in default of payment of a fine shall not exceed one- fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.**IPC Section65**.

Description of imprisonment for non-payment of fine - The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.**IPC Section 66.**

Imprisonment for non-payment of fine, when offence punishable with fine onlyIf the offence be punishable with fine only, [the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed tile following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.**IPC Section 67.**

Imprisonment to terminate on payment of fine The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.**IPC Section 68.**

Termination of imprisonment on payment of proportional part of fine If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.**IPC Section 69.**

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10. SEARCH, SEIZURE, ATTACHMENT AND DISPOSAL OF PROPERTY

Sections which deal with Search, Seizure, Attachment and Disposal of Property are: Sections 51, 52, 83, 93(2), 94, 95, 100, 102, 105(E), 451&457.

Search of a person and search of premise.

Production of seized articles before court.

Forwarding of seized articles for further examination.

Release and disposal of seized articles.

Search of a person and search of premise:

The Code of Criminal Procedure lays down specific and distinct procedure for the search of person and that of close premise. Provisions of search of person has been made in section 51 which is as under

Section 51- Search of arrested person.

(1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, andwhenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,the officer making the arrest or, when the arrest is made by a private person, **the police officer to whom he makes over the person arrested, may search such person,** and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

The officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.**Section** 51 **Cr.P.C.**

Section 100 Code of Criminal Procedure, 1973 provides for search of a closed place.

It imposes certain essential obligations on (1) persons in-charge of closed place. (2) The Officer or other person conducting the search in said place and (3) the general public.

This section consists of eight sub-sections. Sub-section (1) to sub-section (3) details out the obligations which are to be performed by the persons in-charge of closed place to be searched whereas sub-section (4) to sub-section (7) deal with the obligations which an Officer executing the search warrant is required to perform. Sub-section (8) imposes obligation on each and every person to attend and witness search, when called upon to do so by the Officer executing the search warrant.

The Section 100 Code of Criminal Procedure has three essential aspects:

(1) It requires that the person residing or in-charge of the closed place to be searched shall afford all reasonable facilities for search therein;

(2) It empowers the other persons authorized to execute police search warrant to proceed in the manner provided by Section (2) of Section 47;

(3) It provides procedure for search [including woman]. Taking and selecting of witnesses, nature and character of witnesses, preparation of search memo and issuance of its copy.

The object of Section 100 is to see that searches are made properly by the Investigating Officer. The object of making it peremptory on the part of the Police Officer to make the search in the presence of two respectable inhabitants is to ensure that the Police Officers or those who are charged with the duty of conducting searches conduct them properly and do not harm or wrong such as planting of articles by any interested parties and prevent fabrication of any false evidence. The presence of two respectable witnesses is insisted upon by this provision to act as a safeguard against unfair dealings and to protect and safeguard the interest of the accused persons.Section 100 of the Criminal Procedure Code deals with searches not seizures. In the very nature of things when property is seized and not recovered during a search it is not possible to comply with provisions of sub-sections 4 and 5 of the Criminal Procedure Code. 1983 AIR (SC) 1225.

Distinction between section 51 and 100 Cr.P.C. :

The provisions of search as laid down in Section 100 of the Code of Criminal Procedure does not apply to search under **Section 51**. Provisions of **Section *100* apply when search of a place is conducted and not when search of a person is made.** 1956 AIR(SC) 411; 1956 CrLJ 801, Sunder Singh VersusState of U.P.,

It has been held in Safi Mohammad Vs. State of Rajasthan, AIR 2013 SC 2519that even if the search is made by the Investigating officer in illegal manner, the same does not affect the legality of the search and investigation made by Investigating officer with regard to the seizure of the document from the house of the appellant.

Radha Kant Yadav Vs. State of Jharkhand, 2002 (3) JLJR 135 – Modan Singh Vs. State of Rajasthan, (1978) 4 SCC 435 - Investigating

Officer becomes the direct witness on the point of recovery and if any witness does not support this fact then unless there is motive on the part of the I.O. to create false evidence the direct evidence of the I.O. cannot be disbelieved only because the witness who signed the document have turned hostile. ---- there is no law that I.O's. evidence should be looked with suspicion and his evidence need corroborated by some witnesses.

State Vs. Navjot Sandhu, 2005 (11) SCC 600 - There is no inflexible proposition of law that in the absence of independent witnesses being associated with the search, the seizure cannot be relied upon. But in that case closure scrutiny of evidence will be required.

Power to seize offensive Weapons—Section 52 of the Cr.P.C. provides that the officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

If the investigating officer seizes an article during investigation he shall forthwith report the same before the court. The property shall be produced before the court without much delay. Report will be received in court and the property will be produced along with the seizure list.

It is found that the witnesses who have been examined for attesting the seizure have not supported the prosecution version. On behalf of the defence it was submitted that the seizure witnesses were men of status in the village and their not supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo. If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. Modan Singh Vs. State of Rajasthan, (1978) 4 SCC 435

Under this section52 and section 51 Code of Criminal Procedure, 1973 a Police Officer conducting search is statutorily bound to keep articles seized from the person if the accused person is in safe custody and provides receipt of such articles. Normally recovery/seizure memo shall be prepared on the spot of search and recovery.

When the evidence of search and recovery is reliable and then the omission to prepare the recovery memo would not be of much significance. In Jagdish Rai v. State of Bihar, 1972 Cri LJ 525 (527, para 8).(1972) 3 SCC 264it has been held that no seizure memo regarding the stolen property was prepared when the accused was produced along with those articles before Police authorities. This circumstance, in the opinion of the Hon'ble Apex has been found not of much significance because the evidence of said police officer tends to show that the recovery of the stolen articles was mentioned in the report sent by the said police officer and those articles too were sent along with the report forwarded by the witness to Government Railway Police Station.Similar view was taken again by the Apex Court in Rajpal v. State ofMaharashtra. 1974 SCC (Cri) 123.

It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It may be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to thepanchasso far as the question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and

dependable, cannot be discarded by court on the ground that he is a police officer..Vipulbhai Batukbhai Barwalia v.State of Gujarat 2010 SCC OnLine Guj 8438

In yet another case before the Hon'ble Apex Court inMohd. Aslam v. State of Maharashtra, (2001) 9 SCC 362wheretwo panch witnesses who were cited to support the recovery turned hostile and therefore the evidence of the Investigating Officer became unsupported. It was held *"We cannot agree with the said contention. If panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated."*

Proclamation and Attachment of Property :

Section 82 of the Code authorises the Court to declare a person absconding on existence of the circumstances specified therein. The Court issuing a proclamation under Section 82 may, for reasons to be recorded in writing, at any time after the issue of proclamation, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person in exercise of Section 83 of the Code. Amina Ahmed Dossa & Ors. Versus State of Maharashtra 2001 2 SCC 675

Section 82provides that if a Court has reason to believe that any person against whom a warrant had been issued is absconding or is concealing himself to avoid such execution the Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the publishing of said proclamation. Thereafter Section 83provides that the Court issuing a proclamation under Section 82 may for reasons to be recorded in writing at any time after the issue of the proclamation, order the attachment of any property movable, immovable or both belonging to the proclaimed person. The Patna High Court has held that the object of the section is to compel

an accused person to appear in obedience to a warrant issued by the Criminal Courts. The attachment and sale of his property provided for are a penalty sought to be enforced against the accused to coerce him to respond to the orders of the Criminal Courts and to take his trial and not to avoid the reach of justice. Section 83enjoins upon the court to record the reasons in writing for ordering the attachment of any property belonging to the person who has been proclaimed as an offender under Section 83CrPC.

Even the order of attachment of property has two prerequisites. Firstly the court has to satisfy itself either by affidavit or otherwise that the person in relation to whom the proclamation is to be issued is about to dispose of whole or any part of the property or secondly that he is about to remove while or part of the property from the local jurisdiction of that court. Mani Shandly v. State, 2008 (2) Crimes 718 (Del).

Section 82 of Code of Criminal Procedure, 1973 authorizes the Court to declare a person absconding on existence of the circumstances specified therein. The Court issuing a proclamation under Section 82 may, for reasons to be recorded in writing, at any time after the issue of proclamation, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person in exercise of Section 83 of the Code.

Section 82 requires that the Court must, in the first instance, issue a warrant [naturally bailable. It is not at all necessary or desirable to issue non-bailable warrant as a first step though the court may] and it must put down its reasons for believing that the accused is absconding or concealing himself. There must be some evidence on file to establish that every possible effort sanctioned in the Code, was made to serve the said non-bailable warrant and such proof must be available on record.The issuance of the warrant of arrest and Issuance of Proclamation Order simultaneously is totally illegal. **1960 Cri.LJ 501 (Pat.).**

Section 84 Code of Criminal Procedure, intends to safeguard the interest of persons whose property interest are affected by the wrongful attachment of some property mistaking it the property of a proclaimed offender. The general law is that the court by which the order of attachment is issued under Section 83 is empowered to inquire into and decide claims and objections preferred by persons other than proclaimed offenders, but if the claim or objection is in respect of property attached under an order endorsed under sub-section (2) of Section 83, then such claims or objections are to be inquired into and decide by the court of Chief Judicial Magistrate of the district in which the attachment is made.

Section 85 deal with the release, sale and restoration of attached property of the proclaimed person. It discloses the legal consequences as to the fate of attached property when a proclaimed person appears or fails to appear within time specified in the proclamation. The attached property of a proclaimed offender shall be released, when, such person

(i) Appears in Court within the specified time;

(ii) is arrested and before the Court in execution of the warrant issued under Section 70 of the Code, 1973, or

(iii) when a warrant for levy of fine by attachment is issued under section 421(1) (a) of the Code, 1973 after conviction of the accused person.

But in a case of otherwise situation, the proclaimed person does not appear within the time specified in the proclamation the property under attachment shall be at the disposal of the state government. In this connection, the expression "at the disposal of the state government has been interpreted to mean absolute control over the attached property."Securing the attendance of an absconding accused under Section 85 CrPC is a matter between the State and the accused

The words "shall be at the disposal of the Government", do not mean

that from the moment the absconder fails to appear on the date fixed, all his right, title and interest in the property immediately pass over to the Government.

In the case of M.P. Sharma v. Satish Chandra,AIR 1954 SC 300A constitution Bench of Eight Judges of the Apex Court has held that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of the social security and that power is necessarily regulated by law, though fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy analogous to the analogous to the Americas fourth Amendment, we have no justification to import it into a totally different fundamental right by some process of strained construction nor it at legitimate to assume that the constitutional protection under Article 20(3) would be defeated by the statutory provisions for searches. It was concluded by the said Constitution Bench that a search under the enabling provisions of the Criminal Procedure Code cannot be challenged as illegal on the ground of violation of Article 20(3). Section 93.of the Cr.P.C. provides when search-warrant may be issued.Section 93 Code of Criminal Procedure, 1973 empowers Court to issue search warrant and lays down various essential conditions for issuance of search warrants. Anatomy of Section 93would disclose that it consists of three sub-sections 1 to 3. Sub-section (1) envisages situations wherein particulars and general search warrants may be issued. Sub-section (2) empowers the Court to specify in the warrant the particular place or part thereof to which only the search or inspection shall extend. Sub-section (3) provides that to grant a warrant to search for a document or parcel or other thing in the custody of the postal, telegraph authority only the D.M., C.J.M. are empowered. Sub-section (2) of Section 93Code of Criminal Procedure, 1973 empowers a Court, in his wisdom to specify in the warrant the particular place or part thereof to which only the search or inspection shall extend.

This Section 94 is not exhaustive as to the provisions of search. In **Purshottam Dass v. State (Delhi), 1975 0 CrLJ 309** it was held that this is no prohibition in Section 94 that a police officer cannot, without a prior permission obtained under this section, carry out a search. It is only where an order has been passed under this section that the search has to be carried out in the manner which may be specified in the warrant issued for the purpose. It does not provide any mandate imposing an obligation impairing the powers given by Section 165, Criminal Procedure Code. Section 94is intended as emergency provision Ganga Dharan v. Kochappa Chettapran1985 Cri LJ 1517(1520) Ker.**.** Please see the following chart for the terms used in Section 94of the Code of Criminal Procedure, 1973, as they are defined in Indian Penal Code.

1)Reason to believe	Section 27 Indian Penal Code.
(2)Stolen property	Section 410 Indian Penal Code.
(3)Forged documents	Section 470 Indian Penal Code.
(4)Counterfeit Currency Notes	Section 489A Indian Penal Code.
(5)Obscene objects	Section 292 Indian Penal Code.

The power to issue an order of forfeiture of certain publications which were considered by the Government to be objectionable and the proceedings consequent thereto is contained in Sections 95 and 96 of the Code, 1973. Sections 95 and 96 form a single scheme dealing with the same subject matter viz. forfeiture of objectionable matter. Both the sections should be read together. The provisions under Section 95 are wider than the provisions of Section 153A Indian Penal Code. Section 95 Code of Criminal Procedure, 1973 empowers the State Government to declare certain publication containing objectionable matter which is punishable under Section 124A or Section 153A or Section 153B or Section 292 or Section 293 or Section 295A of the Indian Penal Code

forfeited and to issue search warrants for the same. The conditions necessary for forfeiture under Section 95 of the Code are: (i) formation of opinion by the State Government prior to declaration of forfeiture and (ii) statement of the grounds of Government's opinion. The expression grounds of its opinion used in Section 95 of the Code implies that opinion should be supported by the facts. The requirement of stating the grounds of opinion is mandatory and in order bereft of the grounds of opinion does not stand the test of legality. Mere reproduction of ingredients of relevant section of IPC is not sufficient.

The provisions contained in Section 100 CrPC relating to search and seizures within a closed place are the safeguards to prevent the clandestine use of powers conferred on the law enforcing authorities. They are powers incidental to the conduct of investigation and the legislature has imposed certain conditions for carrying out search and seizure in the Code. The courts have interpreted these provisions in different ways. One view is that disregard to the provisions of the Code of Criminal Procedure relating to the powers of search and seizures amounts to a default in doing what is enjoined by law and in order to prevent default in compliance with the provisions of the Code, the courts should take strict view of the matter and reject the evidence adduced on the basis of such illegal search. But often this creates a serious difficulty in the matter of proof. Though different High Courts have taken different views, the decisions of this Court quoted above have settled the position and we have followed the English decisions in this regard.

The general provisions given in the CrPC are to be treated as guidelines and if at all there is any minor violation and the courts have got discretionary power to either accept it or reject it.

105E. ***Seizure or attachment of property—***(1) Where any officer

conducting an inquiry or investigation under Section 105D has a reason to believe that any property in relation to which such inquiry or investigation is being conducted is likely to be concealed transferred or dealt with in any manner which will result in disposal of such property, he may make an order for seizing such property and where it is not practicable to seize such property, he may make an order of attachment directing that such property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned.

(2) Any order made under sub-section (1) shall have no effect unless the said order is confirmed by an order of the said Court, within a period of thirty days of its being made.

Disposal of Seized Articles

Secs 451 to 459 of the CrPC deal with the disposal of property in a criminal court.

Order for custody and disposal of property pending trial in certain cases—When any property is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.**SECTION 451**

Explanation:—Forthe purposes of this section "property" includes—

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

Court is empowered under Section 457, Code of Criminal Procedure to release the property seized by the police but not yet produced before the Court. Section 451 is about such property which is seized by the police and is produced before the Court. Section 452 deals with the cases in which trial is concluded. Order under Section 452 is of final nature whereas order under Section 451 can only be of interim nature.

Section 452 would apply at the stage of conclusion of trial. In cases of offences under the Arms Act it is obligatory upon the court concluding the trial to pass appropriate orders for disposal of seized articles **(Cr.Appeal (SJ) No 372of 2004** – Md. Isteyaque VS. The State of Jharkhand**.)** An order may be made under sub-Section (1) of Section 452, Cr.P.C. for

(1) The delivery of the property;

(2) The destruction of the property and

(3) The confiscation of the property.65

But order must contain a speaking order as to how the property shall be disposed of.

Section 451and 457 of the Code of Criminal Procedure, 1973, somewhat overlap, though Section 457 is a general provision applicable in all cases where there is no enquiry or trial pending. The powers of courts under Section 451are somewhat limited than those in the case of Section 457, Section 451mainly speaks of the proper custody of property pending conclusion of the enquiry or trial whereas under section 457 says that the Magistrate "may make such order as he thinks fit respecting disposal of property or delivery of such property to the person entitled to the possession thereof...." Each case is to be governed by its own facts and circumstances and it cannot be laid down as a broad proposition of law that in no case, the custody of the seized property can be given either to the accused or to the complainant, pending disposal of the main case, Section 451 contains no such restriction nor can be read between the lines.Section 451 enables the Magistrate to provide for interim custody of

property pending conclusion of enquiry or trial. It is only a temporary arrangement and what is contemplated is only an interim provision to provide custody with a proper person as the court thinks fit with liability to produce the property back as and when directed by the Court. The maximum duration of the arrangement is only till conclusion of the enquiry or trial. It follows that the arrangement is only temporary and the main object is to protect or preserve the property pending trial. Even if the person entrusted with interim custody is the owner his possession or custody during the period of entrustment is onlyanrepresentative of the court and not in his independent right.

For applicability of Section 451, Code of Criminal Procedure, the word property includes movable as well as immovable property.

If the investigating officer seizes an article during investigation he shall forthwith report the same before the court. The property shall be produced before the court without much delay. Report will be received in court and the property will be produced along with the seizure list.

Section 451 and 457 – Distinction

The essential distinction is when property is produced Sec.451 would apply and if not produced, but seizure is reported, Sec.457 would apply.Criminal court has power to release property seized by the police from a person and reported to the Court but not yet produced before the Court. The scheme of Chapter 34 regarding disposal of property envisages three contingencies. S. 451 of the Code is intended to dispose of property on an interim arrangement pending the conclusion of the inquiry or trial. S. 452 of the Code will apply when the trial or inquiry is concluded, S. 457(1) of the Cr. P.C. is applicable only when the property seized is not produced before the Criminal Court during an enquiry or trial. This has been explained by the Supreme Court in Ram Prakash Sharma v. State of Haryana (1978) 2 SCC 491). The Supreme Court held:

"Chapter 34 of the Criminal Procedure Code deals with disposal of

property. There is a trichotomy in the sense that where property has been seized by the police, but not produced before the court, the power to dispose it of is covered by S. 457. Where property has been seized and/or otherwise produced before the court, the manner to dispose of such property is governed by Section 451. If the question of disposal arises after the enquiry or trial in any criminal court is concluded, the disposal of the property involved in the case is governed by Section 452. We need not go elaborately into the implications of each provision since we are not called upon to do so in the present case.

A bank account is a property within the meaning of 102 of the Cr.PC and can be dealt with by IO. Then Court can exercise the power under Sec.451 or Sec.457, as the case may be. State of Maharashtra v. Tapas D. Neogy 1999 (7) SCC 685

Sec.451 application can be filed during the pendency of inquiry or trial. Court can make such order for the proper custody of the property pending the conclusion of inquiry or trial if no purpose is served by keeping the same in his custody.

InSunderbhai Ambalal Desai v. State of Gujarat (2002) 10 SCC 283 and General Insurance Council v. State of Andhra Pradesh 2010(6)SCC 768 the Honourable Supreme Court held that Magistrates shall pass orders regarding the custody of the property without delay.

The property not suspected of commission of the offence which is being investigated into by the police officer cannot be seized. Under Sec.102 of the Code, the police officer can seize such property which is covered by Sec.102(1) and no otherwise (M. T. EnricaLexie v. Doramma AIR 2012 SC 2134).

Disposal Under Special Statutes

If there is any special provision in a particular statute as to the mode of disposing the property, then it has to be followed. When statute provides for interim disposal and confiscation 451 can be invoked only if confiscation proceedings are not initiated. Indian Forest Act Section 52 C of the Bihar amendment ousts the jurisdiction of the courts to release any property subject to confiscation.

"52-C. Bar of Jurisdiction of Courts etc. in certain circumstances.-(1) On receipt of intimation under sub-section (4) of section 52 about initiation of proceedings for confiscation of property by the magistrate having jurisdiction to try the offence on account of which the seizure of property which is subject matter of confiscation, has been made, no Court, Tribunal or Authority (other than the authorized officer, Appellate Authority and Revision Authority referred to in sections 52, 52A and 52B) shall have jurisdiction to make orders with regard to possession, delivery, disposal or distribution of the property in regard to which proceedings for confiscation are initiated in this Act, or any other law for the time being in force.

Explanation.-Where under any law for the time being in force, two or more courts have jurisdiction to try forest offence, then on receipt of intimation under sub-section (4) of section 52 by one of the Courts of Magistrates having such jurisdiction shall be construed to be receipt of intimation under that provision by all the Courts and the bar to exercise jurisdiction shall operate on all such Courts.

Hon'ble the supreme court in The State of Bihar & Anr. –Appellants versus Kedar Sao & Anr 2003AIR(SC) 3650held in the following wordings:-

"All the more so, in our view, in this case, having regard to Section 53-C inserted by the Bihar Amendment Act 9 of 1990 in the Indian Forest Act, 1927, which in unmistakable language of a mandatory nature, ordaining that on receipt of intimation under sub-section (4) of Section 52 about initiation of proceedings for confiscation of property, by the Magistrate

having jurisdiction to try the offence on account of which the seizure of property, which is subject matter of confiscation, has been made, no Court, Tribunal or Authority (other than the Authorized Officer, Appellate Authority and Revision Authority referred to in Sections 52, 52A and 52B) shall have jurisdiction under the said Act or any other law for the time being in force to make orders with regard to possession, delivery, disposal or distribution of the property in regard to which proceedings for confiscation are initiated". Thus the Forest produce shall also not be released.

In case where the value of the vehicle has to be ascertained, it may be ascertained through AMVI/MVI.

Disposal of different types of properties

Perishable Items: -

The Magistrate may direct that such goods be delivered to the owner or the person entitled to the possession with such conditions as may think fit under Sec.457 read with 459 of the Code. If such property is unclaimed, the property may be sold in public auction and the sale proceeds shall be deposited in Criminal Court Deposits and shall be entered in Property Register. After final disposal of the case, the sale proceeds of unclaimed property shall be confiscated to State.

Live Stock: -

Where live stock is seized the descriptive particulars and other identification marks be noted and such property can be returned to the owner for interim safe custody. The Court can even direct the owner to file periodical report about the condition of the livestock.

Valuable Articles and Currency Notes

The guidelines given in Sunderbhai Ambalal Desai v. State of Gujarat (2002) 10 SCC 283 be followed.

Gold and Silver Items:

When any gold and silver items are produced before the Court by police,

the said property be certified and weighed by the appraiser and shall obtain a certificate to that effect. In such cases, Magistrate should pass appropriate orders as contemplated under Section 451 Cr.P.C. at the earliest.For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:-

(1) preparing detailed proper panchnama of such articles;

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security.

For this purpose, the Court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 Cr.P.C. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. **The Court should see that photographs of such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451 Cr.P.C. to impose any other appropriate conditions.**

VehiclesIt is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles. In case where the vehicle is not claimed by the accused, owner, or the insurance company or by third person, then such vehicle may be ordered to be auctioned by the Court. If the said vehicle is insured with the insurance company then insurance company be informed by the Court to take possession of the vehicle which is not claimed by the owner or a third person. If Insurance company fails to take possession, the vehicles may be sold as per the direction of the Court. The Court would pass such order within a period of

six months from the date of production of the said vehicle before the Court. In any case, before handing over possession of such vehicles, appropriate photographs of the said vehicle should be taken and detailed panchnama should be prepared.

For articles such as seized ***liquor*** also, prompt action should be taken in disposing it of after preparing necessary panchnama. If sample is required to be taken, sample may kept properly after sending it to the chemical analyser, if required. But in no case, large quantity of liquor should be stored at the police station. No purpose is served by such storing.

Similarly for the Narcotic drugs also, for its identification, procedure under Section 451 Cr.P.C. should be followed of recording evidence and disposal. Its identity could be on the basis of evidence recorded by the Magistrate. Samples also should be sent immediately to the Chemical Analyser so that subsequently, a contention may not be raised that the article which was seized was not the same or the procedure under NDPS be followed whichever is applicable.

Explosive Devices/ Bombs:-

Soon after the seizure of any bombs/ explosives, the Police take precautions for safe handling and report the same to the Court and also inform the same to Bomb Defusing Squad / Team for necessary instructions. Bombs not be produced before court. The court may pass appropriate orders which are essential for safe handling of explosive items and to send them to Forensic Analysis and/or its diffusion or destruction as the case may be.

Bharat Mehta Vs. State through Inspector of Police, Chennai, 2008 (2) Supreme 596

Question for consideration: Where a vehicle which is under hire purchase agreement is seized in a criminal case who shall be regarded the real owner of the vehicle for release? Whether it will be the financer or the

party who has taken it on hire purchase agreement?

Held- Financer is the owner and the vehicle need to be released in favour of the financer.

When The Seized Article Is Not to Be Released in Favour of the Accused:

(i) Where during the trial at any point of time the accused has denied to be in possession of the seized articles it cannot be released subsequent to his acquittal on technical grounds.

(ii) Coal should not be ordinarily released unless duly verified papers along with reliable reasons for nonproduction of the documents for transportation etc. are produced in the court.

(iii) No release of forest produce including vehicle of transportation etc. where confiscation proceeding has been initiated.

(iv) No release of country made and illegal arms.

Procedure in sending materials to FSL

The investigating officer shall produce in the court sample of materials seized by him in the prescribed form. The legible seal of the I.O. and the Gazetted officer (wherever necessary) must be affixed and it must be signed by the sealing officer(s) with name & Designation. One sample of each seized material be sent to FSL or to the expert examiner at the earliest possible time with proper forwarding letter from competent authority with details of the sample. The net and gross weight of each sample/parcel must be mentioned individually in the forwarding letter and on the parcel as the case may be.

Forwarding Note

In all cases where the examination of any material is required at the Forensic Science Laboratory, copy of this form duly filled in must accompany the exhibits.

Case No. Police Station :

District :

Sec of Law:

1. NATURE OF CRIME

This covers nature of charge, brief history and any relevant details)

II. LIST OF EXHIBITS SENT FOR EXAMINATION

Sl.No	Description of the exhibits	How, when and by whom found	Source of the exhibits	Remarks

III. NATURE OF EXAMINATION REQUIRED

(Including any information which will assist the examination)

** 1. The exact place from where the exhibits were collected.

2. If these exhibits were in the possession of the person (Victim/suspect/witness).

The other details of the owners be furnished.

MemoNo.....Dated,

the.....

Forwarding to the Director, Forensic Science Laboratory,

SPECIMEN SEAL

IMPRESSION

Signature of the Forwarding Officer:

Designation of the Forwarding Officer:

It must authorize the SFSL to destroy the material exhibits if the test so requires.

Note:- In the “Nature of Crime” & “Nature of Examination” care be taken to

ensure that all necessary information regarding individual samples submitted is included.

In the packing of material for expert examination, it is important that the specimen samples be well protected against contamination, from outside sources. The specimen when received at the Laboratory must be a true unadulterated sample of the material found at the scene of crime.

The exhibits be collected, packed and transported according to the directions contained in Chapter 42 of the Police manual. Methods described under each type of exhibit be meticulously observed.

The specimen must be in separate clean glass-stoppered bottles and sealed.

The specimen seal impression be on sealing wax.

Certificate has to be signed by a competent forwarding authority and forwarded to the Director, State Forensic Science Laboratory or as the case may be with exhibits.

Certified that the DIRECTOR, STATE FORENSIC SCIENCE LABORATORY, has the authority to examine the exhibits sent to him in connection with the case of State versus.....under Sec.....and if necessary, to take them to pieces or remove portions for the purposes of the said examination.

Date:

Place: Signature and Designation

of the Forwarding Authority

In the case of documents

The questioned writings / signatures / typewriting etc. be encircled with red / blue pencil and marking be given in ascending order as Q1, Q2,

Q3.... The appropriate standard materials, in original for comparison and be given markings as S1, S2, S3. Similar type of specimen / admitted writings / signatures / type writings / stamp impressions etc. Preferably a document of contemporary period containing admitted signature/hand writing shall also be forwarded. It mention specific nature of examination required. Avoid folding and unusual handling of the documents. The investigation officer deposit the documents in closed / sealed envelope along with duly filled FSL Forms and Chalan for payment of fees, if applicable.

Annexure -

Standard Requisition Form

1. Date :
2. Crime No and of Law :
3. Police Station & District :
4. Particulars of questioned writings or signatures along with the detailed description of the documents containing such writings and signatures.(The Questioned writings or signatures may be encircled with red pencil and given markings such as Q1, Q2, Q3 etc.)
5. Particulars of documents and exact locations of erasures, alterations, obliterations, interpolations, etc. which are alleged to have been made
6. Particulars of the standard writings

(a) Writings or signatures written in the normal routine and preferably near about the period of questioned writings and signatures by the persons concerned for comparison with the questioned writings and signatures. (These writings may be encircled with the Blue pencil and given markings such as A1, A2, A3 etc)

(b) Particulars of samples, ie, specimen writings and signatures written to dictation by the persons concerned for comparison with the questioned

writings and signatures (These writings may be encircled with Blue pencil and given markings such as S1, S2, S3, etc)

7. The age of writer, his name and any of his physical conditions, (such as extreme illness, infirmity or injury to his hand or fingers or his mental condition etc.) which are likely to affect the writings may be endorsed on each sheet of specimen writings or signatures and be taken by the Investigating Agency in the presence of the Magistrate or other witnesses.
8. Serial-wise questionnaire giving the exact nature of examinations required to be made.
9. Mode of dispatch of Documents (through Special Messenger and if so, his name and designation/Insured Post/Registered Post. Whether the documents were sent in a sealed cover or unsealed cover)

Name, Signature and designation of the InvestigatingOfficer.

Compiled By

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Additional Director Cum Senior Faculty Member
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Judicial Academy Jharkhand.

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11. VICARIOUS LIABILITY IN CRIMINAL LAW

Crime is essentially a mental process accompanied by an act in violation of a criminal law. A guilty mental element is the foundation of criminality unless it is dispensed with by the statute in strict liability cases.

In Nathulal vs. State of M.P. AIR 1966 SC 43 the Apex Court aptly observed, "*Definitions of diverse offences under the Indian Penal Code state with precision that a particular act or omission to be an offence must be done maliciously, dishonestly, fraudulently, intentionally, negligently or knowingly. Certain other statutes prohibit acts and penalise contravention of the provisions without expressly stating that the contravention must be with a prescribed state of mind. But an intention to offend the penal provisions of a statute is normally implicit, however, comprehensive or unqualified the language of the statute may appear to be unless an intention to the contrary is expressed or clearly implied, for the general rule is that a crime is not committed unless the contravener has mens rea. Normally full definition of every crime predicates a proposition expressly or by implication as to a state of mind: if the mental element of any conduct alleged to be a crime is absent in any given case, the crime so defined is not committed.*"

The need for an in-depth study and better appreciation of law concerning joint liability arises on account of the sea change in the nature of crime and its modus operandi. A brief review of the nature of crime will show that crime has become a profitable enterprise for some, and the main players and the king pins in such cases may not be directly involved in its execution. Crime in such cases are not committed in the spur of moment by feuding family members but are marked by cold planning and dexterous execution by professional criminals. In cases of terrorism, narcotics, gold smuggling, cyber crime etc there are even cross-border connections. The challenge before criminal adjudication is to bring within

the legal net such conspirators and plotters who are not on the forefront but operate from background. Further, there is a significant increase of mob violence committed by a member of unlawful assembly and there is need of better understanding of law on the point so that there is no miscarriage of justice.

While in cases where the accused is the principal offender in the crime and there is evidence of his direct participation, he can be charged simplicitor for the offence without the aid of any provision for vicarious liability. Difficulty arises in cases of vicarious liability where there may not be direct physical participation of the accessories in the joint criminal enterprise but the involvement is unmistakable. There may be cases where the criminal act may have been committed in the furtherance of the common intention or in the prosecution of common object or it may have been abetted by the abettor or a part of a large conspiracy. The challenge of criminal adjudication in such cases is to establish the tenuous link between the offence and the instigators, conspirators and those facilitating the offence. The common thread between the confederates of crime may not be always visible, particularly where the crime is a planned enterprise aided by modern technology. The theory of vicarious or constructive liability, whatever we may call it, is aimed to bring within the legal net, the category of offenders who are instantly not on the forefront. The provisions relating to it have been embedded in the Indian Penal Code create criminal liability by legal fiction by which mens rea is imputed on the basis of overt or covert act of the offender.

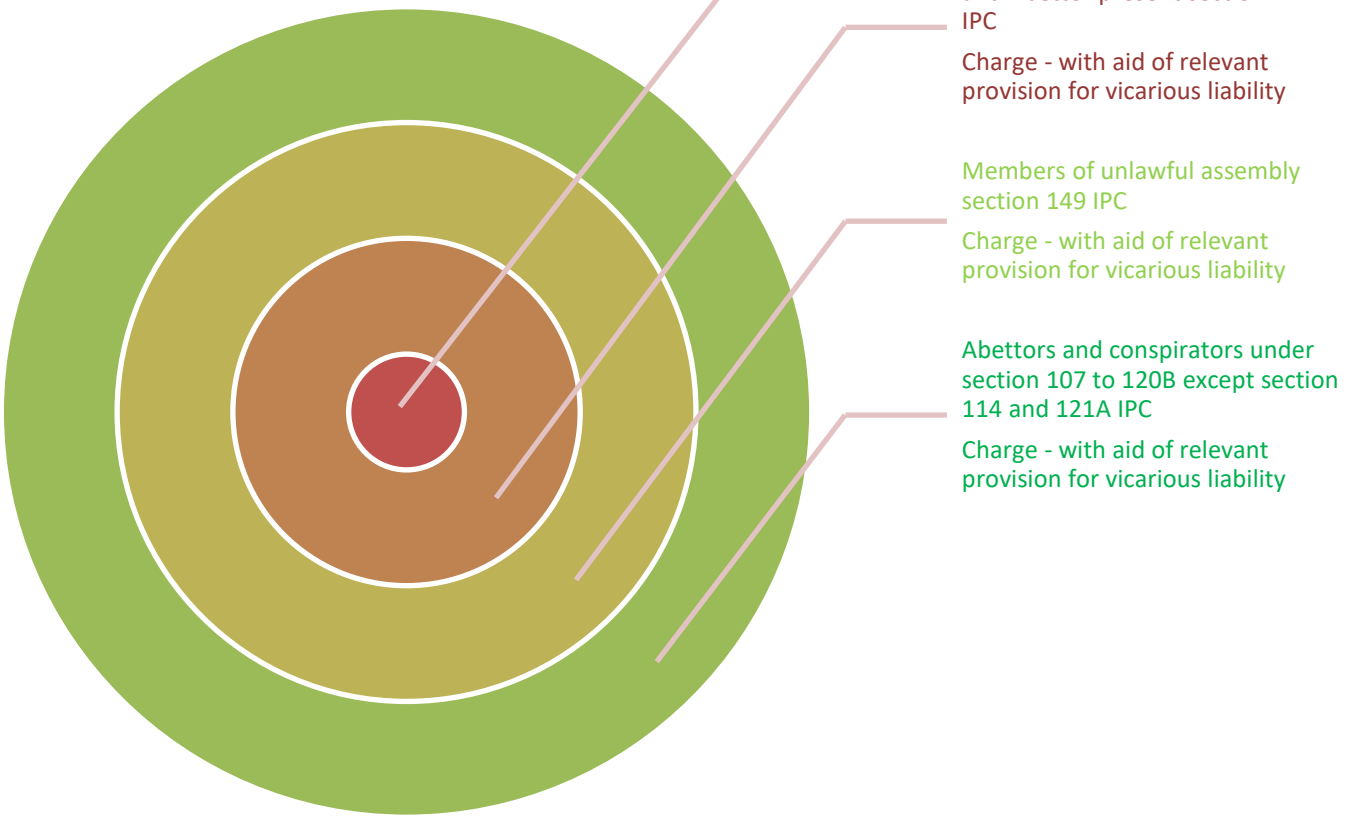
When the Indian Penal Code was enacted in 1860, it was not codified in Great Britain. It was but natural that Lord Macaulay who drafted the Penal Code was much influenced by the common law principles which is reflected not only in different sections of the Code but also in its chapterization. The criminal liability under the Indian Penal Code for

criminal acts committed by groups has a distinct imprint of the English Common Law which makes a distinction between the principal offender and the accessories to the crime. The fastening of criminal liability on persons other than the principal offenders for individual and collective acts has always been a tricky business. Under English Law persons who are in any way connected with the perpetration of crime can be divided into two classes: - those who take part in the actual execution of the crime, called the principals and those who counsel, procure or command the execution and in any way assist the criminal after the crime with a view to shield him from justice, called the accessories.

- ***Principal offenders –*** those who take part in actual execution of the crime.
- ***Accessories –*** those who counsel, procure or command the execution.
    - ***Accessories before the fact-*** Chapter-V from Section 107 to 120
    - ***Accessories at the fact –*** Section 34 to 38 Under chapter – II and section 149 of the IPC
    - ***Accessories after the fact-***are scattered in different provisions namely 130, 136, 157, 212 and 216 under the title Harbouring. Sections 34 to 38 do not create a substantive offence, they are interpretative clauses.

When it comes to ascription of criminal liability on accessories for collateral acts that have been committed in the course of the principal offence, the principles of vicarious liability for joint criminal enterprise under different provisions of the Penal Code namely sections 34 to 38, 170 to 120 and 149 of the IPC are applied. The terms 'joint liability' 'common liability', 'constructive liability' or "vicarious liability" convey more or less one legal mandate. Constructive liability in criminal law means the liability

of a person for an offence which he has not actually committed. An act committed by another person will be attributed to the accused if such an act is done in furtherance of common intention or in prosecution of a common object. This must not however be confused with vicarious liability. Vicarious liability is the liability one incurs of the acts of a servant or an agent during the course of service. Vicarious liability in criminal law is an exception rather than a rule. But constructive liability in criminal law is a well recognized principle. The phrase constructive liability means and connotes the sense that a person is liable in law for the consequences of an act of another even though he has not done it himself. The word abettor in the Code corresponds to the word accessory in English law.



Accessories under the law are of three kinds:

a) accessories before the fact,
b) accessories at the fact, otherwise known as principals of second degree and
c) accessories after the fact.

The IPC does not strictly follow this classification, but the grouping of different provisions of vicarious liability is evident from it.

Chapter II Sections 34 to 38 IPC

The batch of Sections 34 to 38 deals with cases in which two or more persons are involved in one and the same crime. These sections do not create a substantive offence but only lay down principles for determination of the criminal liability of such persons. As a matter of construction, these sections are interpretative clause included in Chapter II on General Explanation and must be read into the definitions of substantive offences.

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

Scope: Quite interestingly, Sections 34, 111 and 113 I.P.C were not recommended in the draft of the Penal Code prepared by Lord Macaulay and were inserted subsequently on the recommendation of the committee headed by Sir Barnes Peacock, the Chief Justice of the Calcutta High Court. Section 34, IPC does not create a substantive offence. This section fastens constructive liability if two or more persons sharing the common intention act in furtherance thereof. The constructive liability under this section would arise if following two conditions are fulfilled: (a) there must be a common intention to commit a criminal act; and (b) there must be participation of all in doing such act in furtherance of that intention.

Common intention need not be anterior in point of time when the crime was committed and may develop at the spur of the moment when the crime was committed. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 34 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away in order to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused in order to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

There may be other provisions in the IPC like Section 120-B or Section 109 which could be invoked to catch such non-participating accused. Thus, participation in the crime in furtherance of the common intention is sine qua non for Section 34 IPC.

For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in mind. Under Section 32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission.

The decision of the Privy Council in *Mahbub Shah's case AIR 1945 PC 148* is warrant only for the proposition that it is not enough to attract the provisions of Sec. 34 that there was the same intention on the part of the several people to commit a particular criminal act or a similar intention, but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events, though it might not have been present to start with.

"In Crime as well as in life, he also serves who merely stands and waits" – Lord Sumner in Barendra Kumar Ghose Case

Free Fight – State of Bihar vs. Surendra Singh Rautela, 2001 Cr.L.J. 1650 (Jhr.) **-** In case of free clash between several persons when injuries have been received by several persons of each group, section 34 IPC cannot be invoked

***Sudden Fight* –** Normally section 34 IPC would not apply, if the fight begins suddenly. Each person would be taken as responsible for his individual act.

Same intention may become common intention.

Q: Can an accused be convicted under section 304 part II with aid of section 34?

Answer: This question has been answered in *Afrahim Seikh vs. State of WB, AIR 1964 (SC) 1263:* The question is whether the second part of S.304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death is the likely result of the beating, that the requirements of S. 304, Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why Section 304, Part II cannot be read with S. 34. The common intention is with regard to the criminal act i.e. the act of beating. If the result of the beating is the death of the victim , and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e., beating, there is no reason why S. 34 or S. 35 should not be read with the second part of S. 304 to make each liable individually.

2009 (4) East Cr. C 80 SC Aizaz Vrs. State of U.P.

To constitute common intention it is necessary that intention of each one of them be known to rest of them and shared by them. The essence is simultaneously, consensus of the minds of persons participating in the criminal action to bring about a particular result. The participation need not in all cases be physical presence. In offence involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offence when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be render liable is not one of the conditions of its applicability in every case.

Ingredients :

- In furtherance of common intention
- Participation in the act by two or more persons
- Prior concert of meeting of mind

Mahbub Shah's case AIR 1945 PC 148- The section does not say "the common intentions of all" nor does it say an intention common to all. The section uses the expression "in furtherance of common intention of all". This shows the requirement of a pre-concert or a pre-arranged plan.

Virtual presence-

Suresh Vs. State of U.P., 2001(3) SCC 673

It has been held in this case that where one of such persons in furtherance of common intention, overseeing the actions from a distance through binoculars, gives instructions on mobile section 34 will apply.

Vicarious Liability of Company

HDFC Securities Ltd Vs State of Maharashtra : AIR 2017(SC) 61

The IPC, does not provide for vicarious liability for any offence alleged to be committed by a company. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor, *for example,* the NI Act 1881. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company.

Sharad Kumar Sanghi Vs Sangat Rane (2015)12 SCC 781

When a complainant intends to rope in the Managing Director or any officer of the Company, it is essential to make requisite allegation to constitute the vicarious liability.

Maksud Sayed Vs State of Gujarat 2008(5) SCC 668

Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate, in this case, failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

Sunil Bharti Mittal vs. C.B.I. 2015AIR(SC) 923

Magistrate can summon any person even if not named in charge sheet provided there is sufficient material to proceed against him and a prima facie case is made out.

The principle of 'alter ego' stipulates that criminal intent of the "alter ego" of company would be imputed to the company/corporation; not vice versa. Other way round runs contrary to the principle of vicarious liability and is not permissible.

Standard Chartered Bank vs Directorate of Enforcement, (2005) 4 SCC 530--There is no immunity to the companies from prosecution merely because the prosecution is in respect of offences for which the punishment prescribed is mandatory imprisonment. We do not think that the intention of the legislature is to give complete immunity from prosecution to the corporate

bodies for these grave offences. The offences mentioned under Section 56(1) of the FERA Act, 1973, namely, those under Section 13; clause (a) of sub-section (1) of Section 18; Section 18-A; clause (a) of sub-section (1) of Section 19; sub-section (2) of Section 44, for which the minimum sentence of six months' imprisonment is prescribed, are serious offences and if committed would have serious financial consequences affecting the economy of the country. All those offences could be committed by company or corporate bodies. We do not think that the legislative intent is not to prosecute the companies for these serious offences, if these offences involve the amount or value of more than Rs one lakh, and that they could be prosecuted only when the offences involve an amount or value less than Rs one lakh. As the company cannot be sentenced to imprisonment, the court cannot impose that punishment, but when imprisonment and fine is the prescribed punishment the court can impose the punishment of fine which could be enforced against the company. Such discretion is to be read into the section so far as the juristic person is concerned. Of course, the court cannot exercise the same discretion as regards a natural person. Then the court would not be passing the sentence in accordance with law. As regards company, the court can always impose a sentence of fine and the sentence of imprisonment can be ignored as it is impossible to be carried out in respect of a company. This appears to be the intention of the legislature and we find no difficulty in construing the statute in such a way. We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment. The corporate bodies, such as a firm or company undertake a series of activities that affect the life, liberty and property of the citizens. Large-scale financial irregularities are done by various corporations. The corporate vehicle now occupies such a large portion of the industrial,

commercial and sociological sectors that amenability of the corporation to a criminal law is essential to have a peaceful society with stable economy.

Section 35 – When such an act is criminal by reason of its being done with a criminal knowledge or intention –Whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Scope –This section supplements the principle embodied in section 34. It deals with those cases in which acts are crimes by reason only of a particular intent or knowledge. It may be noted that the expression "in furtherance of common intention of all" of Section 34 is absent in Section 35. A number of persons acting with similar intention without any pre-arranged plan cannot be said to act in furtherance of common intention and section 34 may not apply, but the applicability of S.35 will not be excluded in cases. Under section 34, each and every person who performs even the fractional part of the act in the furtherance of common intention is deemed to be regarded as the performer of whole of it. But where the performer has the requisite intention of the ***individual fractional act, but not the common intention of the whole*** then in term of Section 35 he will be liable only for his fraction act alone. Section 35 only speaks of a number of persons doing an act with certain criminal knowledge or intention and not under a common intention, ***so that a pre-concerted plan will not be necessary to make this section applicable.***

Criminal act and Offence

Section 34 does not use the expression "offence" but requires "criminal act" to be committed in the furtherance of common intention and the

common intention required by the section only relates to criminal act as a whole and not to the particular offence that is committed in the course of the criminal act, provided the act falls within the scope of offence. In section 35, the word 'act' has been used which may not be criminal per se and the condition for application of this section is that it has been committed with criminal intention or knowledge.

In Section 34, therefore, intention and knowledge need not to be proved against each of the accused, but only a criminal act in the furtherance of common intention. On proof of participation in any manner in the criminal act committed in the furtherance of common intention, the accused has to rebut the presumption by giving defence that he had no intention to commit the offence.

Section 35 deals with participation in action where knowledge or intention has to be expressly proved. Under Section 35, the prosecution has to establish criminal intention or knowledge on the part of each of the accused. Under section 34, the intention or knowledge is presumed. .

Further, under Section 34 a **criminal act** need to be committed, but under Section 35 it may be any act, not necessarily criminal , but done with intention or knowledge.

It has been held by ***Calcutta High Court in*** *Adam Ali Talugdar v. Emperor, AIR 1927 Cal. 324: (1927) 28 Cr. LJ 334* that "*The last section (S.34) dealt with a case in which several persons were assumed to conspire with the common intention of committing a crime. This section goes further and provides that where the element of a particular knowledge or a particular intention enters in the composition of a crime, all the co-accused must be shown to possess that particular knowledge or intention in common, otherwise they cannot be held jointly liable for the crime committed by any of them.*"

In the Bhopal Gas Tragedy, *1996 SCC (6) SC 129, Keshub Mahindra Vs. State of M.P.* ***case the Apex court held that mere fact of running of a plant with proper permission could not be a criminal act and the mere act of storing hazardous substance or having a defective plant could not suggest prima facie that the accused had knowledge that they were likely to cause death of human being. Framing of charge under section 304(2) read with section 35 IPC, therefore was not proper and was quashed. By the said judgment dated 13.9.1996 the Hon'ble Supreme Court quashed the charges framed against accused Nos. 2 to 5, 7 to 9 and 12 under Sections 304 (Part II), 324, 326 and 429 IPC and directed that the charges of 304A IPC could be made out against accused Nos. 5, 6, 7, 8 and 9 and under the same sections with the aid of Section 35 against accused Nos. 2, 3, 4 and 12.***

It was observed in this case that *this (S.35) provides that where several persons are concerned in an act which is criminal only by reason of it being done with a criminal intention or knowledge, each of such persons who join in the act with such knowledge is liable for act in the same manner as if the act were done by him alone with that knowledge. The effect of section 35 is that although an act may be done conjointly by two or more persons, it is only such of them as do the act with a criminal intention or knowledge that will be liable and not the others.*

So far as the remaining accused Nos. 2; 3, 4 and 12are concerned the material produced on record clearly indicates at least prima facie that they being at the helm of affairs have to face this charge for the alleged negligence and rashness of their subordinates who actually operated the plant on that fateful night at Bhopal and for that purpose section 35 or the IPC would also prima facie get attracted against them. A mere look at that Section shows that if the act alleged against these accused becomes

criminal on account of their sharing common knowledge about the defective running of plant at Bhopal by the remaining accused who represented them on spot and who had to carry out their directions from them and who were, otherwise required to supervise their activity, Section 35 of the IPC could at least prima facie be invoked against accused 2, 3, 4 and 12 to be read with Section 304 A, IPC.

Section 36 – Effect caused partly by act and partly by omission – Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or an omission is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same.

Illustration – A intentionally causes Z's death partly by illegally omitting to give the Z food and partly by beating Z. A has committed murder.

Scope:

This section is to be read along with section 32 of this Code. In fact, this section is the corollary of section 32. The legal consequences of an 'act' and of an 'omission' are the same. If an act is committed partly by an act and partly by an omission, the consequences will be the same. This section shows that when an offence is the effect partly of an act and partly of an omission it is only one offence, which is committed and not two. The word act includes illegal omission. This section unlike Ss 34 and 35 consciously avoids the word intention or knowledge so a judicial determination on the part of intention or knowledge will not be called for in such a case.

In *Sushil Ansal vs. CBI 2002 CriLJ 1369* relating to the Upahar fire tragedy case, framing of charge under Ss 304 A, 337 and 338 r/w 36 of the IPC was upheld by the Delhi High Court considering the cumulative omissions leading to the offence of negligence leading to fire tragedy and consequent

deaths and injuries. In this case the manager of the Cinema hall was convicted on trial under Sections 304-A/337/338 read with Section 36 IPC and Section 14 of the Cinematograph Act, 1952.

Section 37- Co-operation by doing one of several acts constituting an offence – When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those act, either singly or jointly with any other person, commits that offence.

Scope: Section 37 deals with such offenders who cooperate in the commission of the offence. Intention in the cooperation of the commission of the offence is the paramount consideration and is the ingredient of the offence. Cooperation can be simultaneous or can be in parts i.e. one after the other. If the cooperation is simultaneous and the offenders are present at the time of the commission of the offence then all are jointly liable under section 34 of this Code, but when they are cooperating and are not physically present at the time the offence is complete, all are liable under section 37.

In other words, anyone supplying a link in the chain of a series of acts or commissions is liable for the consequent offence committed as if he were the author of the whole chain of acts or omissions. The cooperation required by the section need not be active participation. It may be passive also.

The difference with section 34 can be better appreciated by one illustration of conjoint assault by several persons, some giving blows, some stick blows, some knife injury and some gunshot injury. The acts done by them cannot be treated as several within the meaning of S.37. They are doing one criminal act and their different acts being done in the furtherance of common intention to murder the victim and S.34 will apply

squarely. The reason is that although several persons joined together in committing the crime and the injuries may have been caused by various acts, all their acts constitute, from a common sense point of view, only a single act and not several different acts. The words 'several acts' in this section also mean 'several series of acts'. Section 34 postulates common intention while this section, intentional co-operation.

Where all concur in effecting the criminal result, each does the act so far as his own part extends, and, as to the residue, may be regarded as causing it to be done by means of a guilty agent. All the persons concerned stand in the mutual relation of principals and agents to each other. If, for instance, several persons combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.

Practically, when the case involves an offence committed by a series of acts based on circumstantial evidence, proof of one of the acts done with requisite intention shall be sufficient to attract Section 37 to make the offender performing part of the act liable for the offence.

This Section contemplates offence to be committed by several acts. Where such is not the case and there is only one indivisible act, this section will have no application. In order to amount to co-operation in the commission of an offence by doing several acts, all the person doing the acts need not be present at the same time and place where the offence is completed. This section also does not require act to be done in furtherance of common intention. This section will come into play in case of collusive enterprise where the collaborator has intentionally given effect to the part of the act but cannot be held liable under any of the foregoing sections of vicarious liability.

The distinction with section 34 has been succinctly drawn in ***Barendar Kumar vs Emperor*** - "*Section 34 deals with doing of separate acts, similar or diverse by several persons; if all are done in furtherance of common intention, each is liable for the result of them as if he had done himself.....Section 37 provides that when several acts are done to result together in the commission of an offence, the doing of any one of them with an intention to co-operate in the offence, which makes the actor liable to punished for the commission of the offence*"

Interrelation among sections 34 to 37

All these sections create criminal liability of a person for his acts which may or may not be the principal act constituting the offence, yet the legal basis and requirements are different in these sections. While section 34 speaks about "**a criminal act** done by several persons", section 35 talks about "**an act"** simplicitor, which may not be criminal *per se* , section 36 deals with the effect produced "**by an act or by an omission"** resulting in an offence, section 37 targets **"cooperation in commission"** of several acts constituting an offence. Section 36 does not require intention or knowledge but other sections do require the same.

From the above, it is manifest that where a criminal act is committed section 34 shall be attracted under the conditions mentioned therein. Section 35 shall come into play in the absence of common intention and prior concert of mind, but where the act has been committed with requisite criminal knowledge or intention. Section 36 shall apply to a situation where the offence is the outcome of partly an act and partly an omission. Section 37 aims at cases where an offence is committed by means of several acts and those who intentionally cooperate by doing any one of those acts shall be liable for that offence.

Section 38 – Persons concerned in criminal act may be guilty of different offences – Where several persons are engaged or concerned in the commission of a criminal act they may be guilty of different offences by means of that act.

Scope: Section 38 of the IPC is the converse of Section 34 of the IPC and provides for different punishments for different offences, where several persons are concerned in the commission of a criminal act, whether such persons are actuated by one intention or the other. Section 38 applies where a criminal act is jointly done by several persons and several persons have different intentions or state of knowledge in doing the joint act. The Section provides that the responsibility for the completed act may be of different grade according to the share taken by different accused in the compilation of the criminal act; the section does not mention anything about the intention, common or otherwise or knowledge.

The next question arises about the criminal liability of the persons who did not actually participate in the crime, but was the member of the unlawful assembly and an offence is committed in the prosecution of the common object?

Section 149 is an answer to such a situation and in such an eventuality, while the principal offender will be charged with the main offence, others will be charged with the main offence r/w 149 IPC .

Section 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.

Scope: This section does not define offence but merely provides that in certain circumstances persons may be convicted of an offence under the Indian Penal Code. "What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the person constituting the assembly and he entertained alongwith the other members of the assembly the common object as defined in Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all."Common object" is different from a "common intention" as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances.

Ingredient of the offence:

1. The accused must be a member of the unlawful assembly.
2. An offence must be committed by another member of the assembly.
3. The offence must have been committed in the prosecution of common object of that assembly or ;

   The members of the assembly must have known that such offence was likely to be committed in prosecution of the common object of the assembly
4. Prior formation of an unlawful assembly with a common object is not necessary as the common object can develop *eo instanti.*

Palakom Abdul Rahim vs. State of Kerala, 2019(4) SCC795

The accused persons in all 11 persons were initially charge-sheeted including the appellants for the offence under Sections 143,148, 323, 324,325 and Section 302 IPC **read with Section 149** of the IPC. There was a separate charge against Accused 1 and 3 for the offence under

Section 302 **read with Section 34 IPC** and yet alternate charge under Section 302 against accused no.3.

1. Trial Court convicted A1 and A3 along with other accused persons under Sections 143,148, 323, 324,r/w S149 and for Section 302 r/w 149 IPC.
2. Kerala HC held all the three accused guilty under S302/34 IPC
3. **The Hon'ble Apex Court:** When an accused is held guilty under law for offence under Section 302 r/w 34, in law means that the accused is liable for the act which caused the death of the deceased in the same manner as if it was done by him alone.

   It goes without saying that it would depend on facts of each case as to whether Section 34 or Section 149 or both the provision are attracted. The non-applicability of Section 149 is no bar in convicting the accused under Section 302 r/w 34 of the IPC, provided there is evidence which discloses commission of offence in furtherance of common intention and this Court had an occasion to consider the application of Section 34 and Section 149 as follows in *Birbal Choudhary vs State of Bihar:*" At the same time, it is also clarified that it would depend of facts of each case as to whether Section 34 or Section 149 of both the provisions are attracted. It is also held that it would depend on the facts of each case as whether Section 34 or Section 149 IPC or both provisions are attracted."

Mala Singh & Others Vs. State of Haryana, 2019 (2) JLJR SC 183

IPC Sections 302/323/506/149/148 – 11 accused persons were tried, however, 8 co-accused were acquitted by High Court under section 302/149 by giving them benefit of doubt but the High Court convicted appellants under section 302/34 though the initial trial was on the basis of charge under section 302/149 – Prosecution failed to adduce any evidence against three appellants to prove their common intention of the

murder of the deceased. Evidence led in support of charge under section 149 was not sufficient to prove the charge of common intention of appellants under section 34.

In *Pandurang Chandrakant Mhatre & Ors. vs. State of Maharashtra, (2009) 10 SCC 773*, the Hon'ble Apex Court cautioned that where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, only those accused, whose presence was clearly established and an overt act by any one of them was proved, should be convicted by taking into consideration a particular fact situation.

Muthuramalingam & Ors vs State Represented by Inspector of Police, Criminal Appeal No. 231-233 of 2009 SC

An overt act is not always an inflexible requirement of rule of law to establish culpability of an unlawful assembly. The crucial question is whether the assembly entertained a common object and whether the accused was one of the members of such an assembly by intentionally joining it or by continuing in it being aware of the facts which rendered the assembly unlawful. Without unlawful object no assembly becomes an unlawful assembly.

Question: Whether persons less than five can be tried and convicted under Section 149 of the I.P.C?

1963 AIR 174 SC, Mohan Singh vs State of Punjab ***(5J) answers the above question.***

It would thus be noticed that one of the essential ingredients of section 149 is that the offence must have been committed by any member of an unlawful assembly, and s. 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided of course; the other requirements of the said section as to the

common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. ------- We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.

In dealing with the, question as to the applicability of s. 149 in such cases it is necessary to bear in mind the several categories of cases which come before the Criminal courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very where s. 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under s. 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under s. 302/149 if the charge is that the persons before the court, along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the court does not make section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the court and others number more than five in all and as Such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under s. 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. Similarly, less than five persons may be charged

under s. 149 if the prosecution case is that the persons before the court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the court along with unidentified and un-named assailants or members composed an unlawful assembly, those before the court, can be convicted under section 149 though the unnamed. and unidentified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving, before the court less than five persons to be tried, then s. 149 cannot be invoked.Even in such cases, it is possible that though the charge names five or more persons is composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under section 149 because along with the two or three persons convicted where others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases the acquittal of one or more persons named in the chargedoes not affect the validity of the charge under section 149 because-on the evidence the court of facts is able to reach the conclusion that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the unlawful assembly un-named and unidentified may

conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under section 149 is framed.

Section 34 and 149

The classical distinction between the two provisions is as follows:

(1) Section 34 does not by itself create any specific offence, whereas section 149 does so.

(2) Some active participation, especially in crime involving physical violence, is necessary under section 34, but section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime.

(3) Section 34 speaks of common intention, but section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention.

Section 34 does not fix number of persons who must share the common intention, but section 149 requires that there must be atleast five persons who must have the same common object.

Chapter V (Sections 107 to 120 B)

Abetment – Sections 107 to 118

The word abettor in the Code corresponds to the word accessory in English law.

Section 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 **willful misrepresentation, or by willful 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 authorised by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully 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 facilitates the commission thereof, is said to aid the doing of that act.

Scope:

In order to constitute the offence of abetment there must be guilty intention or knowledge. All three forms of abetment stated in the section

involve guilty intention or knowledge on the part of the abettor. If the person who lends his support does not know or does not have reason to believe that the act which he is aiding or supporting was itself a criminal act, it cannot be said that he intentionally aids or facilitate the commission of an offence and that he is an abettor.

The word instigate denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite.

Law does not require instigation to be in a particular form or that it should only be in words. The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case. It is not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetting was instigation and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abettor. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Further the act abetted should be committed in consequence of the abetment or in pursuance of the conspiracy as provided in the Explanation to Section 109.

Abetment by Conspiracy

A conspiracy to do a thing is a combination of two or more persons with a common design of doing a specific thing. Under Sections 120 A and 120 B, bare agreement between two or more persons constitutes an offence under the circumstances mentioned therein. Thus an **agreement to commit an offence** is by itself an offence under Section 120 A, though nothing more is done in furtherance of the conspiracy.

The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy.

There must be some act or illegal omission in pursuance of that conspiracy.

Another point of distinction is that abetment by conspiracy under 107 and 108 always connotes a conspiracy **to commit an offence**. But, there can be a criminal conspiracy under section 120A even though the agreement between the conspirators is not to commit an offence but only to do an **illegal act or a legal act by illegal means**.

But where the agreement is not to commit an offence in order to constitute an offence but say a legal act by illegal means under Section 120 A, it is necessary under its proviso that some act is done by one or more of the parties to such agreement in pursuance thereof. But where the agreement is to commit an offence, the offence of criminal conspiracy will be complete by the very fact of the agreement even though nothing further is done under the agreement. **Further, under section 121A, the mere conspiracy to wage war against the Government of India without anything further, has been made an offence.**

The Law Commission of India, in 1971, opined that it was strongly of the view that there is neither theoretical justification nor practical need for punishing agreements to commit petty offences or non-criminal illegal acts. In line with this, the Commission recommended that the offence of criminal conspiracy should be limited to agreements to commit offences which are punishable with at least imprisonment for a term of two years upwards. This recommendation has largely been accepted under Section 196 Cr.P.C wherein sanction is required for prosecution for offences under Section 120 B punishable for a term of two years or less.

Aid by Act

The offence of abetment by aid must be distinguished from the commission of the offence itself. To prove the charge of abetment by aid, it

is necessary to prove that the accused facilitated the commission of the act, with knowledge of the offence.

It has been held that howsoever insignificant the aid may be, it would be abetment if it is given with the requisite intention or knowledge. The test is not to determine whether the offence would or would not have been committed if the aid had not been given but whether the act was committed with the aid of abettor in question.

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.

Illustration

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

Scope : Section**107** specifies when a person can be said to abet an “act” or as the section says doing of a thing . This section clarifies when abetment of an act will be abetment of an offence. If there is no abetment at all as defined in Section 107 there is no question of any abetment of an offence. There is no question of abetment after the offence is completed.

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 abated 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.

Scope: Generally where the principal offence fails, the charge of abetment shall also fail. But this is not a universal rule and it admits of exception depending on the facts and circumstances of the case.

Gallu Sah vs. State of Bihar, AIR 1958 SC 813 is a case where the principal offender was acquitted of the charge but the abettor was held guilty on evidences available on record.

6. We now turn to the second point urged on behalf of the appellant. It must be emphasizes here that the learned Judge was satisfied that (1) the appellant gave the order to set fire to the hut and (2) that the hut was actually set fire to by one member or another of the unlawful assembly, even though the unlawful assembly, as a whole did not have any common object of setting fire to the hut of Mst. Rasmani. The point taken by learned counsel of the appellant is that when the learned Judge did not accept the evidence of the witnesses that Budi set fire to the hut there was really no evidence to show that the person who set fire to the hut of Mst. Rasmani did so in consequence of the order given by Gallu Sah. The learned Advocate points

out that one of the essential ingredients of the offence is that the act abetted must be committed in consequence of the abetment.....

It seems to us, on the findings given in the case, that the person who set fire to the hut of Mst. Rasmani must be one of the persons who were members of the unlawful assembly and he must have done so in consequence of the order of the present appellant. It is, we think, too unreal to hold that the person who set fire to the hut of Mst. Rasmani did so irrespective, or independently, of the order given by the present appellant. Such a finding, in our opinion, would be unreal and completely divorced from the facts of the case and it is necessary to add that no such finding was given either by the learned Assistant Sessions Judge of the High Court. As we read the findings of the learned Judge, it seems clear to us that he found that the person who set fire to the hut of Mst. Rasmani did so in consequence of the abetment, namely, the instigation of the appellant.

1994 SCC(Cri) 1150, Manbir Singh vs. State of UP

When it was established that the co-accused had the gun and the belt of cartridge and during altercation between the deceased and the principal accused who took the gun, and loaded it, co-accused had exhorted the principal accused to shoot the deceased, then the instigation is clear and clearly amounts to abetment that resulted in the shooting of deceased by principal accused hence the co-accused is liable to be convicted under Section 302 /109 of the IPC.

*Bank of India Vs. Yeturi Maredi Shankar Rao, AIR 1987 SC 821,*accused was Accounts Clerk in the bank who obtained the passbook of the victim for posting upto date entries and never returned the same. After about a month Rs. 6000/- was withdrawn from her account by a withdrawal form.

During investigation forgery of withdrawal was proved. The first appellate court convicted the accused under section 467 /109 and section 471. The Hon'ble HC acquitted him under section 467/109 and consequently set aside his conviction also under section 471. Hon'ble Apex Court admitted that the forgery of signatures could not be connected with the accused, but based on circumstances he was convicted under sections 467/109 and 471.

Note: The main take away from this case is that charge of forgery is difficult to prove if the main accused has got it done by an anonymous accomplice, because section 467 is directed against the person who has forged a document. To prove this part, objective finding regarding the person having committed forgery may be required on the basis of some cogent evidence like signature verification, depending upon the facts circumstances of the case. Section 467 read with Section 109 becomes applicable in such case and evidence of any act of instigation, conspiracy or aid in the commission shall be sufficient to bring home the charge against the accused. Therefore, caution need to be exercised in such cases while framing charge.

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.

Scope: This section applies where the abetted person does the very act abetted, but with a different intention from that of the abettor. If the act if done with the intention or knowledge of the abetted person

constitutes one offence, and if done with the intention or knowledge of the abettor, another offence, the abettor would be liable only for the latter offence. Thus, where the abettor abets the act of simple beating but the accused person give such a beating as results in death and the offence under Section 304/34 is made out against the accused persons, still the abettor shall be liable only for the offence of simple hurt. For satisfying the requirement of S.114 or S.109 the meeting of mind is necessary.

Matadin Vs State of Maharashtra AIR 1999 SC 138

In this case the charge was framed under Ss 302/34of the IPC against the two accused. On the exhortation of the appellant Matadin the other co-accused inflicted the fatal knife cut injury.

Held: The courts below have not found that the language which Matadin used exhorting his fellows was used in such a tone as to exhort them to kill Ashok or to cause grievous hurt to him by using dangerous weapons or means. When the words "maro sale ko" are used it could mean "to beat" or even "to kill" a person. Though the witnesses have stated that these words were used by Matadin in abusive way but from that it could not be said that he exhorted his fellows to kill Ashok. We, therefore, set aside the conviction and sentence of Matadin under Section 302 read with Section 34 IPC and instead convict him under Section 324/110 IPC.

Section 111 – 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.

Provided the act done was *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.

Scope: Section 109 and 110 provide for cases where the act done is the very act abetted while this section provides for cases in which the act done

is different from the act abetted. The abettor is liable for such different act committed provided the conditions laid down in the section are satisfied. This section and Sections 112 and 113 make it abundantly clear that if a person abets another in the commission of an offence and the principal goes further and does something more which has a different result from that intended by the abettor and makes the offence an aggravated one, the abettor is liable for the consequence of the acts of his principal. A probable consequence of an act is one which is likely or which can be reasonably expected to follow from such an act. An unusual, unexpected consequence cannot be described as a probable one.

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.

Scope: As seen in S.111, an abettor is liable for an act done by the person, abetted, though it is different from the one abetted, provided it fulfils the conditions laid down therein.

Section 113 – Liability of an abettor for an effect caused by the acct 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 causes *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 which the intention of causing that effect, provided *they knew that the act abetted was likely to cause that effect***.**

Scope: What is immediately apparent is the different criterion of liability for a "different act" (Ss111&112) being done and for a "different effect" (S.113) being caused. "***Different act" liability is to be on the probable consequences and "different effect" liability*** is to be governed by a different rule – that which the ***abettor actually knew to be likely to happen***. The plain connotation of "different act" liability being which is objectively foreseeable as being likely to happen. So we have ***section 34 – common intention, section 111 – probable consequence, section 113 – knowledge of likelihood and section 149 – common object***.

Whenever the Court is confronted with the issue of group or gang crime, where so called collateral crime is committed, the court concerned need to take a serious view, since such crimes are not committed without any prior plan and therefore the foreseeability or likelihood of the probable consequence can be presumed in such cases depending on the evidence on record. Thus, where in case of robbery, murder, injury or such offence is committed in case of participation they can be presumed to be in furtherance of common intention and in case where the accused has abetted the offence he can be charged under Section 111 and 113 of the IPC.

Section 114 Abettor present when the 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.

Scope: Where the abetment is completed prior to the commission of the offence and the abettor is also present at the commission of the offence, the abettor is deemed to have committed the offence himself. In the absence of the proof of the two ingredients namely--

1. abetment prior to the commission of the offences and
2. abettor's presence at the time of such commission,

this section will not apply. S. 114 deals with constructive liability. Where the act abetted is not an offence this section will have no application.

AIR 1981 SC 1417, State of Karanatka vs Hema Reddy

Where accused, A, a mortgagee abetted the execution in his favour of a forged sale deed in respect of the mortgaged property by another accused B, B will be liable to be convicted under Section 467 r/w 114 IPC

AIR 2005 SC 1271, Mukti Prasad Rai vs State of Bihar

Where the two appellants armed with lathis entered into the house and instigated other to beat the deceased and his son, it would be safe and appropriate to convict the two appellants under S.324 r/w 114 of the IPC *" Coming to the role ascribed to appellant Nos. 1 and 2, the evidence on record does not support the prosecution case that these two appellants entertained the idea of killing Kartik Rai and his son and with that idea in*

mind they exhorted the other accused to kill one or both of them. The allegations in regard to exhortation are omnibus in nature. PW-3 and PW-6, who are the main eye-witnesses did not depose to the fact that the call was given by these two appellants to kill Kartik Rai and/or his son. The exhortation was to beat them up, though PW-6 had stated in the First Information Report that the appellant Nos. 1 and 2 and Shakti Prasad Rai (since died) exhorted others to kill them. That allegation was not reiterated by PW-6 at the time of deposition in the Court. However, the fact that appellants Nos. 1 and 2 were also armed with lathis when they trespassed into the house of the deceased is a positive indicator that they did not enter the house as mere onlookers. Therefore, accepting the version of PW-3 and PW-6 to the effect that appellants Nos. 1 and 2 instigated others to beat up, it would be safe and appropriate to convict them namely Mukti Prasad Rai and Parmeshwar Prasad Rai under Section 324 read with 114 IPC and sentence them to imprisonment for a period of one year and a fine of Rs. 500/- each. In default of payment of fine, they shall suffer simple imprisonment for a further period of two months. Accordingly, we do so."

1991 CriLJ 2138 Khem Karan Vs State of UP

In a case of murder where one of the accused instigates others to beat deceased he can be convicted only under S.114 but not under Ss 302 IPC

Criminal Conspiracy

Section.120(A) 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.

120B. Punishment of criminal conspiracy--

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 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.***

Scope: The essence of conspiracy is an agreement to do an illegal act or a legal act by illegal means. A person may be convicted of conspiracy as soon as such a conspiracy is hatched before any act is carried into effect. The offence is complete as soon as the parties have agreed to their unlawful purpose, although nothing has been settled as to the means or devices to be employed for affecting it. In order to prove a criminal conspiracy which is punishable under section 120B of the IPC, there must be direct or circumstantial evidence to show that there was agreement between two or more person to commit the offense.

Section 10 of the Evidence Act makes a departure from the conventional law of criminal jurisprudence, under which, the acts of the co-accused is

normally not regarded as a evidence against the other. U/s 10 of the Evidence Act anything said done or written by an accused can be used against another if there is evidence of conspiracy.

Firozuddin Basheeruddin vs. State of Kerala, AIR 2001 SC 3488

Like most crimes conspiracy requires an act actus reus and accompanying mental state (mens rea). The agreement constitutes the act and intention to achieve unlawful objective of the agreement constitutes the required mental state. In the phase of modern organized crime, complex business arrangement in restraint of trade, and subversive political activity, conspiracy law has witnessed extension in many forms.

Conspiracy criminalizes an agreement to commit a crime. All conspirators are liable for crimes committed in furtherance of conspiracy by any member of the group – as regards admissibility of evidence strict standards are not necessary in as much any declaration made by a conspirator in furtherance of and during pendency of a conspiracy though hearsay, is admissible against each co-conspirator—To put it differently, the law punishes conduct that threatens to produce the harm, as well as conduct that has actually produced it. Contrary to the usual rule that an attempt to commit a crime merges with the completed offense, conspirators may be tried and punished for both the conspiracy and the completed crime. The rationale of conspiracy is that the required objective manifestation of disposition to criminality is provided by the act of agreement. Conspiracy is a clandestine activity. Persons generally do not form illegal covenants openly. In the interests of security, a person may carry out his part of a conspiracy without even being informed of the identity of his co-conspirators. Since an agreement of this kind can rarely be shown by direct proof, it must be inferred from circumstantial evidence of co-operation between the accused. What people do is, of course, evidence of what lies in their minds. To convict a person of conspiracy, the prosecution must show that he agreed

with others that together they would accomplish the unlawful object of the conspiracy. Another major problem which arises in connection with the requirement of an agreement is that of determining the scope of a conspiracy - who are the parties and what are their objectives. The determination is critical, since it defines the potential liability of each accused. The law has developed several different models with which to approach the question of scope. One such model is that of a chain, where each party performs a role that aids succeeding parties in accomplishing the criminal objectives of the conspiracy. No matter how diverse the goals of a large criminal organisation, there is but one objective: to promote the furtherance of the enterprise. So far as the mental state is concerned, two elements required by conspiracy are the intent to agree and the intent to promote the unlawful objective of the conspiracy. It is the intention to promote a crime that lends conspiracy its criminal cast. Conspiracy is not only a substantive crime. It also serves as a basis for holding one person liable for the crimes of others in cases where application of the usual doctrines of complicity would not render that person liable. Thus, one who enters into a conspiratorial relationship is liable for every reasonably foreseeable crime committed by every other member of the conspiracy in furtherance of its objectives, whether or not he knew of the crimes or aided in their commission. The rationale is that criminal acts done in furtherance of a conspiracy may be sufficiently dependent upon the encouragement and support of the group as a whole to warrant treating each member as a causal agent to each act. Under this view, which of the conspirators committed the substantive offence would be less significant in determining the defendant's liability than the fact that the crime was performed as a part of a larger division of labour to which the accused had also contributed his efforts. Regarding admissibility of evidence, loosened standards prevail in a conspiracy trial. Contrary to the usual rule, in conspiracy prosecutions any declaration by one conspirator, made in furtherance of a conspiracy and during its pendency, is admissible against

each co-conspirator. Despite the unreliability of hearsay evidence, it is admissible in conspiracy prosecutions. Explaining this rule, ***Judge Hand,*** *said: "Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all. [Van Riper v. United States 13 F.2d 961, 967 (2d Cir. 1926)]."*

Thus conspirators are liable on an agency theory for statements of co-conspirators, just as they are for the overt acts and crimes committed by their confreres. (Paras 23, 24, 25, 26 and 27)

In para 32 of the judgment, the learned trial Judge formulated the points arising for determination as follows :

1. What was the cause of death of Hamza ?

2. Are the accused responsible for the death of Hamza?

3. Was there any criminal conspiracy to cause the death of Hamza, as alleged by the prosecution?

4. Are the accused guilty of the offence u/s 201 IPC?

5. Are the accused guilty of the offence u/s 109 IPC?

6. Are the accused guilty of the offence u/s 143 and 148 of the IPC?

7. Are the accused guilty of the offence u/s 511 r/w Section 302 IPC?

8. Are the accused guilty of the offence u/s 194 IPC?

9. Are the accused guilty of the offence u/s 25 and 27 of the Arms Act?

10. What, if any, are the offences proved against each of the accused?

11. Sentence."

Coleridge, J., while summing up the case to jury in **Regina v. Murphy (173 Eng. Reports 508)** pertinently states:

I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, "Had they this common design, and did they pursue it by these common means- the design being unlawful?"

Gerald Orchard of University of Canterbury, New Zealand explains the limited nature of this proposition :

Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together and agreed in terms" to pursue the unlawful object: there need never have been an express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done".

I share this opinion, but hasten to add that the relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The concurrence cannot be inferred by a group if irrelevant facts artfully arranged so as to give an appearance of coherence. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. We must thus be strictly on our guard."

AIR 1999 SC 2640, State vs Nalini (Rajiv Gandhi assasination case)

It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused. Conspirators may, for example, be enrolled in a chain A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the center doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that

intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by ***Judge Learned Hand*** that" this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders". As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be

inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators and the mere fact that conspirators individually or in

Harpal Singh vs State of Punjab, 2017(1) JBCJ 37 SC

Qua a charge of conspiracy, it is not necessary that all conspirators should know each and every detail of the plot so long as they are conspirators in the main object thereof. It is also not necessary that all of them should participate from inception of stratagem till end, determinative factor being unity of object or purpose and their participation at different stages. Such is encompassing sweep of culpability of an offence of conspiracy, if proved, even from established attendant circumstances.

Md. Hussain Umar Kochra case 1969 (3) SCC 429 -

In conspiracy, agreement is the gist of the offence and the common design and common intention in furtherance of the scheme is necessary. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. It was announced that conspiracy may develop in successive stages and new techniques may be invented and new means may be devised, and a general conspiracy may be a sum of separate conspiracies having a similar general purpose, the essential elements being collaboration, connivance, jointness in severalty and coordination.

In *Kehar Singh and Ors. vs. The State (Delhi Administration) [AIR 1988 SC 1883 at p. 1954]*, the Hon'ble Supreme Court observed:

Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the court must enquire whether the two persons are independently pursuing the same end or they have come together to the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy required some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of the two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Conspiracy can be proved by circumstances and other materials.(See: *State of Bihar v. Paramhans [1986 Pat LJR 688]*). To establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary. In some cases, intent of unlawful use being made of the goods or services in question may be inferred from the

knowledge itself. This apart, the prosecution has not to establish that a particular unlawful use was intended, so long as the goods or service in question could not be put to any lawful use. Finally, when the ultimate offence consists of a chain of actions, it would not be necessary for the prosecution to establish, to bring home the charge of conspiracy, that each of the conspirators had the knowledge of what the collaborator would do so, so long as it is known that the collaborator would put the goods or service to an unlawful use. (See: *State of Maharashtra v. Som Nath Thapa [JT 1996 (4) SC 615]*)

Charge with substantive offence and conviction for constructive offence and vice versa--

1. Permissibility of such conviction is predicated on the principle of notice to the accused so that he is not prejudiced in his defense. If the content or the body of the charge contains the facts regarding the element of the offence, mere absence of section should not prejudice in his defense. Thus, if all the accused persons are charged under Section 302/149 of the IPC, but the charge states that it was A who fired at the deceased at the relevant time and place. In such fact situation A can be convicted u/s 302 IPC simplicitor in the absence of a charge simplicitor even if the charge under Section 149 fails against others.
2. Where a person is charged with substantive offence, it is known to him that he has been charged to have committed the offence, but when an accused is charged constructively to have committed an offence by the said section 149 or Section 34 of the IPC, it makes him understand that he is the accused because somebody in furtherance of the common intention or for the prosecution of the common object has committed the substantive offence.

3. The burden to prove prejudice is on the accused-- ***Mohan vs State, 1971 Cri LJ 1010 (Del)***
4. There is no hard and fast rule laid down as to when the prejudice has been caused to the accused. It is for the Court in each case to decide whether the defect in the charge has caused prejudice to the accused.
5. Omission to state common object of unlawful assembly does not vitiate conviction based on those charges unless accused has been prejudiced in his defence because of the general nature of charge under Section 149.
6. The accused is entitled to know with certainty and accuracy exact nature of the charge against him, and unless he has knowledge, his defence will be prejudiced.

The question arises – whether a person charged for having committed an offence constructively with the help of Section 149 or Section 34 IPC can be convicted for having committed the substantive offence for which he had not been charged?

The main authorities on this point are : *AIR 1958 SC 672, B.N.Srikanthia vs Mysore State* and *William Slaney vs State of MP, AIR 1956 SC 116*

The answer to the above question is in the affirmative. The object of the Code is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well establish and well understood lines that accord with our notions of natural justice. If he is tried by competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance within outward forms of the law, mere mistakes in procedure, mere in consequential errors and omissions in the trial are

regarded venal by the Code and the trial is not vitiated. Unless the accused can show substantial prejudice. That, broadly speaking, is the basic principal on which the Code is based. Put at highest, all that appellant can urge is that charge in alternative ought to have been framed Sections 34,114 &149 of the IPC provide for criminal liability viewed from different angles as regards actual participants, accessories and man actuated by a common object or a common intention; and the charge is rolled up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various head of criminal liablity for the offence cannot be said to be fatal by itself.

Question : Can a person charged for the principal offence be convicted for the abetment?

No. When only the principal offence has been charged, and no charge of the abetment framed and accused has no notice of the facts constituting abetment, conviction on a charge of abetment is improper. *Prasana Kumar vs Ananda Chandra, AIR 1970 Ori 10.*

Sohan Lal vs. State of Punjab, 2003 Cri.L.J. 4569 SC – Accused charged under section 304B cannot be convicted under section 109 because abatement is a substantive offence and absence of charge caused prejudice to the accused.

Question: Can a person charged with abetment, be convicted for the principal offence?

Yes, Gujarat High Court in ***N.C. Shah vs. State of Gujarat, 1972 Cri LJ 200 (Guj)*** relied on *State vs. Ruplal Koeri, AIR 1953 Pat 394,* and held that an accused can be convicted of the substantive offence if he is charged

only with abetment of the offence, but not when he has been prejudiced in his defence of a case based on substantive charge.

Question Whether a conviction can be passed regarding the principal offence are r/w section 34 where the charge is framed u/s 149?

State of Bihar vs Biswanath Rai, 1997 CrLJ 4426 SC – A charge u/s 149 is no impediment to conviction by application of 34 if the evidence discloses the commission of the offence in furtherance in common intention.

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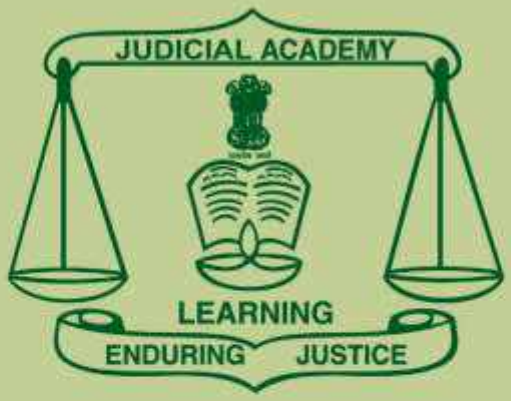

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