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OFFENCES UNDER THE PENAL CODE OF CEYLON

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Other books of the Author

Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon (1972)

General Principles of Criminal Liability in Ceylon (1972)

The Law of Evidence in Sri Lanka (1974)

Criminal Procedure in Sri Lanka under the Administration of Justice Law :No. 44 *of* 1973 (1975)

The Law of Property in Sri Lanka Volume I (1976)

The Law of Property in Sri Lanka Volume II Landlord and Tenent (1976)

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Essays in Administrative Law in Sri Lanka (1980)

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OFFENCES UNDER THE PENAL CODE OF CEYLON (Sri Lanka)

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To

Professor T. Nadaraja

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FOREWORD

Offences under the Penal Code of Ceylon was promised to us by Dr G. L. Peiris at the time he published his pioneering work on *General Principles of Criminal Liability in Ceylon*. The excellence of his earlier work justified the expectation that the thoroughness and clarity of mind which characterized the assembling and the analyzing of the cases on the substantive criminal law of Sri Lanka would be continued.

In days gone by, in the courts and law schools of this country, lawyer, judge and student alike relied heavily on the bulky tomes on the Indian Penal Code left behind by Sir Hari Singh Gour and Dr Ratnalal. It is refreshing now to find that, in the first year itself of the Republic, a young university product of our own Sri Lanka has emulated the examples of Gour and Ratnalal in studies dealing almost exclusively with the Penal Law as declared hitherto in this Country by legislator and by judge. The Courts of the future, in their natural role of shaping the law, will find helpful both the analysis and the comments to which Dr Peiris has submitted the judicial decisions of this Country.

That the bulk of the legal literature is the product of minds not themselves constantly engaged in the disputation preparatory to court decisions is a feature not confined to our shores. The absence of preoccupation with such disputation probably makes university men and women peculiarly suited to undertake objective assessments of the arguments of lawyers and the decisions handed down by judges. Certainly, in this work, Dr Peiris has given us such an objective assessment from which the lawyer from his student days onwards can derive much profit.

T. S. FERNANDO
President, Court of Appeal

Chambers of the President
Court of Appeal, Colombo
April 10, 1973

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PREFACE

(First Edition)

This book continues and completes the work begun in *General Principles of Criminal Liability in Ceylon : A Comparative Analysis*, published in 1972. The two works, taken together, are intended to provide a comprehensive analysis and synthesis of the substantive criminal law of Ceylon as contained in the Penal Code.

The method of treatment adopted in the two books is broadly similar. A significant difference, however, is that the comparative material incorporated in the present work has been reduced to a minimum. This was thought desirable because the law of Ceylon, in the relevant areas, has followed in the main a course of development of its own, so that analogies with foreign systems would not be immediately useful. Moreover, in view of the voluminous case law interpreting offences created by the Penal Code of Ceylon, it was anticipated that an attempt to discuss the law of other jurisdictions would render it difficult to restrict the work within a reasonable compass.

The approach taken in this book to specific offences constituted by the Penal Code is pragmatic to the extent that the cases have been followed closely. Most of the relevant cases have been collected and cited for the convenience of practitioners who may not find the leisure to embark on an arduous search for authorities having a bearing on a particular point. Nevertheless, abundant authority does not dispense with the need for a critical attitude. It has been sought, therefore, whenever necessary, to evaluate conflicting trends of decision and to curtail the scope of unsatisfactory authorities.

I thank the Hon. T. S. Fernando, President of the Court of Appeal of Ceylon, for finding the time to peruse the book at the stage of galley proofs and for writing a Foreword. I must also acknowledge the assistance I have derived from the digest of cases on the Penal Code published by Mr. E. P. Wijetunge, a former Crown Counsel, in 1955.

Continuous encouragement and guidance I have received from Professor T. Nadaraja, Professor of Law and Dean of the Faculty of Law in the University of Ceylon, make it right that this book should be dedicated to him.

It is appropriate to refer here to the significant contribution made by Lake House Investments Ltd. in recent times to the compilation and analysis of the laws of Ceylon. Many legal works have

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already been published by them, while several others are planned and await publication. A considerable volume of legal literature has been produced in a comparatively short time without undue emphasis on commercial considerations. Especially commendable are the efforts made by Lake House Investments Ltd. to encourage original writing in the field of law in the Sinhala language. This is primarily the achievement of Mr. H. Amerasinghe, the Manager of their Publishing Department. I am deeply grateful to him for the interest he has shown in my work during the last two years. His enthusiasm was largely responsible for the preparation of my books for publication. The assiduous work cheerfully and conscientiously put in by Mr. G. M. B. Herat contributed in no small measure to the rapid printing of this work and the previous books. The courtesy shown at all times by the publishers has made it a pleasure to work with them.

G. L. PEIRIS

Faculty of Law
University of Ceylon (Colombo Campus)
30 March 1973

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CHAPTER 1

THE STRUCTURE OF OFFENCES IN THE PENAL CODE

The Penal Code of Ceylon contains a variety of provisions which are not restricted in their application to particular offences but govern all offences, whether created by the Penal Code or not. For example, Chapter IV of the Penal Code sets out a series of exceptions from criminal liability which applies to the whole range of offences recognized by the law of Ceylon.[1] The position is similar in regard to several rules as to abetment incorporated in Chapter V of the Penal Code.[2] These and other general principles of criminal liability are examined in a separate work[3] and do not form part of the study contained in this book.

The object of this work is to investigate particular categories of offences embodied in the Penal Code. These include offences consisting of agreement,[4] offences against the State,[5] offences against the public tranquillity,[6] offences by or relating to public servants,[7] offences against public justice,[8] offences relating to coins and Government stamps,[9] offences relating to weights and measures,[10] offences against the public health, safety, convenience and morals,[11] offences relating to religion,[12] offences affecting the human body and offences affecting life,[13] offences against property,[14] offences relating to documents, property-marks, currency notes and bank notes[15] and offences violating feelings.[16]

These offences are all specifically recognized by the Penal Code, and the limits of liability indicated. An attempt is made in this work to discover and analyze the factors which underlie the constitution of these offences, to examine their rationale critically and to identify, with particular reference to the case law, the component elements of liability for each of these specific offences.

The primary advantage of a codified system of law is clarity of content.[17] Offences which have some features in common but are different in other respects, are distinguished and accord-

---

1. Penal Code section 38(2).
2. ibid.
3. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980).
4. Penal Code Chapter VA.
5. Chapter VI.
6. Chapter VIII.
7. Chapters IX and X.
8. Chapter XI.
9. Chapter XII.
10. Chapter XIII.
11. Chapter XIV.
12. Chapter XV.
13. Chapter XVI.
14. Chapter XVII.
15. Chapter XVIII.
16. Chapters XIX and XX.
17. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980) Chapter 13.

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ed separate treatment. This is illustrated, for example, by offences in respect of property which form part of our law. While this approach has the merit of eliminating ambiguity, certain precautions have necessarily to be adopted if the ends of justice are not to be defeated. This objective is achieved for the law of Ceylon by several provisions applicable to cases of doubt in regard to the appropriate offence of which the accused may be convicted.

The following principles of law are relevant in this connection:

(a) If a single act or series of acts 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 all or any one or more of such offences and any number of such charges may be tried at one trial, and in a trial before the High Court, may be included in one and the same indictment; or the accused may be charged with having committed one of the said offences without specifying which one.[18]

(b) If, in the same circumstances as those envisaged in (a), the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provision quoted above,[19] the accused may be convicted of the offence which he is shown to have committed, although he was not charged with it.[20]

(c) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the accused may be convicted of the minor offence although he was not charged with it.[21]

(d) When a person is charged with an offence and it is proved that he attempted to commit that offence and that, in such attempt, he did an act towards the commission of that offence, he may be convicted of an attempt to commit that offence although he was not charged with such attempt.[22]

(e) In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.[23]

---

18. Code of Criminal Procedure Act, No. 15 of 1979, section 176.
19. See note 18 *supra*.
20. Code of Criminal Procedure, section 177.
21. Code of Criminal Procedure, section 178.
22. Code of Criminal Procedure, section 179.
23. Penal Code, section 67A.

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The preliminary point may therefore be made that, while the Penal Code embodies a division of offences into separate categories, the prosecution is permitted, in appropriate circumstances, to charge the accused with several offences and to secure a conviction of one or more of them[24] or, exceptionally, to obtain a conviction of an offence different from that with which the accused was charged, provided that other requirements of the law are satisfied.[25]

24. See note 18 *supra*.

25. See note 20 *supra*.

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CHAPTER 2

OFFENCES AGAINST THE STATE

Chapter VI of the Penal Code contains a series of provisions dealing with offences against the State. Of the variety of offences created by this Chapter, only one offence carries with it the punishment of death. This is the offence of waging or attempting to wage war, or abetting the waging of war, against the Queen.[1] The illustration to the relevant section reads: "A joins an insurrection against the Queen. A has committed the offence defined in this section".[2]

The other offences against the State constituted by the Penal Code are: conspiracy to deprive the Queen of the sovereignty of Ceylon or of any part thereof, or of any of Her Majesty's Realms and Territories, or to overawe, by means of criminal force or the show of criminal force, the Government of Ceylon;[3] collection of men, arms or ammunition or preparation by other means to wage war with the intention of either waging or being prepared to wage war against the Queen,[4] or conspiracy to commit any of these acts;[5] concealment of a design to wage war with intent to facilitate the plan;[6] attempt by contumacious or insulting words or signs to bring the Queen into contempt;[7] assaulting the Governor-General, a Senator or a Member of Parliament with intent to compel or restrain the exercise of any lawful power;[8] exciting or attempting to excite disaffection;[9] waging war against any power in alliance or at peace with the Queen;[10] committing depredation on the territories of any power in alliance or at peace with the Queen;[11] receipt of property taken by war or depredation contemplated by the previous sections;[12] an act of a public servant voluntarily allowing a prisoner of State or a prisoner of war in his custody to escape;[13] an act of a public servant negligently suffering a prisoner of State or of war in his custody to escape;[14] and aiding the escape of, rescuing or harbouring such a prisoner.[15] All these offences against the State, with the exception of the offence of waging or attempting to wage war or abetting the waging of war against the Queen,[16] are punishable with varying sentences of imprisonment.

---

1. Penal Code, section 114.
2. Illustration to section 114.
3. Section 115.
4. Section 116.
5. Section 115.
6. Section 117.
7. Section 118.
8. Section 119.
9. Section 120.
10. Section 121.
11. Section 122.
12. Section 123.
13. Section 124.
14. Section 125.
15. Section 126.
16. Section 114.

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A special feature of the offences contained in Chapter VI of the Penal Code is the provision that "No prosecution shall be instituted under this Chapter except by, or with the written authority of, the Attorney-General".[17]

Verbal modification of the provisions dealing with offences against the State is made necessary by the adoption of the Constitution of the Republic of Sri Lanka on 22 May, 1972. "The Queen" is referred to in several of these provisions,[18] and "the Governor-General" in one of them.[19] The words, "Government of Ceylon",[20] "public servant",[21] "Senator"[22] and "Member of Parliament"[23] are also mentioned. Most of these terms are defined in Chapter II of the Penal Code. The word "Queen" denoted the Sovereign for the time being of Ceylon.[24] The term "Governor-General" denoted "the Governor-General and Commander-in-Chief of the Island of Ceylon and included the Officer for the time being Administering the Government of Ceylon and, to the extent to which a Deputy for the Governor-General is authorized to act, that Deputy".[25] The expression "Government of Ceylon" meant, in the relevant context, Her Majesty's Government in Ceylon established under the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.[26] The definition of a "public servant" included reference to the Queen and to the Queen's authority.[27]

These provisions are now obsolete. "The Republic of Sri Lanka", "the President" and "the Government of the Republic of Sri Lanka" would now have to be read in place of "the Queen" "the Governor-General" and "the Government of Ceylon", respectively. A "public servant" now owes allegiance to the Republic of Sri Lanka, instead of the Queen. Moreover, where reference is made to "the House of Representatives" or to "a Member of Parliament", substitution of "the National State Assembly" and "a Member of the National State Assembly" is necessary, while reference to "a Senator" has to be deleted. However, although changes in phraseology are inevitable, the substance of the offences remains virtually intact.

Some of the provisions dealing with offences against the State have been interpreted by the courts of Ceylon. In regard to the offence of waging or attempting to wage war against the Queen,[28] the judgment of the court, in *Liyanage*,[29] establishes the following principles:

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17. Section 127.
18. Sections 114, 115, 116, 117 118, 120, 121 and 122.
19. Section 119.
20. Section 120.
21. Sections 124 and 125.
22. Section 119.
23. ibid.
24. Section 12.
25. Section 16.
26. Section 14.
27. Section 19.
28. Section 114.
29. (1965) 67 N.L.R. 193.

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(i) No design upon the Queen's person was necessary to establish this offence—for example, if persons assemble and act with force in opposition to some law which they think inconvenient, hoping thereby to get it repealed, a conspiracy to wage war could be proved.[30]

(ii) The word "Queen" was used in this context in a figurative sense as meaning the Head of the State or the external embodiment of lawful constitutional Government. The Government stood for the Queen in this country.[31]

(iii) Waging war was of two kinds: (*a*) against the person of the Queen, and (*b*) against the majesty of the Queen, or against the Queen in Her regal capacity. The latter was "a constructive levying of war directed more against the Government than the person of the Queen, although in legal construction it was levying war against the Queen herself."[32] This was the only form of waging war possible in Ceylon, since "The Queen was not here in person, though her Government was."[33] Insurrections of this nature are encompassed by the definition of waging war, since they constitute an attack on the Queen's legal office and tend to dissolve all Government, society and order.[34]

(iv) To constitute waging of war against the Queen, it is not necessary that there should be a regular trained force or a regular army. The pomp and pageantry of war are not necessary, nor military array. "Insurrection and rebellion are more humble in their first infancy; but all such external marks of pomp will not fail to be added with the first gleam of success."[35]

(v) However, the purpose must have some element of generality, in that the aim should involve subversion of the State or its measures, which must be manifested by the generality of the design and not merely by the object of redressing a private wrong or procuring some private advantage. A limited object of the latter kind is exemplified by riots between opposing factions. There can be no waging of war when the attack is personal and particular, and not general, in the sense of being directed against the State or its authority.[36] The object sought to be accomplished must be "of a general public nature".[37]

(vi) An insurrection to destroy a Government by force or to compel the Queen to alter the composition or personnel of Her

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30. At p. 206. 31. ibid.
32. East, I, *Pleas of the Crown*, ch. 2 sec. 17, quoted with approval by the Court in *Liyanage* at p. 207.
33. *Liyanage*, *supra*, at p. 206. 34. *Liyanage*, at p. 207.
35. *Frost* (1839) 9 C. & P. 129, quoted in *Liyanage*, at p. 207.
36. *Liyanage*, at p. 208.
37. *Gordon* (1781) 21 St. Tr. 485, *per* Lord Mansfield, quoted in *Liyanage*. at p. 207.

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Government was tantamount to waging war.[38] Insurrections for redressing national grievances or for reforming real or imaginary evils of a public nature, in which the insurgents have no special interest, are by construction of law "waging war", since they are levelled at the Queen's crown and royal dignity.[39]

The offence relating to conspiracy to overawe, by means of criminal force or the show of criminal force, the Government of Ceylon[40] consists of the following elements:

(i) A conspiracy or a concurrence of minds, in the legally relevant sense of the term,[41] has to be established.

(ii) The word "overawe" imports more than the creation of apprehension or alarm. It connotes the creation of a situation in which the members of the Government feel themselves compelled to choose between succumbing to force and exposure to a grave peril.[42]

(iii) It is not essential that members of the Government should contemplate danger of assassination or of bodily injury to themselves. It is sufficient if the threatened danger is to public property or to the safety of members of the general public.[43]

(iv) The purpose and the effect of the fear that is induced in the Government or its members, are significant. The purpose must be to coerce, by the use of criminal force or by the show of criminal force, the will of the Government. The effect of application of criminal force or the show of criminal force must be that the Government feared to do that which it had a mind and a will to do, and which the law empowered it to do, or that it was compelled to do that which it would otherwise not have done or which was contrary to law.[44]

(v) "The Government of Ceylon" in the relevant context meant, under the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, the Governor-General and the Cabinet of Ministers.[45] Under the present Constitution, "the Government of Sri Lanka", in the same context, would connote the President of Sri Lanka and the Cabinet of Ministers.

In *Liyanage's* case, the court observed: "It is sufficient to state our opinion that a plan, having as its object the deposition of the Cabinet duly appointed for the time being under the Constitution, or the coercion or the compulsion of the Governor-General or the Prime Minister to exercise executive power without the Cabinet so established, and/or with Parliament being dissolved by the Governor-General involuntarily, would be a plan to overthrow the Government. Such a plan would be punishable

38. *Liyanage*, at p. 208.
39. ibid.
40. Penal Code, section 115.
41. See Chapter 4, *infra*.
42. *Liyanage*, at p. 208.
43. *Hasan Khan* (1951) Patna 60 at p. 65, cited in *Liyanage*, at p. 208.
44. *Liyanage*, at p. 208.
45. id., at p. 210.

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under section 115 of the Penal Code if the contemplated means by which its object is expected to be achieved are unlawful, for example, (*a*) by unlawful arrests, or even the unlawful arrest of one Minister, and/or (*b*) by a legally unauthorized show or threat of force."[46]

A distinct offence relating to overthrow of the Government of Ceylon was not created by the Penal Code, but an offence so designated was sought to be introduced by the Criminal Law (Special Provisions) Act, No. 1 of 1962. This Act recognized the offence of conspiracy to overthrow, or attempt or preparation to overthrow, or the doing of any act, or conspiracy to do, or attempt or preparation to do any act calculated to overthrow, or with the object or Intention of overthrowing, or as a means of overthrowing, otherwise than by lawful means, the Government of Ceylon by law established.[47] However, the Privy Council later held that the Criminal Law (Special Provisions) Act, No. 1 of 1962, was *ultra vires* the previous Constitution of Ceylon, and therefore invalid.[48]

A distinctive feature of the provisions of the Penal Code incorporating offences against the State is that acts of preparation to wage war are sufficient to establish criminal liability.[49] In this area, there is a departure from the general principle that preparatory acts are distinguishable from attempts and that criminal liability attaches only to the latter.[50] The reason for the exception is cogently expressed by the Macaulay Commissioners in their Report: "The rebel is out of danger as soon as he has subverted the Government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations".[51] This rationale was endorsed by the Ceylon court in *Liyanage*.[52]

The offence of exciting or attempting to excite disaffection is the subject of an elaborate definition in our law. "Whoever by words, either spoken or intended to be read, or by signs, or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the Queen or to Her Government in Ceylon, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the Queen's subjects to procure, otherwise than by lawful means, the alteration of any matter by law established,

46. id., at p. 212.
47. Section 6(2).
48. (1965) 68 N.L.R. 265.
49. Penal Code, section 116.
50. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed., 1980) Chapter 10.
51. *Liyanage* (1965) 67 N.L.R. at p. 212.
52. ibid.

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or attempts to raise discontent or disaffection amongst the Queen's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects"[53] is said to commit this offence. The Explanation to this section, embodying a fundamental democratic right, declares that "It is not an offence under this section by intending to show that the Queen or Her Government in Ceylon have been misled or mistaken in measures, to point out errors or defects in the Government or any part of it, or in the administration of justice".[54]

The concept of "classes" in the final clause of the definition of the offence of exciting disaffection was discussed by the Court of Criminal Appeal in *Abu Bakr*.[55] The charge against the accused was that, by means of certain words he uttered during a speech at a public meeting, he attempted to promote feelings of ill-will and hostility between different classes of the Queen's subjects. The indictment did not specify what were the different classes contemplated in the charge. However, Crown Counsel told the jury that the classes were "capitalists" and "workers" respectively. It was held that the charge cannot be established unless the classes are reasonably well-defined, stable and numerous. Moreover, it was said to be a question of fact for the jury in each case whether a given class has these characteristics and is accordingly a class envisaged by the statutory provision.

The Court of Criminal Appeal was guided by three Indian decisions which held that the word "capitalist" is too vague to denote a definite and ascertainable class.[56] However, Gunasekera J. administered the caution that "In each case the decision as to whether 'capitalists' were such a class must be understood in the light of its own circumstances. It may well happen that a term that does not ordinarily denote a class such as it contemplated in the section, does in a particular context mean such a class."[57] The decision of the court to quash the convictions was based on the failure of the trial judge to explain to the jury that the term "classes", as used in the section, must be given a restrictive interpretation rather than its meaning in ordinary parlance.[58]

The offence in regard to an act by a public servant negligently suffering a prisoner of State or a prisoner of war in his custody to escape[59] was construed by the courts of Ceylon in *John* v. *Perera*.[60] Two persons, a jail overseer and a jail guard, were charged with this offence. The court emphasized that it must be shown that the escape was directly attributable to some act of negligence on the part of the accused. In appeal, Pereira J. said: "To say that, because the prisoner escaped, the accused

53. Penal Code, section 120.
54. Explanation to section 120.
55. (1953) 54 N.L.R. 566.
56. At p. 570.
57. At p. 571.
58. At p. 571-572.
59. Penal Code, section 125.
60. (1913) 17 N.L.R. 189.

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are guilty of negligence is to assume the very fact that has to be established by evidence. It is quite conceivable that a prisoner may so suddenly dart off as to escape vigilance of the highest order and to baffle arrest, especially by persons so handicapped by a bad leg and heavy boots as the accused were."[61] The basis of the decision was the absence of a presumption of negligence in these circumstances.

While the provisions in regard to offences against the State contained in Chapter VI of the Penal Code constitute the general law on the subject, these provisions have been found inadequate in times of crisis. Thus, soon after the *coup d'etat* which was attempted on 27 January, 1962, Parliament enacted special laws which purported to have the effect both of expanding the scope of the substantive offences and of dispensing with some of the procedural safeguards which are available to accused persons in ordinary criminal proceedings. However, these purported changes in the substantive and procedural laws proved abortive, in view of the ruling by the judicial Committee of the Privy Council that the legislation was inconsistent with Constitutional provisions and therefore inoperative.[62]

An insurrection which spread to most parts of the Island took place a decade later—in April, 1971. A State of Emergency had been declared a short time before the events connected with the insurgency, and the provisions of the Public Security Ordinance invoked. The Constitution of the Republic of Sri Lanka was promulgated on 22 May, 1972. The new Constitution contains a provision that "Unless the National State Assembly otherwise provides, the Public Security Ordinance shall, *mutatis mutandis*...be deemed to be a law enacted by the National State Assembly".[63]

Emergency Regulations made by the President under section 5 of the Public Security Ordinance have radically altered, for the time being, the content of offences against the State, recognized by the law of Ceylon. The changes have been effected in two ways: (1) A significant extension of offences created by the general law has been made, and (2) a series of new offences has been introduced. It must be noted, however, that the innovations established by Emergency Regulations do not comprise part of the permanent law of the Republic but have effect only until the Regulations made by the President on the recommendation of the Prime Minister remain in force under the aegis of the Public Security Ordinance. With the lifting of the State of Emergency, these innovations will cease to be part of our law and the general law embodied in the Penal Code will again become the source of the principles applicable to offences against the State.

61. At p. 190.
62. *Liyanage* (1965) 68 N.L.R. 265.
63. Article 134(1).

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Nevertheless, an examination of the changes effected in the law by Emergency Regulations, serves a useful purpose, in that it may be suggestive of the inadequacies of the general law under conditions of crisis. Instances of expansion of the ambit of existing offences and addition of new offences may be investigated separately.

The phraseology of several offences against the State constituted by the Penal Code, has been altered crucially. The following are examples:

(*a*) The offence of sedition and incitement[64] receives a detailed definition in the Emergency Regulations. This definition has in common with the offence, as set out in the Penal Code, several features. Thus, the basic ideas of exciting feelings of disaffection, hatred and contempt against the Head of the State, the Government, or the administration of justice; the object of seeking to procure, otherwise than by lawful means, the alteration of any matter by law established; and the raising of discontent or disaffection among the inhabitants of Sri Lanka or any class of them, are reflected alike in both definitions.

The distinguishing characteristics of the new definition are:

(i) explicit mention of bringing or attempting to bring the Constitution of Sri Lanka into hatred or contempt;[65]

(ii) the addition of the words "sections" and "groups" in juxtaposition with "classes";[66]

(iii) the introduction of a distinct provision in regard to relevant categories of persons being excited or incited "to the use of any form of physical force or violence, breaches of the peace, disobedience of the law or obstruction of the execution of the law for the purpose, thereby inducing or compelling the National State Assembly or the Government to alter any matter by law established or to do or forbear from doing any act or thing";[67]

(iv) inclusion, in the definition of the offence, of a separate clause in regard to the doing or the omission to do, or attempts or acts of incitement to do or omit to do, any act or thing which constitutes the breach of any Emergency Regulation;[68]

(v) the raising of discontent among particular categories of persons—such as State officers, persons engaged in the service of the Republic and persons engaged in the performance of essential services—is treated separately in the Emergency Regulations;[69]

(vi) the imposition, for offences connected with creating disaffection, of a much heavier penalty than that provided by the

64. Regulations issued on 15 July, 1972, section 24.
65. Section 24(b)
66. Section 24(d)
67. Section 24(f).
68. Section 24(g).
69. Section 23.

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Penal Code.[70] While the appropriate penalty under the Penal Code is simple imprisonment for a term which may extend to two years,[71] this has been enhanced by the Emergency Regulations to rigorous imprisonment for a minimum period of three months and a maximum period of twenty years.[72] The penalty prescribed by Emergency Regulations thus contains the feature that a minimum penalty is stipulated by law.

(*b*) The collection of men, arms or ammunition or preparation by other means to wage war against the Queen, is an offence under the Penal Code.[73] This offence receives a broader definition in the Emergency Regulations which have the effect (i) of adding the words "explosives", "weapons" and "other dangerous articles or substances" after "arms or ammunition", and (ii) of creating an allied offence in respect of preparation to train, or attempts to train, any person in the manufacture or use of such weapons or substances.[74]

Among the entirely new offences against the State created by Emergency Regulations, are the following:

(*a*) Conspiracy to overthrow, or attempt or preparation to overthrow, or the doing of any act, or conspiracy to do or attempt or preparation to do any act, calculated to overthrow, or with the object or intention of overthrowing, or as a means of overthrowing, otherwise than by lawful means, the Government of Sri Lanka by law established.[75]

(*b*) Conspiracy to murder or attempt to murder or wrongfully confine or conspiracy or attempt to prepare wrongfully to confine the President, or a Member of the National State Assembly, or a member of the Police or a Member of the Armed Forces or a State officer with the intention of inducing or compelling such person to exercise or refrain from exercising in any manner any of the lawful powers of such person.[76]

It is of interest to note that these offences are strikingly similar to those sought to be introduced by the Criminal Law (Special Provisions) Act, 1962, after the abortive *coup d'etat* of that year. This Act was held by the Privy Council to be *ultra vires* the legislative competence of the Ceylon Parliament under the previous Constitution, on the ground that the statute was tantamount to a "legislative judgment." In their Lordships' view, the former Constitution of Ceylon recognized a clear separation of the judicial power from the legislative and executive powers the judicial power being vested in functionaries whose in'

70. Section 24.
71. Penal Code, section 120.
72. Emergency Regulations made on 15 July, 1972, section 24.
73. Penal Code, section 116.
74. Emergency Regulations, section 31.
75. Section 21(a).
76. Section 21(b).

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dependence from the other organs of government was effectively guaranteed. The basis of the ruling that the legislation was invalid, was its manifest transgression of judicial powers and functions.

In the view taken by the Privy Council, the obnoxious feature of the impugned legislation was its *ad hoc* and *ad hominem* character. This quality derived primarily from the provision contained in the Criminal Law (Special Provisions) Act, No. 1 of 1962, that "The preceding provisions of this Act... shall cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about the 27th January, 1962, or from one year after the date of commencement of this Act, whichever is later."[77] A comparable restriction does not characterize the new offences created by Emergency Regulations. In any event, the new Constitution does not contemplate a separation of powers in the form which enabled the Privy Council, in *Liyanage's* case, to declare invalid the relevant legislation.

Moreover, the offences against the State constituted by the Emergency Regulations are wider in yet another respect than those which the Criminal Law (Special Provisions) Act, No. 1 of 1962, purported to recognize. While the latter Act, in its relevant provisions, referred only to "Governor-General, the Prime Minister or any other Member of the Cabinet of Ministers",[78] the Emergency Regulations include reference also to members of the Public and Armed Forces and State officers.[79] The wider language was necessitated, presumably, by conditions which prevailed in the island during the insurgency.

(*c*) Acts which have the effect of overawing, influencing or coercing, or preparation, conspiracy or attempt to overawe, influence or coerce any person with the intention of inducing or compelling the Government of Sri Lanka, the President, a Member of the National State Assembly, a member of the Police or of the Armed Forces or a State officer, to exercise or refrain from exercising in any manner the lawful powers of such authority or person.[80]

(*d*) "Whoever by words whether spoken or written or by signs or by visible representations or by conduct or by any other act, advocates, urges, or advises directly or indirectly the necessity, duty or desirability of overthrowing or overpowering, otherwise than by lawful means, the Government of Sri Lanka by law established"[81] is said to commit an offence.

The words "otherwise than by lawful means" were commented on briefly by the Ceylon court in *Liyanage*.[82] It was

77. Section 21.
78. Section 6(2)(a).
79. Emergency Regulations made on 15 July, 1972, section 21 (b).
80. Section 21(c).
81. Section 25.
82. (1963) 67 N.L.R. 191.

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declared: "Everyone knows that a Government by law established can be overthrown, in the sense of being defeated and displaced, by constitutional means. The obvious cases are the defeat of the Government in power by a motion passed in Parliament or at a general election. They result in an overthrow by lawful means and are perfectly constitutional".[83] These are clear instances of the use of lawful means to overthrow a government in power, but other cases involving, for example, strikes and certain forms of trade union activity may be more controversial.

(*e*) It is declared that "No person shall publish any rumour or false statement which is likely to cause public alarm".[84]

(*f*) It is an offence "to print or publish any document recording or giving information or commenting about, or any pictorial representation, photograph or cinematograph film of, any of the following matters: the activities of any proscribed organization; any matter relating to the investigations carried on by the Government into the terrorist movement; the disposition, condition, movement or operations of the Police, the Sri Lanka Army, the Sri Lanka Navy and the Sri Lanka Air Force; any matter pertaining to the defence and the security of Sri Lanka; and any matter, likely, directly or indirectly to create communal tension".[85] An exception is explicitly made in the case of proceedings before any Court or Commission established under the Criminal Justice Commissions Act No. 14 of 1972, and the printing or publication of such proceedings.[86]

(*g*) "Whoever, not being a member of the Armed Forces or the Police Force, wears or has in his possession the custody or control of any garb, dress, uniform, identity card, token or other symbol resembling in any manner or any detail the garb, dress"[87] and so on worn or used by any member of the Armed Forces or the Police Force, is declared guilty of an offence.

(*h*) The possession, without lawful excuse, of (i) any map, plan, sketch or drawing, pertaining to any office organization, institution or establishment of the Government, including a State Corporation, or the deployment or disposition of members of the Police or the Armed Forces, transport services or any arms or ammunition belonging to the Police or the Armed Forces,[88] or (ii) any subversive literature which is likely to be prejudicial to the interest of public security or to the preservation of public order,[89] or (iii) any explosives, offensive weapons and offensive substances,[90] is said to be an offence.

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83. At p. 208-209.
84. Emergency Regulations of 15 July, 1972, section 27.
85. Section 27A.
86. ibid.
87. Section 32.
88. Section 29.
89. Section 30.
90. Section 33(1).

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The difficult problem of reconciling the interest of public order and security with the retention of safeguards enjoyed by accused persons in ordinary criminal proceedings, arose in Ceylon in an acute form during the aftermath of the insurrection. The authorities were convinced that the existing laws were wholly inadequate to cope with a crisis of this magnitude. New legislation was enacted, making far-reaching changes. An important statute in this connection is the Criminal Justice Commissions Act, No. 14 of 1972.

This Act, which received the Assent on 18 April, 1972, empowered the Governor-General, whenever he is satisfied (*a*) that, within a specified period, whether generally or in a particular area or district, there have been committed offences in connection with, in the course of, or during any rebellion or insurrection and (*b*) that the practice and procedure of the ordinary courts are inadequate to administer criminal justice for the purpose of securing the trial and punishment of the offenders, to establish a Criminal Justice Commission consisting of such number of Judges of the Supreme Court, not exceeding five, as shall be specified in the warrant constituting the Commission.[91] The terms of reference of the Commission may include, *inter alia*, the power to "inquire and determine whether any person or persons and, if so, what persons were or were not guilty of such offences."[92] A Criminal Justice Commission is deemed to be a superior court of record.[93] In regard to the personnel of the Commission, there is no significant deviation from orthodox procedures. Authority is conferred the Chief Justice to appoint by name the Judges of the Supreme Court (of whom he may be one) who shall be the members of the Commission.[94]

The most radical provision contained in this statute is that "The proceedings at any inquiry before a Commission shall be free from the formalities and technicalities of the rules of procedure and evidence ordinarily or normally applicable to a court of law and may be conducted by the Commission in any manner not inconsistent with the principles of natural justice, which to the Commission may seem best adapted to elicit proof concerning the matters that are being investigated".[95] In particular, the Commission may, at the inquiry, notwithstanding any of the provisions of the Evidence Ordinance, admit any evidence which might be inadmissible if those provisions were applicable.[96] A confession or incriminatory statement made by any person suspected of having committed an offence, may at any inquiry before the Commission be proved against such person.[97] The normal principle in regard to the burden of

91. Section 2(1).
92. Section 2(3)(b).
93. Section 2(2).
94. Section 3(1).
95. Section 11(1).
96. Section 11(2)(a).
97. Section 11(2)(b).

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proof is reversed by the provision that "If it is sought by or on behalf of such person to reduce or minimize the weight that shall be attached to such confession or incriminatory statement, the burden of proving the facts necessary to support such contention shall lie on such person"[98]

A confession or other incriminatory statement made by an accomplice incriminating any other person suspected of having committed an offence, is declared to be relevant and admissible against the latter person.[99] The proviso, however, is added that "The Commission shall attach only such weight to evidence against a person suspected of an offence, proceeding from the confession or incriminatory statement of an accomplice as, in all the circumstances, appears to the Commission to be safe and just".[100] Moreover, "If an accomplice gives evidence which is, in material particulars, different from such confession or statement, the Commission may disregard the evidence given by such accomplice and act on such confession or statement".[101] Thus, in such matters, *inter alia*, as the admissibility of confessions and the requirement of corroboration of an accomplice's evidence, proceedings before a Criminal Justice Commission represent a departure from safeguards which are part of the general law.

Legislation of this nature inevitably involves controversial objects of policy. In Ceylon during recent years, there has been some evidence of a growing body of opinion which believes that some aspects of our law are too favourable to accused persons. On the other hand, the conviction has been expressed by others that there is inherent value in the continued operation of these principles of adjective law which become all the more relevant in times of civil strife and turbulence. It may be pointed out that the new offences created by Emergency Regulations are accorded only temporary operation, while the Criminal Justice Commissions Act is intended to effect permanent changes in the law which governs the trial of persons suspected of having committed offences against the State. This Act is based on the premise that grave offences against the State, such as organization of or association with a rebellion or insurrection, cannot be put on the same footing as other offences recognized by the criminal law and that the enormity and scope of the former offences warrant the adoption of distinct procedural rules. The desirability of this expedient has been the subject of vigorous and sustained debate in Ceylon. A noteworthy feature of the controversy, furthermore, has been the participation of a great variety of sections of opinion. In the final analysis, evaluation of the policy objectives relevant in this area depends on extra-legal values and is significantly related to the enlightenment and effectiveness of prevailing public opinion.

98. ibid.
99. Section 11(2)(d).
100. Proviso to section 11(2)(d).
101. ibid.

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A general consideration may be usefully borne in mind, however. The respective merits and disadvantages of an "adversary" and an "inquisitorial" system of criminal justice have recently been the subject of lively debate in Ceylon and elsewhere. It has been said that the former looks on a criminal trial as a contest between the State and the accused person and approaches the rules governing the conduct of a prosecution in this spirit. The latter system, on the other hand, is said to accord priority to ascertainment of the truth. The former approach has been characterized cynically as being reminiscent of attitudes associated with the hare and the hounds. In particular, the criticism has been made that the law of procedure and evidence in jurisdictions where the "adversary" system prevails, is unduly weighted in favour of the accused who frequently finds himself in a position to thwart the ends of justice by taking advantage of technicalities and refinements embedded in the provisions of adjective law. The substance of the criticism is that the prosecution is unnecessarily hampered in the presentation of logically relevant evidence to the court or jury by artificial rules and procedures which are not always defensible, on rational grounds in the contemporary context.

Traditionally, the British system of criminal justice has been thought to typify the "adversary" approach, while prosecutions on the Continent—notably in France—have been considered representative of the "inquisitorial" system. However, closer investigation suggests that this facile dichotomy is unconvincing, since fundamental assumptions and procedures in Britain and on the Continent reveal a significant degree of similarity. Nevertheless, even in Britain, the traditional conception of a criminal trial has increasingly attracted adverse comment in recent times. The criticisms have proved cogent enough to induce the present Conservative Administration in Britain to examine the whole question afresh and to contemplate far-reaching changes. Similar innovations are advocated with vigour by a section of opinion in Ceylon.

Derisive dismissal of the "adversary" approach as anachronistic or lacking in balance is not altogether justified. Although the applicable rules have evolved substantially from British usage, their rationale has general validity. The value-judgments on which they are founded are supportable in principle and symbolize important ideals in the sphere of criminal justice. The salient principles in this area concern, for example, the presumption of innocence, proof beyond a reasonable doubt, inadmissibility of confessions subject to clearly defined exceptions, the requirement of independent corroboration of an accomplice's testimony and the right to trial by jury.

In times of national emergency, it is undeniable that some of the safeguards available to accused persons under the normal

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law may have to be dispensed with, in the interest of security of the community as a whole. In some countries like the United States of America, India and Nigeria, a Bill of Fundamental Rights incorporated in the Constitution specifies the circumstances in which, and the limitations subject to which, these safeguards may be abrogated temporarily. In other jurisdictions where no comparable principles form part of the content of the paramount law, the gravity of an emergency and the consequent need to interfere with the protection of accused persons ordinarily ensured by legal provisions, are determined in the final analysis by administrative authorities, albeit restrained by public vigilance and criticism. But it is one thing to concede that the normal safeguards may be eliminated in exceptional circumstances, and another to contend that their removal should constitute a permanent and regular feature of a new system which supplants its predecessor. The merits of the latter expedient, judged from the standpoint of policy, are by no means self-evident. On the contrary, its adoption obviously involves great jeopardy to the freedom of the individual. By this method the machinery of criminal justice may be streamlined and the effectiveness and rapidity of its functioning enhanced, but these apparent advantages are secured at the expense of other values and principles which are no less vital.

A further point which warrants emphasis is that the denial of safeguards available to the accused under the existing law—for example, the proposal to define much more extensively the circumstances in which confessions made to police officers by accused persons or suspects may be received in evidence—would be acceptable only if other changes in pre-trial procedures, particularly in preliminary investigation and interrogation by police officers, supply an effective guarantee that reform of rudimentary provisions of adjective law remains consistent with the minimum requisites of justice. Especially relevant in this context are the attitudes on the part of the common people to the police and the nature of the relationship between the police and the political authorities. In a society where brutal methods are part of police work, and are tacitly accepted as such, removal of safeguards is fraught with special danger. The desirability of the contemplated changes depends primarily on a variety of factors which operate in the background and find expression in assumptions and responses which may be recognized as commonplace in a given community. Changes which are wholly beneficial to one society may prove disastrous in another. Practical considerations, then, are more significant in this regard than the theoretical basis of conflicting approaches to criminal justice.

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CHAPTER 3

OFFENCES AGAINST THE PUBLIC TRANQUILLITY

1. RATIONALE OF THE OFFENCES

These offences have as their aim the protection of society against certain risks which may arise from the gathering of a large number of persons. Indeed, some early judicial pronouncements would appear to suggest that some element of danger is inherent in the coming together of a great multitude of persons in one spot.[1] However, our law is founded on the premise that a concourse of men, merely by the act of meeting, do not pose a threat to the community. An assembly of persons becomes the concern of the criminal law only when the objects of the assembly are incompatible with the maintenance of social order and peace. The right to assemble is a fundamental democratic right which is guaranteed by the Constitution of the Republic of Sri Lanka.[2] The limitations on this right are established by reference to the purposes of the assembly, the intentions of those who comprise it and the likelihood that society would be harmed by acts of members of the assembly.

II. THE STRUCTURE OF CEYLON LAW

Three primary offences against the public tranquillity are recognized by the law of Ceylon. They are the offences of being a member of an unlawful assembly,[3] rioting[4] and affray.[5]

Section 138 of the Penal Code defines an "unlawful assembly", while the substantive offence of being a member of an unlawful assembly is constituted by section 139. The punishment for this offence is prescribed by section 140. Several further offences based on membership of an unlawful assembly but containing additional elements, are created by separate sections of the Code—for example, those dealing with joining an unlawful assembly armed with a deadly weapon[6] and joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.[7]

Rioting is an aggravated form of the offence relating to membership of an unlawful assembly. Wherever force is used by one member of the assembly in prosecution of the

1. *Redford* v. *Birley* (1822) Stark 76.
2. Article 18(1)(f).
3. Penal Code, section 139.
4. Section 143.
5. Section 156.
6. Section 141.
7. Section 142.

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common object of the assembly, every member of the assembly is guilty of the offence of rioting.[8] The element which distinguishes a riot from an unlawful assembly is the use of force or violence by the assembly or by any member of it in regard to a matter involved in the objects which the assembly resolves to accomplish. A heavier penalty is exacted for rioting than for membership of an unlawful assembly.[9] The punishment for rioting is still further enhanced when, for example, a person guilty of rioting was armed with a deadly weapon[10] or had assaulted or obstructed a public servant engaged in suppressing a riot.[11] Being hired to take part in an unlawful assembly[12] or to go armed[13] are distinct offences which carry the same penalty as that applicable to membership of an unlawful assembly[14] or joining an unlawful assembly armed with a deadly weapon.[15]

The offence of affray is constituted when two or more persons, by fighting in a public place, disturb the public peace.[16] The penalty imposed for committing an affray is light, in comparison with the sections which govern punishment for membership of an unlawful assembly[17] and rioting.[18]

III. THE DEFINITION OF AN UNLAWFUL ASSEMBLY

There are three basic elements in the definition of an unlawful assembly in our law. These relate to (*a*) the number of persons constituting the assembly; (*b*) the existence of a common object among the members of the assembly; and (*c*) the nature of the common object.

(*a*) *The Number of Persons Constituting the Assembly*

An assembly cannot be unlawful, for the present purpose, unless it consists of at least five persons. This requirement has raised some problems of interpretation. The applicable principle is that less than five persons may be properly convicted of this offence, if the prosecution is able to show that they, together with other persons, formed an assembly of five or more than five. It is not essential that all the offenders should be convicted, or even named in the indictment, so long as there is reliable evidence that the total membership of the assembly exceeded five persons. Thus, where five persons are charged with being members of an unlawful assembly and two are acquitted, it does not follow necessarily, that the convictions of the three others should be set aside. This depends on the

8. Section 143.
9. Section 144.
10. Section 145.
11. Section 149.
12. Section 155.
13. ibid.
14. Section 139.
15. Section 141.
16. Section 156.
17. Section 140.
18. Section 144.

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question whether the assembly is alleged to have consisted exclusively of the five persons who are charged, or whether the assembly also included other persons who, together with those convicted, would number five or more than five. It is only in the former event that the convictions cannot be allowed to stand.

This principle receives expression in the case law. One of the issues raised in *Dias*[19] was whether, on an indictment charging five persons with being members of an unlawful assembly, the acquittal of one or more of the accused precludes the jury from returning a verdict of guilty against the remaining accused on the charges relating to unlawful assembly. The trial judge explained to the jury that if all or any of the accused, along with others not before the court, to the number of five or more, were acting with the common object imputed to them in the indictment, the convictions could be sustained. It appeared in this case that several strangers were attacked by the five accused persons, in the company of six or seven others. The injured men succeeded in identifying only some of their assailants but the evidence clearly suggested that there were many other assailants who escaped and could not be traced.

The following principles are clearly established by the judgment: (i) Although there must be at least five persons inspired by a common object, it is not necessary that they should all be brought to trial, for some of them may abscond, but this has no bearing on the liability of those remaining. (ii) If there is evidence to show that five or more persons assembled for the objects specified, an indictment can be presented against any one of them on the basis that he was a member of an unlawful assembly. It was held that the evidence led in this case was sufficient to support the finding by the jury that there was an unlawful assembly and that the four accused persons they convicted were members of the assembly.

In *Mendis*[20] six persons were indicted with being members of an unlawful assembly. The trial judge acquitted four of them. In appeal, it was contended that the convictions of the two others were not valid, because two persons, by themselves, cannot form an unlawful assembly. This argument succeeded on the ground that the two appellants could be considered members of an unlawful assembly only in the light of evidence that there were at least three others who entertained with them the common object stated in the charge, so as to make up the required number of five. In *Mendis*, Abrahams C.J., referring to the earlier case of *Jayawardene* v. *Perera*,[21] observed: "I am by no means certain that the learned judge in that case

19. (1935) 17 C.L. Rec. 16.
20. (1937) 17 C.L. Rec. 50.
21. (1899) 1 Tamb. 15.

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meant to lay down as an absolute proposition that if, on a trial of a number of persons for being members of an unlawful assembly, so many are acquitted that the remainder of themselves cannot form an unlawful assembly, they must perforce be acquitted even if it can be proved that there are other persons who though not charged, had the same common object as the persons convicted and were sufficient in number to constitute with those persons an unlawful assembly."[22]

The position as to the requirement of number is made clear by a comparison of the cases of *Dias*[23] and *Jayawardene* v. *Perera*. In the latter case, the allegation was that the assembly comprised six persons, so that, when two were acquitted, the remaining persons were less than five in number. By contrast, in *Dias*, "the charge was definitely that the five accused were members of an unlawful assembly, not that they only constituted the unlawful assembly, and the evidence from the very outset was that they were acting in concert with others."[24] In other words, the complicity of others who were not before the court was established in *Dias*, but not in *Jayawardene* v. *Perera*. This explains why the convictions were sustained in the former case, though not in the latter.

In *Jayaram* v. *Saraph*[25] Pulle J. set out the following principle: "If a number of persons are charged as having "formed' the unlawful assembly, a conviction of at least five is necessary to sustain that conviction. Whereas, if the charge against them was that they were members of an unlawful assembly, a conviction of less than five of those charged could be supported, if there was evidence that others besides those acquitted constituted an unlawful assembly along with those who were convicted."[26] In this case, six persons were charged on four counts, the first of which alleged that they "did form members of an unlawful assembly". The Magistrate convicted only two of the accused persons. On their behalf, it was argued in appeal that the acquittal of the others destroyed the basis of the two convictions. It was not part of the case for the prosecution that, besides the six persons charged, there were other members of the assembly. In these circumstances, the convictions of the two appellants were vitiated.

In *Suriya Aratchige Fernando*[27] the allegation was that the four appellants and another accused person who was acquitted, were members of an unlawful assembly. Wijeyewardene J. said: "It was not the case for the Crown that the five accused who were indicted, were the only members of the unlawful assembly. Moreover, it is quite clear from the proceedings that, while

22. *Jayaram* v. *Saraph* (1954) 56 N.L.R. 22 at p. 23.
23. (1935) 17 C.L. Rec. 16.
24. See note 22, *supra*.
25. (1954) 56 N.L.R. 22.
26. At p. 23.
27. (1947) 48 N.L.R. 200

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there was overwhelming evidence that the four appellants and another took part in the transaction, there were circumstances which involved in some doubt the identity of the fifth person."[28] On this case, Pulle J., in *Jayaram* v. *Saraph*, made the following observation: "I have no reason to think that the decision in that case would have been the same, had the indictment alleged and the evidence sought to prove that the five accused persons and they alone constituted the unlawful assembly."[29]

In the later case of *Francis Appuhamy*[30] five persons were charged with several offences based on membership of an unlawful assembly. The evidence in respect of the number and identity of the persons who committed the offences was that of a single witness. She stated that five persons participated in the commission of the offences and identified the five persons charged before the court. The jury found four of the persons charged guilty, but the fifth not guilty. In the light of the directions given them by the trial judge, it could be said that the jury found the fifth person not guilty because they entertained a reasonable doubt about the identity of that person or thought that the witness was mistaken in regard to his identity. However, there was no doubt about the participation of five persons in the commission of the offences. It was held by the Court of Criminal Appeal that, in these circumstances, the convictions of the four persons found guilty should be upheld. This decision leaves intact the principle acted upon by Pulle J. in *Jayaram* v. *Saraph*, since the acquittal of the fifth accused in *Francis Appuhamy* did not involve any doubt as to the complicity of five persons.

In *Thiagarajah*[31] Gratiaen J. explained the applicable law as follows: "An allegation that a man was a member of an unlawful assembly of five, consisting of himself and four named persons is not the same as an allegation that he was a member of an unlawful assembly of five consisting of himself, three named persons and 'a person unknown to the prosecution'. Just as it requires at least two persons to form a criminal conspiracy punishable under section 113B of the Penal Code, the offence of being a member of an unlawful assembly cannot be committed except in association with four others. The acquittal of one of two accused persons on a conspiracy charge therefore necessarily results in the acquittal of the other, unless the indictment or charge specifically alleged (and it is proved) that someone else, known or unknown, had also participated in the crime. The same principle applies, *mutatis mutandis*, to an indictment or charge alleging participation in an unlawful assembly."[32] This is in conformity with the principles emerging from the previous cases.

28. At p. 201.
29. (1954) 56 N.L.R. 22 at p. 24.
30. (1966) 68 N.L.R. 437.
31. (1955) 57 N.L.R. 58.
32. At p. 65—66.

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(*b*) *The Existence of a Common Object Among the Members of the Assembly*

It is an essential requirement of the offence of being a member of an unlawful assembly that a common object must exist among the members of the assembly. Therefore, the offence cannot be constituted in circumstances where five persons assemble, each for a different purpose of his own, without reference to the others. In this event, there is no object, in the accomplishment of which all the accused persons are interested collectively.

(*c*) *The Character of the Common Object*

The common object must be of a particular nature, in that it must relate to one of six matters:

(i) to overawe by criminal force, or show of criminal force, Her Majesty's Government in Ceylon or the Senate or the House of Representatives or any public servant in the exercise of the lawful power of such public servant;

(ii) to resist the execution of any law or of any legal process;

(iii) to commit any mischief or criminal trespass or other offence;

(iv) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person or the public of the enjoyment of a right of way or of the use of water or other incorporeal right of which such person or public is in possession or enjoyment, or to enforce any right or supposed right;

(v) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do or to omit to do what he is legally entitled to do;

(vi) that the persons assembled, or any of them, may train or drill themselves, or be trained or drilled to the use of arms, or practising military movements or evolutions, without the consent of the Governor-General of Ceylon.[33]

It has been asserted emphatically by the courts of Ceylon that, in a charge of being members of an unlawful assembly, the offence which it was the common object of the assembly to commit, must be specified.[34] This is necessary to safeguard the interest of the accused by informing him beforehand of the nature of the charge. However, where the accused has not been prejudiced or misled by the failure to state the common object, the omission is not fatal to a conviction.[35] In *Ambalavanar*[36] it was said that the omission may be cured by application of section 210 of the Criminal Procedure Code, unless the

33. Penal Code, Section 138 34. *Gunaratne* v. *Soysa* (1928) 30 N.L.R. 241
35. *Wijesinghe* v. *Carolis* (1915) I C.W.R. 207
36. (1892) 1 S.C.R. 271.

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accused has been placed at an unfair disadvantage by the omission. In an early anonymous case Withers J. declared: "It is necessary to state distinctly in the charge what is alleged to have been the common object of the assembly, and this object must be proved and found by the jury or the court."[37]

Van Cuylenberg v. *Amarasekera*[38] was a case where the common object specified in the charge was different from that revealed by the evidence. It was held that the same considerations apply as those which govern an omission to state the common object. The position is that the defect may be rectified at a later stage, unless the accused has been unduly imperilled by this lapse.

The first clause of section 138 now requires to be amended, in keeping with the Republican Constitution of Sri Lanka. "The Government of Sri Lanka" would have to be substituted for "Her Majesty's Government in Ceylon" and "National State Assembly" for "the House of Representatives", while the reference to the Senate has to be deleted.

In regard to the second clause, it is clear that the phraseology employed is wide enough to embrace all laws, and civil as well as criminal process. This is a justifiable approach, since a gathering of men who endeavour to resist civil process, would inevitably pose a threat to the public tranquillity.

Interpretation of the third clause has proved difficult. The Ceylon cases reveal a conflict of judicial opinion. In some cases, the phrase "or other offence" has been given a wide meaning, in that the words have been interpreted as referring not merely to an offence *eiusdem generis* with those immediately preceding, but as including all offences against person or property.[39] On the other hand, a narrower view has also been suggested. The words, "other offence", it has been held, envisage an offence *eiusdem generis* with those stated in the same sub-section, namely, mischief and criminal trespass.[40] On this view, the offence of causing hurt has been excluded from the purview of the provision.[41]

The narrower view has a logical justification. In *Carupiah*[42] Pereira J. observed: "It is manifest that the words 'other offence' mean an offence *eiusdem generis* with the offences mentioned immediately before, because otherwise there was no necessity for the mention of those offences at all. It would have been sufficient simply to say 'to commit any offence'."[43]

37. 1899 Kooh's Rep. 40. 38. (1941) 19 C.L. Rec. 160.
39. *Peris* (1914) 18 N.L.R. 321; *Suppar* (1915) 18 N.L.R. 322; *Cornelis Perera* (1914) 2 C.A.R. 11.
40. *Carupiah* (1914) 1 C.A.R. 52. 41. See note 40, *supra*.
42. (1914) 17 N.L.R. 383.
43. At p. 384.

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But the results of this view of the law are unsatisfactory. For instance, it is difficult to support, as a matter of policy, the refusal to apply the section to an assembly, the common object of whose members is to cause grievous hurt to another.

A mode of supporting the preferable view was suggested by Ennis J. in *Suppar*.[44] His Lordship said: "Now Chapter VIII of the Penal Code, in which section 138 appears, relates to 'offences against the public tranquillity'. If this be taken as the scope of the legislation, it is possible to assign a reason for the specific mention of mischief and criminal force and to place a limit to the otherwise very extensive operation of section 138. Mischief and criminal trespass, in so far as they provide for the protection of private rights, do not necessarily affect the public tranquillity, but the express mention of these specific offences in section 138 shows that the legislature intended to regard the commission of these offences by a number of persons acting in concert, as a matter affecting public tranquillity. The use of the general words in the section would be limited by its scope, and it would be a question in each particular case whether the common object of the assembly was to commit an offence affecting the public tranquillity. In the present case, I entertain no doubt that the voluntary causing of hurt would come within the scope and terms of the section."[45]

The effect of this approach is that the inclusion or exclusion of an offence depends on the court's opinion whether the offence is one which endangers the public tranquillity or not. If the answer is in the affirmative, the offence is brought within the scope of the section. If it is not, the offence is excluded unless it is one of the offences specifically mentioned in the third clause.

In *Carupiah*[46] Pereira J. said: "It is clear that an assembly of five or more persons to commit theft or forgery or criminal misappropriation of property cannot be said to be such an unlawful assembly as is contemplated by section 138."[47] This view may be reconciled with that expressed by Ennis J. in *Suppar*, on the basis that these offences neither involve jeopardy to the public tranquillity nor receive express mention in the third clause. The interpretation preferred by Ennis J. represents the more desirable view, from the standpoint of principle, although its adoption requires a rather strained reading of the words of the provision.

The fourth clause consists of three broadly defined objects which relate, respectively, to forcible possession of property, wrongful denial of a servitude available to an individual or to

44. (1915) 18 N.L.R. 322.
45. At p. 329.
46. (1914) 17 N.L.R. 383.
47. At p. 384

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the public, and wrongful enforcement of a right or purported right. "Property", in the context of the first of these objectives, is not restricted to land but should include movables. The two servitudes which are referred to in the sub-section are not exhaustive but only provide examples, since the words "other incorporeal right" clearly extend to all servitudes. As to the third object, the validity of the right is obviously not the decisive criterion. This is made clear by the words "any right or supposed right". The use of force to assert the right, in the circumstances contemplated, renders the object criminal and makes section 138 applicable.

The fifth clause makes reference to two objectives—compulsion to do what another is not legally bound to do, and compulsion to refrain from doing what another is legally entitled to do. The phrase "legally bound to do" is the subject of definition in Chapter II of the Penal Code. "A person is said to be 'legally bound to do' whatever it is illegal in him to omit."[48] The criterion, then, is that of legal obligation. Similarly, legal entitlement envisages a legal right but not merely a purported right or one which is wrongly assumed to exist.

The fourth and fifth clauses must be read in the light of the provisions of the Penal Code which deal with the right of private defence. The existence of this right, within the limits imposed by the law, is in no way affected by the fourth and fifth clauses of section 138. Several Ceylon cases where the accused persons were found not guilty, involve the conclusion that the accused were acting in furtherance of their right of private defence.[49]

In *Lebbe*[50] the accused persons were an officiating priest and twelve worshippers at a mosque who sought to prevent by force the burial of a child's body in the cemetery attached to the mosque. The child's father and some of his associates had at one time been devotees of the mosque but had later seceded and built another mosque for themselves. There had been a series of disputes over the right of burial in this cemetery. The evidence indicated that the premises had been used as a cemetery from time immemorial by the devotees of the older mosque. A serious disturbance of the peace was avoided by the interposition of the headman who arranged a compromise by which the priest of the older mosque was to officiate at the burial. Since the evidence showed that the accused were acting in defence of a right which they set up in themselves, they were held not to be members of an unlawful assembly. The decision

48. Penal Code, section 42
49. See further, G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pp. 67-69.
50. (1920) 8 C.W.R. 284.

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is to be explained on the basis not merely that the accused persons alleged a right in themselves but that there were adequate grounds on which the existence of the right could be conceded.

In *Lebbe*'s case it was also emphasized that the use of criminal force, or a show of criminal force, forms an integral element of the objects envisaged by the fourth and fifth clauses of section 138. Mere resistance which is not accompanied by the use of criminal force or by a show of criminal force, is not sufficient. Shaw J. declared that criminal force is a necessary ingredient of an unlawful assembly in circumstances where the fourth and fifth clauses of section 138 are invoked. In *Kanagaratnam* v. *Tiruchchittambalam*[51] it was said that a show of criminal force cannot be inferred from the mere number of people assembled. However, in *Swamajoti Unnanse*[52] the caution was administered that the use of force, even under a ight, is to be discouraged.

The principle is established that the right which is asserted must be one recognized by the law. In *Wickremasinghe* v. *Perera*[53] the accused were charged with criminal trespass and being members of an unlawful assembly, in that they had taken forcible possession of a land occupied by the complainant. It was held that a plea of bona fide claim of right to the land did not afford a valid defence to the charge. Jayewardene A.J. said: "No one has the right to vindicate his 'supposed right' by use of criminal force. Such a right is in fact no right at all. It is a mere pretension to a right which does not exist."

One of the points of distinction between *Lebbe* and *Wickremasinghe* v. *Perera* is that the accused persons were in peaceful possession of the land in the former case but not in the latter. The Ceylon cases tend to place greater emphasis on *de facto* possession than on genuine belief in the existence of a lawful right. Thus, a party who believe that they have title to a piece of land, would constitute an unlawful assembly if, in asserting their purported right, they seek to dispossess others in tranquil possession of the land. On the other hand, the party in possession would not generally be guilty of an offence relating to an unlawful assembly if they offer resistance and stand their ground. This is a defensible attitude, in the light of the primary objectives of the criminal law which involve the preservation of social security and peace.

This attitude is further illustrated by the decision in *Wijesinghe* v. *Babahamy*.[54] It was held that a party in possession of a land has a right to prevent by force an attempt at ouster and removal of the crop by a rival group. The principle was accepted that persons assembled with deadly weapons to resist ouster and

51. (1895) 6 C. L. Rev. 65.
52. (1906) 6 Tamb. 80.
53. (1930) 3 C.A.R. 67.
54. (1901) 5 N.L.R. 126.

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to prevent the removal of a crop, cannot be charged with being members of an unlawful assembly.

It is a further requirement of our law that the right on the basis of which action is taken, should not be contentious. If the persons seeking to enforce the right, are aware that it is certain to be resisted, liability for membership of an unlawful assembly may arise in appropriate circumstances. However, the rival party may not be guilty of any offence, if their resistance is based on reasonable grounds. This situation is exemplified by the facts of *Thuriappa*.[55] Certain people of Jaffna of the Potter caste, in their attempt to take a procession through the courtyard of a Hindu temple, were forcibly repelled by people of the Vellala caste. The Potters claimed that this right was available to them, but they were aware that the right would be disputed by the Vellalas. It was not clear from the evidence that the Potters had been doing, as of right, what they attempted to do in this instance, down to a recent period. It was held that the Potters could not be said to have acted in the bona fide assertion of a legal right and that the Vellalas, therefore, were not members of an unlawful assembly. In this case the right that was asserted by the Potters was not adequately established, as the right of the accused persons was in *Lebbe*. In *Thuriappa*, Moncreiff A.C.J. said: "The Potters were the persons who went to the spot for the purpose of enforcing what they claimed as a right, without informing the Magistrate of their intention and well knowing that if the headman did not interfere, there would be a serious breach of the peace."[56]

A mistaken assumption may supply the basis of criminal liability. In *Sivasithamparam Maniagar* v. *Ponniah*[57] a party of goldsmiths, under police protection, were walking along a public road in procession with music to perform a funeral ceremony. The Vellalas, thinking that, according to ancient usages and customs, the goldsmiths had no right to use music, compelled them by force to refrain from using music. It was held that the Vellalas had been members of an unlawful assembly.

In the sixth clause of section 138, the phrase "Governor-General of Ceylon" has now to be replaced by "President of Sri Lanka".

Outside the six objects defined in section 138, no liability can arise in respect of an unlawful assembly. In *Muriwera* v. *Danta*[58] it was decided that, if mere personal violence is the sole object of five or more persons combinedly assaulting a man, they do not thereby become an unlawful assembly. In *Silva* v. *Jayasekere*[59] the court expressed doubt whether an assembly

55. (1904) 8 N.L.R. 70.
56. At p. 73.
57. (1902) 5 C.L. Rev. 108.
58. (1895) 6 C.L. Rev. 78.
59. (1897) 6 C.L. Rev. 111.

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of five or more persons with the common object of gambling, can be considered an unlawful assembly. In *de Rosairo Udaiyar* v. *Muna Wappu*[60] it was held that commission of theft was not one of the objects which could support conviction of an offence in regard to an unlawful assembly.

The Explanation attached to section 138 of the Penal Code declares that "An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly". Thus, where the purposes aimed at by the members of the assembly were innocuous at the time they assembled, but they later resolved to accomplish one or more of the six objects set out in section 138, criminal liability would arise at the later stage. In *Pitchey*[61] Pereira J. said: "As has been held in more than one case, an assembly which is lawful in its inception, may become unlawful by the subsequent acts of its members. It may turn unlawful suddenly and without previous concert among its members."[62]

A clear example is provided by the case of *de Saram* v. *Mari*.[63] On a complaint that a labourer, S, employed on an estate, had committed theft of some firewood, a police sergeant proceeded to the estate and arrested S about 4.30 p.m. The sergeant put S in an estate van and proceeded towards the police station. On the way, the van was stopped by a crowd of more than one hundred labourers. The third accused seized S and tried to pull him out of the van. The sergeant resisted, and a struggle ensued. The sergeant was saved from assault by the intervention of other persons. It was not until 9.30 p.m., after the arrival of reinforcements of police and a discussion on the question of bail had taken place, that S was taken to the police Station. In this case the evidence suggested that the crowd of labourers, when they assembled initially, only sought information. It was only after the altercation between the sergeant and the third accused that they showed signs of becoming restive. An unlawful assembly was held to have been formed at this stage.

In *N. K. A. Appuhamy*[64] the accused-appellants were indicted, on the first count, for having been members of an unlawful assembly, the common objects of which were to commit mischief by fire, murder and rape and, on the remaining counts, for the commission of the same offences in prosecution of the respective common objects. One of the arguments addressed to the Court of Criminal Appeal by counsel for the appellants was that this seemed a case where the assembly had one common object, probably arson, at an early stage, but later had other objects as well. He urged that, if murder and rape were common objects at any time, they became so at later stages of the incident,

60. (1919) 6 C.W.R. 2.
61. (1914) 2 Bal. N. of C. 49.
62. At p. 54.
63. (1940) 17 Times of Cey. 133
64. (1960) 62 N.L.R. 484.

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when it was not entirely clear that all the appellants remained members of the unlawful assembly. It was contended in appeal that the jury had not been directed adequately on this aspect of the evidence. However, the direction by the trial judge that common objects may be entertained in succession and need not exist contemporaneously, was accepted by the Court of Criminal Appeal as a correct and sufficient direction.[65]

IV. THE BASIC OFFENCE RELATING TO MEMBERSHIP OF AN UNLAWFUL ASSEMBLY

The basic offence is constituted by section 139 of the Penal Code which declares that "Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly". The crucial requirement is that the accused must have had knowledge that one or more of the six objects specified in section 138 was or were entertained by the assembly at the time he joined or remained in it. In the absence of this knowledge, the required *mens rea* would be lacking in the accused.

In *Kulatunga* v. *Mudalihamy*[66] Howard C.J., quashing the conviction, said: "It had to be proved by the prosecution that there was an unlawful assembly with a common object as stated in the charges. So far as each individual accused was concerned, it had to be proved that he was a member of the unlawful assembly which he intentionally joined. Also that he knew of the common object of the assembly."[67] Exoneration of the accused in this case stemmed from the failure of the prosecution to establish this element. While the relevant intention and knowledge constitute the mental element of the offence of being a member of an unlawful assembly, the *factum* consists of the act of joining, or remaining in, the assembly.

The law of Ceylon recognizes two aggravated forms of this offence—namely, (a) joining an unlawful assembly armed with any deadly weapon[68] and (b) joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.[69]

As to (a), aggravation of the offence depends on the accused "being armed with any deadly weapon or with anything which, used as a weapon of offence, is likely to cause death".[70] These words have been interpreted judicially. In *Suriarachchi* v. *Therolis*[71] the accused and three others were found digging up plumbago, using for the purpose a crowbar, a mammoty and other implements. They offered no resistance to their arrest.

65. At p. 491.
66. (1940) 42 N.L.R. 33.
67. At p. 34.
68. Penal Code, section 141.
69. Section 142.
70. Section 141.
71. (1916) 2 C.W.R. 61.

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It was held that the accused, under the circumstances, could not be said to have been "armed with deadly weapons".

In *Ambalavanar*[72] the accused were charged with "being members of an unlawful assembly, armed with certain cudgels and sticks which, when used, are likely to cause death". The trial court held, as a matter of law, that cudgels and sticks could not be regarded as weapons likely to cause death when used as weapons of offence. The Supreme Court reversing this conclusion, preferred the view that a cudgel or even a stick might be used in such a way as to cause death and that each case should depend on its own facts. It would seem, then, that "anything which, used as a weapon of offence, is likely to cause death", in the sense in which these words are used in section 141, has a wider meaning than "deadly weapon", in that a weapon which is intrinsically non-lethal, may yet be included in the former category on an appropriate occasion.

In regard to (b), the special feature which renders the offence more serious and makes a heavier penalty applicable in knowledge on the part of the accused persons that the unlawful assembly has been commanded to disperse, and the deliberate refusal to comply with this order.[73]

The offences recognized by sections 142 and 148 of the Penal Code have several characteristics in common. But there is also a material difference between the effect of these two sections. Section 142 presupposes the existence of an "unlawful assembly", as this term is defined in section 138. In other words, the assembly should have been formed for one or more of the six specified purposes. This is not necessarily a requirement in the context of section 148. All that is essential there is that an assembly, consisting of five or more persons, may be expected to cause a disturbance of the public peace. Although, in both cases, a lawful order to disperse has been disregarded, the degree of danger to the security of the community involved in the objects of the assembly may be appreciably greater in the first case than it is in the second. This accounts for the imposition of a relatively light sentence in the second case.

V. THE VICARIOUS LIABILITY OF MEMBERS OF AN UNLAWFUL ASSEMBLY

The principle of vicarious liability in this context is contained in section 146 of the Penal Code which provides that "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

72. (1892) 1 S.C.R. 271. 73. Section 142.

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time of the committing of that offence, as a member of the same assembly is guilty of that offence".

Membership of an unlawful assembly, *per se*, is an offence for which a fixed maximum penalty is prescribed by the law.[74] Once the unlawful assembly is formed or continues in existence, this liability arises, whether the contemplated objects are accomplished or not. But this is not the sole liability which devolves on members of an unlawful assembly. Where an offence is actually committed by any member of the unlawful assembly, the further principle applies that every other person who, at the material time, was a member of that assembly, is guilty of the same offence.[75] The extent of this vicarious liability depends on the gravity of the offence committed by one or more of the members of the assembly.

This dual liability is illustrated by the case of *Francis Appuhamy*.[76] The four appellants, along with another person, stood their trial on an indictment consisting of fifteen charges. The first eight of these charges were based on the allegation that the five persons accused were members of an unlawful assembly. Of these eight charges, the first pertained to the formation of an unlawful assembly *simpliciter*. The second to the eighth charges were based on imputation of vicarious liability for the acts of one or more persons who were members of the unlawful assembly in killing two persons and attempting to kill five others. Each of the appellants was made liable to a distinct penalty on these separate counts.

It is a prerequisite for the imposition of vicarious liability that the accused, at the time of the committing of the offence, should have been a member of the unlawful assembly.[77] Where a person had been a member of an unlawful assembly at its inception, but later withdrew from it before any offence was committed, he may be liable for the offence of being a member of an unlawful assembly, but no liability can be imputed to him for offences committed by other members of the assembly after he dissociated himself from it. This principle was referred to with emphasis in *E. L. Silva*.[78]

The fact that the accused was a member of an unlawful assembly at the time an offence was committed by other members of that assembly, is not a sufficient basis for imputation of vicarious liability. It must be proved, in addition, *either* (a) that the offence was committed in prosecution of the common object of the assembly, *or* (b) that the accused was aware the offence was likely to be committed in prosecution of that object.[79] Proof of one of those elements constitutes the foundation of criminal liability in this context.

74. Penal Code, section 140.
75. Section 146.
76. (1966) 68 N.L.R. 437.
77. Penal Code, section 146.
78. (1940) 4 C.L.J. 255.
79. Penal Code, section 146.

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The concept of a "common object" was commented on by the Court of Criminal Appeal in *Ekmon*.[80] Basnayake C.J. said: "The concept of 'common intention' is to be found in section 32, and the concept of 'common object' in section 138. When dealing with section 138, the concept of 'common object' therein must not be equated to the concept of 'common intention' in section 32. Object and intention are not the same."[81] The essential difference between these concepts is that 'common intention envisages a sharing of similar intention' entertained by the accused persons, while 'common objects refers to the purpose which each of them had in mind. The latter doctrine is restricted in its application by the requirements that vicarious liability arises only where the offence has a bearing on the common object in one of the two ways defined in the statutory provision.

The difference between a 'common intention' and a 'common object' was further explained by Sansoni J. in *N. K. A. Appuhamy*.[82] "A common object is different from a common intention, in that it does not require prior concert and a common meeting of minds before the offence is committed. If each member of the assembly has the same object, then their object would be common, and if there were five or more with this object, then they would form an unlawful assembly without any prior concert among themselves. If these elements are established, the prosecution has then proved the existence of an unlawful assembly with that particular common object."[83] In this case, according to the prosecution, one of the common objects of the unlawful assembly was the commission of rape. In explaining to the jury the criterion by reference to which they should decide whether the allegation is established, the trial judge observed: "If you cannot say with complete confidence that one of the common objects of this unlawful assembly was the commission of the offence of rape, in other words, if you are unable to say that just before this offence of rape was committed, it was in the minds of every one of those members that rape was part of the programme, that rape was going to be committed, and each one knew that the other knew that rape was going to be committed, unless you can say that, you cannot find that one of the common objects of this unlawful assembly was to commit the offence of rape".[84] This statement was endorsed by the Court of Criminal Appeal.[85]

The words "in prosecution of the common object"[86] impose a decisive limitation on the scope of vicarious liability recognized by section 146 of the Penal Code. Failure to emphasize these

80. (1962) 67 N.L.R. 49.
81. At p. 62.
82. (1960) 62 N.L.R. 484.
83. At p. 490.
84. At p. 489.
85. ibid.
86. Penal Code, section 146.

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words in a direction to the jury may be a ground of setting aside a conviction. In *Ekmon*, the trial judge directed the jury in the following terms: "If there has been an unlawful assembly in the course of which anyone had been killed, it cannot be simple hurt—because she had been killed and that injury was not a simple injury."[87] This was held to be an erroneous direction. Basnayake C. J. speaking for the Court of Criminal Appeal, said: "It is not the law that members of an unlawful assembly are liable for acts done by any member of such assembly *in the course* of it."[88] They are liable only if one of the two conditions laid down in the section is satisfied.

An act committed in prosecution of the common object of the unlawful assembly is of significantly more limited scope than an act committed in the course of the unlawful assembly. This is illustrated by a hypothetical case. Where a group of persons resolves to break into the house of their wealthy neighbour and to commit robbery, the common object of the assembly is to commit an offence in respect of property. Let it be assumed, however, that one of the members of the unlawful assembly, out of personal spite, rapes the neighbour's daughter with the intention of humiliating the neighbour. The act of rape takes place while the members of the unlawful assembly are still within the precincts of the neighbour's house and had not yet dispersed. But the rest of the members are altogether unaware that rape would be committed and have done nothing to indicate their encouragement or support of this object. In these circumstances, the act of rape is committed during the existence of the unlawful assembly but not in prosecution of the common object of the assembly. Accordingly, the other members of the assembly are not vicariously liable for the act of rape committed by one of their number.

This limitation on the scope of vicarious liability introduced by section 146, was adverted to by T. S. Fernando J., on behalf of the Court of Criminal Appeal, in *Andrayas*.[89] His Lordship said: "It was not, in our opinion, a correct direction of the jury that mere membership of an unlawful assembly, without more, rendered each member of that assembly criminally liable for an offence committed by some other member thereof. Such liability arose at law only when the existence of a certain other element or elements specified in section 146 of the Penal Code had been established."[90] The most important additional element which the prosecution has to establish is the relation between the commission of the offence and the common object entertained by the assembly. The Court of Criminal Appeal insisted that the jury must be given explicit direction on this

87. (1962) 67 N.L.R. 49 at p. 57. 88. ibid.
89. (1964) 67 N.L.R. 425. 90. At p. 430.

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matter. "It was, in our opinion, not an adequate discharge of the trial judge's function to content himself with a reading out to the jury of the text of the section."[91]

This view was expressed emphatically, although in slightly different language, by the Court of Criminal Appeal in *Sellathurai*.[92] Howard C.J. observed: "The offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members. In other words, the act must be one which, upon the evidence, appears to have been done with a view to accomplishing the common object attributed to the members of the unlawful assembly. No offence executes or tends to execute the common object unless the commission of that offence is involved in the common object."[93]

Where an offence cannot be said to have been committed in prosecution of the common object of the unlawful assembly, it would yet be possible to impute to all the members of the assembly vicarious liability for an offence committed by one or more of their number, if the offence was such "as the members of that assembly knew to be likely to be committed in prosecution of that object".[94] The two elements specified by section 146, are alternative conditions of vicarious liability.

Let us suppose that a group of persons commits house-breaking and that they are all aware that one of their number is armed with a revolver. The common object of the assembly is that of committing the offence of house-breaking so that, if an occupant of the house is killed as a result of use of the revolver, it cannot be maintained that the act of killing was committed in prosecution of the common object of the unlawful assembly. However, since all the members of the assembly knew that the revolver was being carried, available for use if the need should arise, the contingency of firing is one within the contemplation of all the accused. Accordingly, the killing is such an act as the members of the assembly know to be likely to be committed in prosecution of their common object, even though the act was not necessarily involved in the attainment of that object. The second mode by which the relation between the offence and the common object may be established, is relevant to these circumstances, and a case for recognition of vicarious liability is consequently made out.

This element became material in *Gabo Singho*.[95] Six accused were indicted on charges of being members of an unlawful assembly, the common object of which was to commit robbery, and of having committed murder in prosecution of that common

91. ibid.
92. (1947) 48 N.L.R. 570
93. At p. 574.
94. Penal Code, section 146.
95. (1948) 37 C.L.W. 43.

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object on the first ground set out in section 146. The charge to the jury was based on the second ground set out in that section, namely, that if the members of the unlawful assembly knew that murder was likely to be committed in prosecution of the common object, they would be guilty of murder. Five of the accused were convicted on the charges of unlawful assembly and murder.

Wijeyewardene A.C.J., quashing the convictions of murder, stated: "An accused person is entitled to know with certainty and accuracy the ground on which it is sought to make him criminally liable for a murder committed by another. The Crown has taken special care in the second count to state specifically that the liability of all the members of the unlawful assembly for the murder committed by one of them arose out of the fact that the murder was committed in prosecution of the common object of that assembly. That was, therefore, the case which the accused had to meet. If the Crown desired to make the members of the unlawful assembly liable on the second ground set out in section 146, the Crown should have moved to amend the second count."[96] The principle which emerges from this decision is that section 146 embodies two distinct grounds of vicarious liability and that the accused should be clearly informed which of these grounds the prosecution intends to rely on. This amounts to a salutary protection of the interest of an accused person.

Once the prosecution is able to bring the case within the purview of either of the grounds stated in section 146, all the accused persons are deemed guilty of the offence committed by any of them so long as those who are sought to be made liable remain members of the unlawful assembly at the time the offence is committed. It is not necessary that the others should have committed any physical act, apart from joining or remaining in the unlawful assembly. In *N. K. A. Appuhamy*,[97] counsel argued that several of the accused persons had not been proved to have done any acts indicative of their membership of an unlawful assembly and that, at most, only their presence at the scene had been established. Sansoni J., rejecting this contention as a ground of acquittal, said: "It is not only by the doing of a criminal act, like the use of force, that a person becomes a member of an unlawful assembly. The third, fourth and fifth accused came together with the other accused who were convicted, possibly carrying weapons and lending the weight of their presence by being in attendance throughout. . . . The language used, the weapons carried and the state of tension prevailing at the time must all have impressed themselves on the accused. Once they were apprised of the illegal object of

96. At p. 44.

97. (1960) 62 N.L.R. 484.

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the others, it was their duty to withdraw; when they failed to do so, their continued presence could reasonably have been construed as that of persons who intentionally remained in order to further the common objects of the assembly".[98] A similar view was taken in *Kulatunga* v. *Mudalihamy*.[99]

When the requisite elements contained in section 146 are shown to exist, an offence is proved, but the punishment depends on the offence of which the offender is by that section made guilty. It is necessary, therefore, that the appropriate punishment section should be read with it to the jury.[100] Section 146, then, may enable imputation of liability for any of a series of offences, ranging from comparatively less serious to capital offences. The effect of the section is to make each member of an unlawful assembly liable (subject to the requirements stipulated in the section) for an offence committed by any other member of the assembly.

The extent of vicarious liability in criminal matters recognized by the law of Ceylon has been examined elsewhere.[101] The conclusion was there suggested that the doctrine of vicarious responsibility has a stringently limited application in the criminal law of Ceylon, as compared with that of most other jurisdictions.[102]

VI. JOINDER OF CHARGES

In Ceylon, the question has arisen whether charges based on the existence of an unlawful assembly may be validly joined in the same indictment with charges founded on the existence of a common intention as described in section 32 of the Penal Code. In *Khan* v. *Ariyadasa*[103] counsel for the appellants contended that such a combination of charges constituted a fatal misjoinder.

The matter is governed by the provisions of the Code of Criminal Procedure Act. No. 15 of 1979. Section 175(1) provides that "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, and in trials before the High Court, such charges may be included in one and the same indictment". According to section 175(2), "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

98. At p. 490. 99. (1940) 18 Times of Cey. 21.
100. *Khan* v. *Ariyadasa* (1963) 65 N.L.R. 29 at p. 36.
101. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pp. 67-69.
102. ibid. 103. (1963) 65 N.L.R. 29.

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them may be charged with and tried at one trial for each of such offences, and in trials before the High Court such charges may be included in one and the same indictment".

In *Khan* v. *Ariyadasa*[104] counsel for the accused argued that what can be joined together under the similar provisions of the then Criminal Procedure Code are different offences but not one and the same offence by different names. His contention was that neither section 32 nor section 146 creates a distinct offence but merely provides a basis of criminal liability. A similar argument was addressed to the Court of Criminal Appeal in the earlier case of *Heen Baba.*[105]

The trial judge in *Heen Baba's* case directed the jury that, where the indictment consisted solely of charges framed on the basis of the existence of an unlawful assembly even if the jury reached the conclusion that no unlawful assembly was established, it was competent for them to find the accused guilty of the substantive offences alleged in the charges by placing reliance on section 32. The jury in this case found the accused not guilty on the charges in the indictment, but found them guilty of the substantive offences alleged in those charges read with section 32.[106] On the direction to the jury in *Heen Baba's* case, T. S. Fernando J. in the subsequent case of *Khan* v. *Ariyadasa*, made the following comment: "The language used justifies one in inferring that the court implied there that charges based on the existence of an unlawful assembly could have been validly joined with the charges based on the existence of a common intention as described in section 32."[107]

The opposite view, however, was accepted by Herat and Abeyesundere JJ. in *Don Marthelis.*[108] It was held that counts based on the allegation of unlawful assembly cannot be joined in the same indictment with counts based on a common intention. Abeyesundere J. said: "Section 178 of the Criminal Procedure Code requires every charge to be tried separately, except in the cases mentioned in sections 179, 180, 181 and 184 of that Code. Crown Counsel who appeared for the Attorney-General conceded that none of the four last-mentioned sections applied to the counts in the indictment in this case. The joinder of the two sets of charges referred to above is therefore not according to law."[109]

In *Ibra Lebbe*[110] several accused were indicted on thirteen charges, seven of which were based on the allegation that they were members of an unlawful assembly, and the remainder of

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104. ibid.
105. (1950) 51 N.L.R. 265.
106. (1963) 65 N.L.R. 29 at p. 34.
107. ibid.
108. (1963) 65 N.L.R. 19.
109. At p. 109. [See Section 173 of the C.P.A. of 1979]
110. (1963) 65 N.L.R. 470.

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which could have resulted in a conviction of two or more of the accused only if the offences charged had been committed in pursuance of a common intention. H. N. G. Fernando J. said: "Both precedent and reason lead me to the conclusion that the joinder is authorized by the Criminal Procedure".[111] This view was later endorsed by the Privy Council.[112]

In *Khan* v. *Ariyadasa* T. S. Fernando J. expressed the view that the decision in *Don Marthelis* was *per incuriam* and that *Heen Baba's* case should be followed. The improper concession by Crown Counsel in *Don Marthelis* was held to vitiate the decision, in that the applicability of the relevant sections of the Criminal Procedure was not fully considered by the court. In *Khan* v. *Ariyadasa* T. S. Fernando J., in a closely reasoned judgment, preferred the view adopted in *Heen Baba.* This view is based on the assumption that charges of offences based on the general principle of criminal liability contained in section 32 of the Penal Code are not implied in-charges of specific offences involving membership of an unlawful assembly.

In explaining the difference between the scope of the two provisions, T. S. Fernando J. quoted with approval the opinion of the Judicial Committee of the Privy Council in *Barendra Kumar Ghosh.*[113] Lord Summer declared: "There is a difference between object and intention for, though their object is common, the intentions of the several members may differ and indeed may be similar only in the respect that they are all unlawful, while the element of participation in action which is the leading feature of section 32, is replaced in section 146 by membership of the assembly at the time of the committing of the offence." In other words, a material difference is that the commission of physical acts by all the accused persons is necessary for the application of section 32, while it is sufficient for invocation of section 146 that each accused person had joined or remained in the unlawful assembly, with awareness that the offence in question would be committed in prosecution of the common object of the assembly.

Moreover, a vital point of contrast between the two provisions is that section 146 creates a specific offence and deals with the punishment of that offence, while section 32 merely declares a principle of law but does not create a substantive offence.[114] In *Khan* v. *Ariyadasa* T. S. Fernando J. declared: "It seems to me that a simple test for deciding whether what the prosecution alleges are two distinct and separate offences

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111. At p. 473.
112. (1965) 67 N.L.R. 145. But see *Thambipillai* (1963) 66 N.L.R. 58, *per* Basnayake C.J. for a different view.
113. (1925) A.I.R. (P.C.) 1.
114. *Heen Baba* (1950) 51 N.L.R. 265.

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are in reality one and the same offence, would be to consider whether the elements necessary to establish the one are the same as those necessary to establish the other."[115] Judged by this test, the two provisions are found to contain materially different elements. In the light of these considerations, it is clear that charges based on the existence of an unlawful assembly and those alleging a common intention do not involve the same offence by different names and that their respective scope is quite distinct. The joinder of these separate charges has statutory warrant.[116] The conclusion reached in *Khan* v. *Ariyadasa* may now be taken to represent the accepted view on the point in Ceylon.

The differences between the doctrine relating to a common intention embodied in section 32 of the Penal Code and vicarious liability imposed by section 146 on members of an unlawful assembly may be summarized as follows:

(i) The former principle may apply to two or more persons, while the latter requires a minimum of five persons;

(ii) By definition, an unlawful assembly should have been formed for one or more of the six purposes enumerated in section 138, but no comparable limitation applies to the scope of a common intention;

(iii) A "common object"—that is to say, the same intention entertained by each of the members of an unlawful assembly—is sufficient for the purpose of section 146, but section 32 postulates something more—namely, the sharing of an intention between or among the accused;

(iv) Section 32 requires the commission of a physical act by all the accused persons, while it is sufficient in the context of section 146 that each accused person joined the unlawful assembly with knowledge of its character and objects, even though no further act was done by some of them;

(v) The act contemplated by section 32 is one committed "in furtherance of the common intention of all" while the offence envisaged by section 146 is one committed "in prosecution of the common object of the assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of the common object of the assembly."

VII. RIOT

The definition of a riot is contained in section 143 of the Penal Code which declares that "Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every

115. (1963) 65 N.L.R. 29 at p. 36.
116. Section 175 of the Code of Criminal Procedure.

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member of such assembly is guilty of the offence of rioting." The material elements in the definition of a riot are (i) the use of force or violence; and (ii) the purpose for which force or violence is used. These two characteristics distinguish a riot from an unlawful assembly, in that a riot requires proof of these two special requirements, in addition to all the elements which are relevant to the offence of being members of an unlawful assembly.

In regard to element (i), the kind of force or violence contemplated in the definition of a riot was explained in *Sabapathi*.[117] Browne A.P.J. said: "I will at once say that no doubt the force used will always be criminal force in the instances of riot committed in carrying out the common object of classes first, fourth and fifth of section 138, of which common object it was a large element, as also that of class third, since the force is there used 'in order to the committing of any offence'; but that when riot is committed to carry out the common object of clauses second or sixth, the force used to constitute such riot need not be criminal force. But, indeed, in judging of whether riot has been constituted by an act of force or violence, it is not necessary to inquire whether, at the moment the force is used, there is criminal intent therewith, for in cases where the assembly is unlawful by reason of the use or display of criminal force being part of the common intent, it will already have been found to be existing to constitute the illegality of the assembly, and where it is unlawful without it, there is no need the force used should ever be of criminal intent.".[118]

The first, fourth and fifth clauses of section 138 envisage explicitly, and the third clause implicitly, objects involving the use of criminal force or a show of criminal force. The formation of an assembly which has one or more of these objects in view, is sufficient to create liability for an offence relating to membership of an unlawful assembly. The use of force, of any kind, is not an integral element of the definition of this offence. But where the assembly is not only formed, but force is actually employed in achieving the objects of the assembly, the graver offence of rioting is committed.[119]

The notion of "violence", as an aspect of the definition of a riot, has a wide connotation. It is not necessarily restricted to violence used against human beings but extends to violence directed at inanimate objects or animals—for example, items of property such as crops, dwelling houses and cattle.[120]

The offence of rioting is one which places in jeopardy the public tranquillity. A mere quarrel between individuals does

117. (1900) 4 N.L.R. 20.
118. At p. 21-22.
119. cf. *Amaris* (1898) 6 C.L. Rev. 108.
120. *District Mudaliyar* v. *Kulas* (1898) 6 C. L. Rev. 118.

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not endanger the peace of the community, in the manner and to the extent contemplated by the offence of rioting. This is illustrated by the facts of *Hinni Appu*.[121] A thief was caught by an estate watcher and, hearing the thief's cries, the neighbours rushed to the spot. In the course of the ensuing melee, the watcher's leg was broken. It was held that the facts were not sufficient to disclose a riot.

It is probably a sound view that rioting calls for the use of force of a kind or in a manner extrinsic to the force necessary to commit the offence, which it is the common object of the assembly to commit. Let it be supposed that five persons form an unlawful assembly which has as its object the commission of grievous hurt. One of the members of the unlawful assembly causes grievous hurt to the victim. If it appears that only such force as was involved in the committing of grievous hurt was used, and no force or violence was resorted to in any other way the offence of rioting is not established. The offenders would be guilty of (a) the offence of being members of an unlawful assembly, and (b) the offence of causing grievous hurt. But where, for example the common object of the assembly was to commit criminal trespass, and force was used in the prosecution of this object, a case of rioting may be made out. The use of force in any degree is not part of the definition of criminal trespass, so that the force used was not merely such force as is implicit in commission of the offence of criminal trespass. This interpretation of the law derives support from the approach of the court in *Suriarachchi* v. *Therolis*.[122]

It need hardly be emphasized that all the essential elements of the offence must be proved beyond a reasonable doubt by the prosecution. In *Lewishamy*[123] it was held that an inference of guilt, on a charge of unlawful assembly and rioting, cannot be drawn from the mere possession by the accused of property stolen from the scene of the alleged unlawful assembly. Moreover, it is clear, a person present at a riot merely through curiosity cannot be considered guilty of being a member of an unlawful assembly or of rioting.[124]

When a person convicted of rioting is proved to have been armed with any deadly weapon or "anything which, used as a weapon of offence, is likely to cause death",[125] the gravity of the offence is enhanced. Thus, the punishment for riothing, armed with a deadly weapon, is heavier than that for rioting.[126] "Deadly weapon" has a fairly fixed meaning, but "anything which, used as a weapon of offence, is likely to cause death" is flexible enough to permit the court to use a considerable measure of discretion in each case. In *Tinagary*[127] a thick stick

121. (1885) 6 C.L. Rev. 81.
122. (1916) 2 C.W.R. 61.
123. (1945) 22 C.L. Rec. 30.
124. (1905) 5 C.L. Rev. Notes p. 65.
125. Penal Code, section 145.
126. Section 144.
127. (1892) 6 C.L. Rev. 54.

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was held not to be a deadly weapon. But a thick stick, in appropriate circumstances, may fall within the purview of the second phrase.

(ii) The requirement that force or violence should be used "in prosecution of the common object of the assembly" restricts the scope of the offence of rioting. It is not sufficient that force was resorted to. It should be employed in the accomplishment of the common object of the assembly. The implications of the limiting phrase were investigated earlier.

Some problems pertaining to the penalty aplicable in certain circumstances have arisen in the Ceylon cases. Section 178(1) of the Code of Criminal Procedure provides that "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it". Section 67 of the Penal Code is to the effect that "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided".

In *Nandua*[128] it was held that, when five or more people assemble with the object of beating a particular person, and proceed to beat the victim in pursuance of their plan, they are guilty both of riot and of voluntarily causing hurt. However Withers J. stated: "It is quite a different question whether they should have different punishments for these two offences.... In this case, clearly, the principal offence was riot. The act of riot, again, was made up of two other offences, unlawful assembly and voluntarily causing hurt, which was the object of the assembly. They therefore should only be punished for the principal offence of riot".[129]

A different view was taken in *District Mudaliyar* v. *Kulas*.[130] Lawrie C.J. observed: "The offence of riot is committed when members of an unlawful assembly use force and violence, but mere force and violence is different from and less than causing hurt. Force and violence may be used to inanimate things, as trees may be uprooted, crops damaged, houses broken; or even animate things, like cattle, are injured. But it seems to me that the causing of hurt, that is, causing pain, disease or infirmity to human beings can be charged and punished separately."[131]

The latter view, it is submitted, is probably preferable. The elements of the offence of rioting may be established completely, in the absence of the element of causing hurt. It follows that

128. (1895) 1 N.L.R. 317.
129. At pp. 318-319.
130. (1898) 6 C.L. Rev. 118.
131. At p. 118.

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the latter constitutes a distinct offence and not one which is part of the offence of rioting. This is not, then, an example of an offence consisting of several parts. The use of violence or force in prosecution of the common object of the unlawful assembly is sufficient to establish the offence of rioting and to make the penalty for that offence applicable. Where the use of force or violence takes a particular form in a given set of circumstances—that is to say, when a human being is assaulted and injuries are caused—the separate offence of causing hurt is established. Consequently, there would seem no objection in these circumstances to imposing, in addition to the penalty for rioting, the penalty prescribed by the law for the separate offence of causing hurt.

VIII. AFFRAY

The offence relating to membership of a unlawful assembly is the foundation of the offence of rioting. Affray, however, is a distinct offence which has no comparable connection with that of being a member of an unlawful assembly. This offence is defined in section 156 of the Penal Code which declares that "When two or more persons, by fighting in a public place, disturb the peace, they are said to 'commit an affray'." The punishment for this offence is prescribed in the next section.[132]

The nature of the offence of 'committing an affray' is made clear by the cases. The following elements must be established:

(i) Two or more persons should have been involved in the fighting. In *Banda* v. *Chelliah*[133] the evidence suggested that one accused committed an assault on the other and that the other did not return the blow. The accused, it was held, could not be found guilty of affray. In these circumstances, no "fighting" can be said to have taken place, in the absence of retaliation by the victim of the assault. Moreover, where one of the persons is exercising a lawful right in offering resistance, no liability on the basis of committing an affray can arise. In *Oliver* v. *Borella Police*[134] Dias J. observed: "When a man has to fight on the public road to defend himself against the attack of a thug who knocks him down and pulls out a knife, he cannot be said to be guilty of an affray, even if the public peace is disturbed".[135]

(ii) The fighting should have occurred in a "public place". In *Jayasuriya* v. *Arnolis Appu*[136] the witness shed of a gamsabhava was held to be a "public place" within the meaning of the section. Similarly, the verandah of a court-house[137] and an open space

132. Section 157.
133. (1909) 2 Leader L.R. 123.
134. (1947) 49 N.L.R. 68.
135. At p. 69.
136. (1919) 6 C.W.R. 307.
137. *Toussaint* v. *Silva* (1889) 6 C.L. Rev. 31.

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in the vicinity of a Hindu temple[138] have been held to be "public places" for this purpose.[139]

(iii) The wording of the section suggests that disturbance of the public peace by the accused persons is an element of the offence. However, the attitude of the Ceylon courts represents a departure from this position. In *Packeer* v. *Shiek Ali*[140] it was held sufficient, in a prosecution for affray, to prove that there was fighting, even though no evidence is led that the public peace was disturbed. In similar vein it was said, in *Grenier* v. *Paranavithana*,[141] that the essence of affray consists of the act of fighting which, *per se*, is tantamount to disturbance of the public peace. In strict principle, this view is open to exception.

The question of a joint trial of the rival parties involved in an affray arises in this connection. The governing provision is section 180 of the Code of Criminal Procedure which provides that "When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit". Although the conclusion has been reached in some cases[142] that there is no warrant for a joint trial of the opposing factions, the view has prevailed that a joint trial in these circumstances is in conformity with the requirements of the law.[143]

IX. OTHER OFFENCES

Several other offences are created by Chapter VIII of the Penal Code, entitled "Offences Against the Public Tranquillity." These are (i) hiring or conniving at the hiring of persons to join an unlawful assembly;[144] (ii) assaulting or obstructing a public servant when suppressing a riot or affray or dispersing an unlawful assembly;[145] (iii) wantonly giving provocation with intent to cause a riot;[146] (iv) harbouring, receiving or assembling any persons hired or engaged, or about to be hired or engaged, in an unlawful assembly;[147] and (v) being hired, or offering to be hired, to take part in an unlawful assembly or

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138. *Kandappa* v. *Konamalai* (1889) 6 C.L. Rev. 117.
139. cf. *Fernando* v. *Arlis* (1908) 3 A.C.R. Suppl. p. 10.
140. (1895) 6 C.L. Rev. 19.
141. (1943) 7 C.L.J. 69.
142. *Velaiden* v. *Zoysa* (1910) 14 N.L.R. 140, *per* Middleton J: *Police Officer* v. *Dineshamy* (1919) 21 N.L.R. 127, *per* Schneider A.J.
143. *Abeyewardene* v; *Fernando* (1924) 27 N.L.R. 97; *Hewavitarane* v. *Appuhamy* (1928) 30 N.L.R. 33; *Weerasinghe* v. *Ismail* (1932) 12 C.L. Rec. 6.
144. Penal Code, section 147.
145. Section 149.
146. Section 150.
147. Section 154.

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riot, or to go armed.[148] Appropriate penalties are prescribed by each of these sections. Other provisions deal with connected matters. Thus, the liability of an owner or occupier of land on which an unlawful assembly is held,[149] the liability of any person for whose benefit a riot is committed[150] and the liability of an agent of the owner or occupier of land for whose benefit a riot is committed,[151] are all matters in respect of which specific provision is made in the Penal Code.

X. CONCLUSION

The provisions of the Penal Code in regard to offences affecting the public tranquillity cover an extensive ground. Widely divergent situations, some with characteristics making for aggravation of liability, and the liability of persons who may be involved in these situations in different ways, are fully provided for. The primary feature of our law in this regard, however, is the amorphous scope of the provision contained in section 146. This is a single substantive provision that may be invoked, irrespective of the nature or gravity of the offences for which the accused persons are sought to be made liable on the basis of the principle embodied in section 146. Whatever may be the offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, liability for the offence is imputable to all other members of the assembly at the time the offence was committed. The value of the technique adopted by our law is that a great variety of circumstances is catered for by a provision which is defined and applied with relative ease. There has been some confusion in the case law as to the respective spheres of operation of the doctrine relating to common object and common intention, but the distinction between these concepts is adequately appreciated in the later cases.

148. Section 155.
149. Section 151.
150. Section 152.
151. Section 153.

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CHAPTER 4

OFFENCES CONSISTING OF AGREEMENT

1. HISTORICAL ORIGIN

The offence of conspiracy is defined by the Penal Code as follows: "If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be."[1]

The offence of conspiracy was not part of our law until 1924, the only available provision at the time being that contained in section 100 of the Penal Code. The second clause of section 100 declares that engaging in a conspiracy for the doing of a thing is a form of abetting the doing of that thing. An offence is constituted in these circumstances by the provisions of section 101.

The inadequacy of this provision was exposed in *Silva.*[2] The first accused, with the object of playing a confidence trick on H, told him that the second accused was a very wealthy Chetty who was fond of gambling and that a great deal of money could be made by playing a game of cards with him. He demonstrated to H that by a certain manipulation of the cards as they were replaced in the pack, all the picture cards would have gone to the other player. H informed the police, and went to the place indicated by the first accused. Before play commenced, the police arrived and arrested the first and the second accused. The bags brought by the second accused, it was discovered, contained not money but only pieces of paper.

In appeal, Jayewardene J. said: "The conviction of the first accused of abetting the second accused to cheat H raises a difficulty with regard to the conviction of the second accused. The offence of cheating not having been committed, it seems to me impossible to deal with the second accused under any section of the Penal Code. In India this omission has been made good by the addition of certain sections included in Chapter VA of the Penal Code. These sections render all persons, principals and accessories, engaged in a conspiracy, guilty of an offence. These sections have not been added to

1. Section 113A(1). 2. (1923) 24 N.L.R. 493.

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our Penal Code".[3] Accordingly, the conviction of the second accused was set aside.

This case drew attention to what was thought to be a lacuna in the existing law. Soon afterwards, Ordinance No. 5 of 1924 was passed to supplement the provisions of the Penal Code by adding sections 113A and 113B. The scope of the present law would enable the conviction of the second accused in *Silva*'s case, on the basis of the offence of conspiracy.

The introduction of the new sections has the effect of expanding the relevant law. The primary difference between the two sections is that, under section 100, those conspiring are treated as abettors, while section 113 renders them liable to be dealt with as abettors or as principal offenders.[4]

II. THE ELEMENTS OF THE OFFENCE

(a) It is obvious that the offence of conspiracy presupposes participation by at least two persons. In *Dharmasena*[5] it was held by the Privy Council that if two persons are convicted of a criminal conspiracy and, on appeal, one is sent for retrial, the other should be sent at the same time for retrial on the charge of conspiracy, so that both may be convicted or acquitted together. In this case, one of the persons, charged with conspiracy was found guilty by one jury, while the other was acquitted by a different jury. Lord Porter, speaking for the Privy Council, observed: "In their Lordships' opinion, this is an impossible result where conspiracy is concerned. It is well established law that if two persons are accused of conspiracy and one is acquitted, the other must also escape condemnation. Two at least are required to commit the offence of conspiracy: one alone cannot do so".[6] Of course, it is possible for one conspirator to be convicted in circumstances where the others cannot be brought to justice, for some such reason as that they are absconding, so long as there is clear proof that a conspiracy involving other persons existed. But the Privy Council expressed the view that, where two are tried together, so that the only possible verdict is that both are or neither is guilty, an order for the retrial of one makes it imperative that the other should also be retried.[7]

Pauline de Croos[8] concerned an indictment against the accused-appellant as the first accused, and another as the second accused, both accused being charged jointly, on the first count with conspiracy to commit or abet the offence of murder. Before the prosecution technically closed its case, the second accused was discharged in terms of section 234(1) of the Criminal

3. At p. 501.
4. *Andree* (1941) 42 N.L.R. 495 at p. 499.
5. (1950) 51 N.L.R. 481.
6. At p. 485.
7. ibid.
8. (1968) 71 N.L.R. 169.

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Procedure Code, on the ground that there was no evidence on which he could be convicted. In appeal, T. S. Fernando J, said: "After the acquittal of the second accused, the first charge of conspiracy should have been struck out".[9]

(b) The words of section 113A give rise to a difficulty of interpretation. It is a question whether the word "agree" refers only to the phrase "commit or abet" or also to the phrase "act together". To state the problem in another form, where two accused persons are charged with "acting together", the issue is whether the prosecution should establish, as an element of the charge, that agreemet to act together existed between them.

Some reference was made to this point by Soertsz J. in *Andree*.[10]. His Lordship stated: "In our law, an acting together in the manner indicated is sufficient to support a charge of conspiracy, without reference to any agreement between the parties".[11] According to this view, agreement is essential in regard to "committing or abetting" but not as to "acting together". However, this opinion expressed by Soertsz J. is clearly not part of the *ratio decidendi* of the case, in view of the further observation that "Assuming that agreement has to be established, there is abundant evidence in this case from which an agreement among the accused can be inferred".[12]

The interpretation of the law favoured in *Andree*, appears to have been taken for granted in *Ponnusamy Sivapathasunderam*[13] where the indictment did not allege an agreement to act together. This omission was not treated as material by the Court of Criminal Appeal.

A decade later, the matter was canvassed before the Court of Criminal Appeal in *Cooray*.[14] Here again, two accused were jointly charged with "acting together" but no mention was made specifically of agreement. The contention on behalf of both accused was that this omission vitiated the charge of conspiracy. Counsel for the accused argued in appeal that section 113A must be interpreted so as to establish the commission of the offence of conspiracy in one or the other of the following circumstances: (i) if two or more persons *agree*, with or without any previous concert or deliberation, *to commit* an offence or *to abet* an offence; or (ii) if two or more persons *agree*, with or without any previous concert or deliberation, *to act together with a common purpose for or in committing or abetting* an offence. This submission was endorsed by Gratiaen J. who delivered the judgment of the Court of Criminal Appeal.

9. At p. 172.
10. (1941) 42 N.L.R. 495.
11. At p. 500.
12. ibid.
13. (1942) 44 N.L.R. 13.
14. (1950) 51 N.L.R. 433.

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Four reasons which support the conclusion reached by the court, emerge from the judgment:

(i) The grammatical structure of the sentence which states the applicable principle, favours this view;[15]

(ii) The second clause of section 100, which represented the pre-existing law, makes explicit the underlying importance of agreement as the substance of a conspiracy;[16]

(iii) The attitude adopted by the court is in conformity with Indian law which is basically similar;[17]

(iv) It had been suggested in an earlier case[18] that, subject to certain differences on the point between English law and Ceylon law,[19] the elements of the English law of criminal conspiracy were substantially introduced into the Penal Code of Ceylon.[20] On this assumption, there can be no doubt that the gist of criminal conspiracy consists of a *concursus animorum*.[21] Once a concurrence of minds is arrived at in the specified circumstances, liability for the offence of conspiracy is independent of the question whether the accused persons committed any acts or not in pursuance of their agreement.[22] When agreement of the kind required by the law is complete, liability for conspiracy is established.

In an evaluation of these reasons, it must be pointed out that considerations based on an analysis of the words and policy of the statutory provision in Ceylon, are of greater force than analogies derived from English or Indian law. While the law on the point in all these jurisdictions rests on a common foundation, it is not a legitimate approach to the problem to introduce obliquely into our law elements which, though characteristic of the law of foreign jurisdictions, do not appear inherent in our own formulation. As an Indian judge observed in a different context, "I think it would have been the inversion of the proper order of things in India to have taken an English case of the highest authority first, and then to have construed the Indian statute in the light of the law that it lays down in England".[23] This attitude may be adopted justifiably in construing our law as to criminal conspiracy.

In *Kanagaratnam*,[24] the position established by *Cooray*'s case was succinctly summarized by Choksy A.J. as follows: "Under our law as it now stands, it is the agreement *per se* to commit

15. At p. 437.
16. At p. 438.
17. At p. 437.
18. *Andree, supra.*
19. See note 41, *infra.*
20. (1941) 42 N.L.R. 495 at p. 497, *per* Howard C.J.
21. *Roulton* 12 Cox C.C. 87 at p. 95.
22. *Mulcahy* L.R. 3 H.L. 306.
23. *Parbhoo* v. *Emperor* (1941) A.I.R. (All.) 402 at p. 422, *per* Brand J.
24. (1952) 47 C.L.W. 42.

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or abet a criminal offence which is intended to be penalized, whether or not overt acts follow the conspiracy, so long as existence of the conspiracy can be proved. The different acts of the various parties which may follow the conspiracy and therefore help to disclose it are themselves really no part of the conspiracy, but only evidence of it. It seems to me that it is the common concurrence of many minds—of more minds than one—with a view to achieving an object which is an 'offence' under our law that constitutes criminal conspiracy under the Penal Code".[25]

In *Cooray*'s case, the Solicitor-General, contending for the view which prevailed in *Andree*,[26] made two major submissions: (i) He argued that an "agreement" necessarily presupposed some degree of "previous concert and deliberation" and that it was therefore implausible to suggest that two or more persons can "agree" to do something "without previous concert or deliberation";[27] (ii) A further argument was that, if "agreement" is the vital ingredient of every form of conspiracy contemplated by section 113A, the words "agree to...act together with a common purpose for or in committing or abetting an offence" would be redundant, because they are in effect synonymous with the earlier words "agree to commit or abet an offence".[28]

Both these contentions were unacceptable to the court. In regard to (i), Gratiaen J. referred with approval to an illustration suggested by Fitzgerald J. in the English case of *Parnell*.[29] The English court said that, where two guilty conspirators never saw each other until they stood face to face in the dock, "It may be that the alleged conspirators have never corresponded. One may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement".[30] In other words, there is no logical inconsistency in an allegation that the accused persons "agreed" to act together "without previous concert or deliberation", since the requisite agreement may have come into being on the spur of the moment, although the accused had not met earlier or discussed any plan between or among themselves. As to submission (ii), Gratiaen J. was of opinion that the phrases "agree to...act together with a common purpose for or in committing or abetting an offence" and "agree to commit or abet an offence" did not have the identical meaning. "One can conceive, for instance, of an agreement between A and B to commit acts (of preparation) which, though designed to further the commission of an offence by C, might possibly fall

25. At pp. 44-45.
26. See note 10, *supra*.
27. (1950) 51 N.L.R. 433 at p. 439.
28. ibid.
29. 14 Cox C.C. at p. 515.
30. ibid.

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short of the actual abetment of a criminal act".[31] It is apparent that the former phrase is of significantly wider scope than the latter.

It would seem, then, that there is no contradiction between the concepts of "agreement" and absence of "previous concert or deliberation". While agreement, in all circumstances, is of the essence of conspiracy, the elements of agreement, in this context, may be stated as follows: (i) No prior meeting is essential; (ii) It is not even necessary that there should have been any contact, of whatever nature, at an earlier time between or among the accused; (iii) All that is necessary is that there should have been concurrence, in the sense of endorsement or acceptance of a common design which may be conceived instantaneously. Adoption of a common design by agreement among all may be inferred from the surrounding circumstances such as mutual hostility towards the victim or the desire to protect a common interest. In this sense, there is clearly a close relation between the ideas of "agreement" and "common purpose" incorporated in the statutory provision. But there is no legal requirement in regard to the mode of concurrence in the common purpose, or the manner in which such concurrence may be established by the prosecution. In *Andree* Soertsz J. expressed the view that, where the indictment is one of conspiracy by "acting together", an agreement is not essential but that "It is sufficient to prove that the accused acted together *with a common purpose* for or in committing an offence".[32] However, the better view now is that the prosecution, in this event, must prove *agreement* to act together with a common purpose for or in committing an offence.

The emphasis on agreement as the epitome of a criminal conspiracy is explicit in the judgment of Hearne J. in *Sundaram*,[33] where it was said that "The gist of the offence of conspiracy is agreement".[34] In this case, three distinct acts of cheating were committed in consequence of the agreement arrived at among the accused persons. As far as the charge of conspiracy was concerned, however, it was held that the liability of the accused was for *one* conspiracy to commit cheating. "One agreement to commit cheating does not become three agreements to commit cheating because, as it transpires, three offences of cheating are committed in pursuance of the agreement."[35] This, again, underlines the principle that what matters in a charge of conspiracy is the agreement that was reached and not the overt acts committed in consequence of it.

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31. (1950) 51 N.L.R. 433 at p. 439 *ad fin.*
32. (1941) 42 N.L.R. 495 at p. 500.
33. (1943) 25 C.L.W. 38.
34. At p. 39.
35. ibid.

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The Court of Criminal Appeal has shown itself disposed to set aside a conviction in circumstances where all the elements of the offence of conspiracy have not been explained adequately to the jury. In *Podisingho*[36] Dias S.P.J. declared: "The majority of us think that, when learned judges have found the definition of the offence of criminal conspiracy difficult to construe, a lay jury would stand in urgent need of proper direction and explanation. Merely to read the section is, in the opinion of the majority of the Court, inadequate".[37] It was held in appeal that the convictions could not be allowed to stand, since there was the likelihood that the jury had not brought their minds to bear on the entirety of the ingredients of a criminal conspiracy and judged the guilt of the accused in the light of these requirements.

(c) An exception statutorily recognized to the offence of conspiracy is that the relevant provision does not extend to a case in which the conspiracy is between a husband and his wife.[38] The basis of the exception is the archaic doctrine of the English Common Law relating to the notional oneness of husband and wife in specific contexts. An attempt by counsel for the accused to extend the area of the exception, proved abortive in *Andree*. In this case, the second and the third accused were employees of the first accused. Counsel contended that employees acting on the mandate of their master cannot be said to be conspiring with him.[39] But Howard C.J., rejecting this submission, said: "I do not consider that the fact of the services of the second and third accused being procured by the first accused on a hiring basis so as to establish a relationship of master and servant was in any way inconsistent with the three of them entering into a conspiracy to contravene the provisions of the Betting on Horse Racing Ordinance".[40] This is manifestly the sound view for, if the position were otherwise, the existence of a contractual relationship might supply the means of circumventing responsibility for a criminal agreement in this context. It is indisputable that the exception is strictly confined to the relationship between husband and wife.

The elements of the offence of conspiracy may be summarized as follows: (i) At least two persons must be involved; (ii) There must be agreement *either* to commit or abet an offence *or* to act together for or in committing or abetting an offence; (iii) Agreement is to be proved by reference to the common purpose entertained by the accused persons; (iv) No previous meeting, discussion or other form of contact is essential; (v) The offence is not constituted by an agreement between husband and wife.

36. (1951) 53 N.L.R. 49.
37. At p. 60.
38. Exception to section 113A of the Penal Code.
39. (1941) 42 N.L.R. 495 at p. 496. 40. At p. 498.

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It is of interest briefly to compare our law as to criminal conspiracy with English and Indian law. The major difference between English law and our law is that, in the former system, the offence of conspiracy is constituted when there is agreement to commit an unlawful act, not necessarily an offence.[41] In Ceylon, by contrast, only an agreement to commit an offence, in the sense of a wrong against the criminal law, falls within the purview of a criminal conspiracy.[42] Thus, there can be a criminal conspiracy to commit a tort in English law, but agreement to commit a delict is insufficient to support a charge of criminal conspiracy in Ceylon. The words "illegal" and "illegally" are defined by the Penal Code as being applicable to "everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action".[43] But the definition of criminal conspiracy in our law makes reference not to an "illegal act" but to an "offence". The word "offence", in this context, "denotes a thing *punishable* in Ceylon under the Penal Code or under any law other than the Penal Code".[44] In this respect, then, our law is more restricted in scope than the corresponding English law.

The formulation which forms part of Indian law is that "When two or more persons agree to do or cause to be done (1) an illegal act, or (2) *an act which is not illegal by illegal means*, such an agreement is designated as a criminal conspiracy".[45] This, again, embodies a wider definition of criminal conspiracy than that which applies in our law, since a lawful act, however committed, cannot furnish the basis of a charge of criminal conspiracy in Ceylon.

Circumstances in which one of the participants in the conspiracy is outside Ceylon, are catered for by a distinct provision of the Penal Code which declares that "A person within Ceylon can be guilty of conspiracy by agreeing with another person who is beyond Ceylon for the commission or abetment of any offence to be committed by them or either of them, or by any other person, either within or beyond Ceylon; and for the purposes of this sub-section as to an offence to be committed beyond Ceylon, 'offence' means any act which, if done within Ceylon, would be an offence under this Code or under any other law".[46]

Particularly in this context, it may be noted that direct communication among all the alleged conspirators is not essential. "There may be one person round whom the rest revolve. The metaphor is the metaphor of the centre of the

41. See *Mulcapy* at note 22, *supra*.
42. Penal Code, section 113A(1)
43. Section 41.
44. Sections 38(1) and 38(2).
45. Indian Penal Code, section 120A.
46. Penal Code, section 113A(2).

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circle and the circumference. There may be a conspiracy of another kind, when the metaphor would rather be that of the chain. A communicates with B, B with C, C with D, and so on, to the end of the list of conspirators."[47] In any of these circumstances, the crucial element of agreement can be established in the absence of direct communication.

III. PROCEDURAL ASPECTS

Section 175(1) of the Code of Criminal Procedure declares that "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, and in trials before the High Court such charges may be included in one and the same indictment." The question has arisen in Ceylon whether it is proper, on the basis of the corresponding provision in the earlier Code, to include a charge of conspiracy in an indictment which alleges the actual commission of the offence in regard to which the conspiracy is said to have existed.

In several cases, such a combination of charges in one indictment has been allowed. In *Ponnusamy Sivapathasunderam*[48] the first count in the indictment alleged a conspiracy to commit murder, while a later section of the first count alleged abetment of the offence committed in pursuance of the conspiracy. It was held by the Court of Criminal Appeal that the first count in the indictment was not illegal either on the ground of multiplicity of charges or because it alleged that the accused persons and another were guilty of the offences of conspiracy to commit murder as well as of conspiracy to abet murder. In *Kanagaratnam*[49] Choksy A.J. held that counts alleging commission of an offence may be validly joined with counts alleging a conspiracy to commit the offence. It was asserted that "Once there is a charge of conspiracy to commit a certain specified offence, all the accused can be charged not only for that conspiracy but also for the various criminal offences committed by the different conspirators individually, or abetted by some of them and committed by others of them, even though all the conspirators may not have been aware of or been party to the various individual offences of their co-conspirators, so long as those offences were committed or abetted in pursuance of that same conspiracy."[50]

The justification for this view was expressed by Soertsz J. in *Ponnusamy Sivapathasunderam.*[51] Where a charge relating to the

47. *Meyrick* 21 Cr. A.R. 94. cited with approval by Gratiaen J. in *Cooray* (1950) 51 N.L.R. 433 at p. 439.
48. (1942) 44 N.L.R. 13.
49. (1952) 47 C.L.W. 42.
50. At p. 45.
51. See note 48, *supra.*

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commission of an offence is combined not with a charge of conspiracy under section 113A of the Penal Code but with a charge of abetment of the offence under section 101, it may cogently be said that "You can no more charge a man as an abettor as well as a perpetrator of the offence abetted than you can charge a man with an attempt to commit an offence and the commission of that offence".[52] Soertsz J. said, however: "But the position is entirely different now, for our law has a distinct offence of conspiracy which penalizes abetment of an offence, regardless of whether it is committed or not. It is that kind of conspiracy that is charged in count 1 here, and the allegation is made that the appellant and his co-accused conspired in that sense to cause the death of the persons named, acting with a common purpose, taking, maybe, different individual parts and yet being liable as co-conspirators to be punished in the manner laid down by section 113B."[53] The contention which prevailed was (a) that two distinct and separate offences are contemplated by the counts in the indictment which allege, respectively, a conspiracy to commit the offence and the actual commission of the offence, and (b) that these distinct offences, being connected with each other in the manner envisaged by section 180(1) of the Criminal Procedure Code, may be referred to legitimately in the same indictment.

It is doubtful whether this position holds good today. It was dissented from emphatically by two judges of the Supreme Court in *Rodrigo*.[54] A problem was posed by the first and third counts of the indictment which joined a charge of conspiracy with a charge pertaining to commission of the offence. Gratiaen J. said: "The evidence on which the Crown relied in support of the charge of conspiracy was none other than the evidence intended to be submitted as proof of the commission of the actual offences. In such a situation it has been considered undesirable and improper by the English courts to charge the accused persons only with conspiracy or to include a charge of conspiracy in an indictment alleging the commission of the offences themselves...I have not been able to discover why the prosecuting authorities in this country have not discontinued this practice locally".[55]

The practical objection to the joinder of these separate charges is that this renders admissible evidence of what one accused says in the absence of the other[56]—a course "manifestly calculated to operate unfairly and unjustly against the persons accused".[57] In the light of this consideration, it would appear

52. (1942) 44 N.L.R. 13 at p. 17.
53. ibid.
54. (1952) 55 N.L.R. 49.
55. At p. 50.
56. *Luberg* (1926) 19 Cr. A.R. 133. 57. *Boulton* (1871) 12 Cox C.C. 87 at p. 93

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that the interest of the accused persons warrants protection by discouraging the practice of combining charges in these circumstances. From the standpoint of policy, the conclusion reached by the court in *Rodrigo* is to be preferred.

While joinder of these distinct charges was strongly disapproved of in *Rodrigo*, the practice was not declared positively illegal. Indeed, the prosecution has had recourse to this practice in later cases.[58] But the danger indicated by Gratiaen and L. M. D. de Silva, JJ. emerges clearly from the facts of a case like *Pauline de Croos*.[59] In this case, the first and the second accused were charged jointly (i) with conspiracy to commit or abet the offence of murder of a boy who was a son of the second accused, and (ii) with the actual murder of the boy. The second accused was discharged during the course of the trial for want of evidence against him. However, it appeared that, before the second accused was discharged, evidence was led about an improper association between the first and the second accused and her promiscuous conduct with other men. T. S. Fernando J., on behalf of the Court of Criminal Appeal, observed: "So long as the second accused stood charged along with (the first accused) with conspiracy to murder and with murder itself, it was not possible to say that the evidence could have been excluded".[60] Reckless joinder of these charges enabled the leading of evidence in regard to the loose morals of the first accused, although this evidence would not have been admissible in terms of the Evidence Ordinance,[61] if she had stood her trial alone. The Court of Criminal Appeal conceded that the first accused had been placed at a disadvantage unjustifiably on this account, but a majority of the judges dismissed the appeal by the first accused on the ground that no substantial miscarriage of justice was established.

Section 180 of the Criminal Procedure Code has been resorted to as the justification for combining in the same indictment a charge of conspiracy with a charge of committing the completed offence. Section 184 of this Code provides that "When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit". According to the decision in *Rodrigo*'s case section 180 cannot be used properly for the purpose countenanced by previous decisions of our courts in

58. See, for example, *de Croos* (1968) 71 N.L.R. 169, *Kularatne* (1968) 71 N.L.R. 529.
59. (1968) 71 N.L.R. 169.
60. At p. 173.
61. Section 54.

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cases like *Andree*, *Kanagaratnam* and *Ponnusamy Sivapathasunderam*. Section 184, (which new is section 180 of the new Code) however, continues to govern the joinder of defendants in cases involving criminal conspiracy.

In *Rodrigo*, Gratiaen J. said: "I am content to say that, if the accused had been tried alone to meet a charge of abetment..., I am not convinced that the same adverse conclusion would without doubt have been justified".[62] This exemplifies a situation in which the provision contained in section 184 of the Criminal Procedure Code should not be invoked. The joinder of defendants is lawful where the requirements of this provision are satisfied, but always subject to the overriding consideration that separate trials should be ordered, if there is reason to believe that the interest of any or all of the accused persons is likely to be prejudiced by a joint trial.

The question of multiplicity of charges in the context of a criminal conspiracy, remains to be considered. In *Kanagaratnam*[63] four persons were indicted on several counts, the first count being that they agreed to commit or abet or agreed together with a common purpose for or in committing or abetting criminal breach of trust. Counsel for the accused objected to the charge on the ground that the first count put together four different conspiracies to commit criminal breach of trust of money. This contention was rejected, the court holding that the Crown alleged a single conspiracy among all the accused in which they put their heads together and agreed to act together with a single common purpose or design.

A similar objection was taken in *Sundaram*.[64] It was there held by Soertsz and Hearne JJ. that one agreement to commit cheating does not become three agreements because three acts of cheating were committed in pursuance of the agreement but that, if there is one conspiracy to commit falsification of accounts and another to commit criminal breach of trust—two distinct offences—two separate conspiracies may be alleged.

The principles applicable may be stated as follows: so long as the conspiracy is to commit, say, the offence of criminal misappropriation, the fact that several separate acts of misappropriation were committed, does not suggest the existence of more than one conspiracy. A series of acts may be relied on to prove one conspiracy. It is probable that the accused persons would commit different acts in pursuance of the conspiracy, but the divergent nature of their acts does not detract from the oneness of the conspiracy in which they are involved. In *Kanagaratnam* it was said that "The very necessities of the

62. (1952) 55 N.L.R. 49 at p. 54.
63. See note 49, *supra*.
64. (1943) 25 C.L.W. 38.

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case required an agreement between all the accused that each should be prepared to play whatever role the necessities of the moment indicated".[65]

In these circumstances no issue relating to a joinder of charges arises, since a single offence of conspiracy is alleged. On the other hand, if the accused persons agree to commit several distinct offences, albeit with some necessary interrelation among them, they are guilty not of one conspiracy but of a variety of conspiracies. In the latter event, the charges relating to the different conspiracies may be legitimately joined in one indictment only if the conspiracies were entered into with a view to committing several offences which are so connected together as to form one transaction.[66]

IV. PUNISHMENT FOR CONSPIRACY

Punishment for the offence of conspiracy is prescribed by section 113B of the Penal Code. The principle applicable is that "If two or more persons are guilty of the offence of conspiracy for the commission or abetment of any offence, each of them shall be punished in the same manner as if he had abetted such offence".

Although the punishment for conspiracy is generally the same as the punishment for commission of the offence in question, the exceptional circumstances attendant on the case of *Buddharakkita*[67] made necessary a departure from this principle. The indictment contained a charge of murder, as well as one of conspiracy to murder. The first, second and fourth accused were found guilty of conspiracy to murder, while the fourth accused was convicted, in addition, of the offence of murder. Sentence of death was passed by the trial judge on each of the accused persons for both offences.

However, it was held by the Court of Criminal Appeal that the sentence of death passed on the accused appellants for commission of the offence of conspiracy to commit or abet murder, was illegal. Until the enactment of the Suspension of Capital Punishment Act, No. 20 of 1958, the punishment for the offence of conspiracy to commit or abet murder was undoubtedly the punishment of death—that is to say, the same penalty as that for the offence of murder.[68] The suspension Act, however, in addition to providing that capital punishment shall not be imposed for the commission of murder, also made an alteration in the law affecting the punishment for the offence of abetment of murder and, accordingly, for the offence of conspiracy to commit or abet murder.[69] By virtue of the

65. (1952) 47 C.L.W. 42 at p. 44.
66. Code of Criminal Procedure, section 175.
67. (1962) 63 N.L.R. 433. 68. At p. 483.
69. Section 2 of the Suspension Act.

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Suspension Act, a person who committed the offence of conspiracy to murder, while the Act was in force, became liable to the punishment of rigorous imprisonment for life instead of the punishment of death.

However, the law, was again modified by the Suspension of Capital Punishment (Repeal) Act, No. 25 of 1959, which repealed the Suspension Act. Although the later Act provided in terms that "Notwithstanding anything in any other written law, capital punishment shall be imposed under section 296 of the Penal Code on every person who, on or after the commencement of this Act, is convicted of the offence of murder committed prior to that date",[70] no explicit provision was made for puishment in respect of the offence of conspiracy to abet murder. In these circumstances the Court of Criminal Appeal thought it proper to invoke the Interpretation Ordinance which declares that "Whenever any written law repeals... in whole or in part a former written law, such repeal shall not, *in the absence of any express provision to that effect*, affect or be deemed to have affected...any penalty incurred under the repealed written law".[71] In the result, the sentence of death passed on the first, the second and the fourth accused in respect of the first count of conspiracy was quashed, and a sentence of imprisonment for life substituted.

V. OTHER RELEVANT PROVISIONS AND PRINCIPLES

The following points may be noted:

(i) Section 113A of the Penal Code has the character of a residual provision. Separate provisions of the Penal Code govern conspiracies in specific contexts. For example, section 115 of the Penal Code makes punishable a conspiracy to deprive the Queen of the sovereignty of Ceylon or a conspiracy to overawe, by means of criminal force or the show of criminal force, the Government of Ceylon. The appropriate penalty for these types of conspiracies is prescribed by the same provision. Section 113A applies in circumstances where the prosecution establishes a conspiracy to commit an offence, but the conspiracy is not made punishable by any other section of the Penal Code or other written law.

(ii) It is a fundamental principle that the crux of conspiracy is agreement. But this does not entail the corollary that, once the agreement is made, the conspiracy does not extend beyond the actual time at which agreement is reached. The conspiracy persists so long as the conspirators remain in agreement and while they continue to act in accord, in furtherance of the

70. Section 3(a) of the Repeal Act.
71. Section 6(3) of the Interpretation Ordinance.

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objects for which they entered into the agreement.[72] All acts committed within this period are encompassed by the scope of the initial conspiracy.

(iii) The degree of proof required to establish a conspiracy was adverted to by the Bench of three judges at the Trial-at-Bar in *Liyanage*'s case. The court stated: "The question is not whether we can draw the inference of conspiracy but whether the facts are such that they cannot fairly admit of any other inference being drawn from them. We have also to be satisfied that there is an irresistible inference that each defendant, before he is found to have conspired, did so conspire. The evidence must show a common plan so as to exclude a reasonable possibility of the acts having been done separately, and connected only by coincidence".[73] Although these observations were made with reference to a conspiracy to commit offences against the State, they are applicable to proof of conspiracy in general.

(iv) Just as a discussion or meeting is not an essential element of a conspiracy, so also proof of a conspiracy is not necessarily furnished by evidence of such a discussion or meeting. It may be that the discussion was embarked upon with the purpose of exploring the possibility of agreement, but in fact agreement may not have been reached at the discussion. In this event, in the absence, of agreement, no conspiracy is established. Equally, a person who was present at the meeting but was not a party to any agreement which was arrived at, is not guilty of the offence of conspiracy.

(v) Conspiracy is generally proved by circumstantial evidence. Conspiracy can ordinarily be proved only by an inference from the subsequent conduct of the parties in committing some overt acts which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring them about.[74] On each of the isolated acts a conjectural interpretation is placed, and from the aggregate of these interpretations an inference is drawn.[75] For this purpose, then, the detached acts of the different conspirators relative to the main design are admissible as steps to establish the conspiracy itself.[76] The circumstances attendant on the acts of a conspirator may serve to indicate association with others and, as such, these circumstances may be availed of as a valid part of the proof of a conspiracy.[77]

(vi) There must be proof against each conspirator that he had knowledge of the general purpose of the plot and the common design, although it is not necessary that each should have been equally well informed of the details.[78]

72. *Liyanage* (1965) 67 N.L.R. 193 at p. 206.
73. At p. 204.
74. At p. 203.
75. ibid.
76. At p. 204.
77. ibid.
78. At p. 203.

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(vii) Those who initiate the conspiracy and those who join it afterwards, may be equally guilty. However, there may be different shades of guilt between persons who play materially different parts in a conspiracy. One conspirator may fulfil a role which is manifestly of less significance than that played by the conspirators in the inner circle.[79]

(viii) Although a conspiracy is frequently characterized by secrecy, the acts of an accused person which are unconcealed do not refute the suggestion of a conspiracy. Secrecy is often a feature, but does not form an integral element of a conspiracy.[80]

VI. STRUCTURAL ANALYSIS OF THE OFFENCE

A question of some interest in regard to the conception of the offence of conspiracy is whether this offence follows the regular pattern, in that it is divisible into the major constituents of *actus reus* and *mens rea*, or whether the offence is *sui generis*, in that it consists exclusively of the mental element.

Despite superficial appearances, it involves a misconception to treat the offence of conspiracy as deriving solely from a *concursus animorum*. This offence does not make necessary any exception to the general principle that intention alone does not constitute a crime. A lucid statement of the position is that "Agreement is an act in advancement of the intention which each person has conceived in his mind".[81]

Agreement which forms the *actus reus* of the offence is here distinguished from bare intention. While *mens rea* inheres in the formation of intent, agreement requires "the announcement and acceptance of intentions".[82] "Announcement" does not necessarily postulate a statement of intent through the medium of words, since agreement may come into existence in a moment as the result even of a sign or a minute gesture. Nevertheless, an intelligible distinction can be drawn between the intention entertained by each individual and the fusion of these intentions in the agreement reached between or among the conspirators. It is the acknowledgement of one another's intentions, as opposed to the formation of one's own intent, that is treated as the *actus reus* of conspiracy.

A transaction involving criminal conduct in pursuance of a conspiracy may be divided generally into three stages: (i) formation of intent; (ii) communication and acceptance of intent; (iii) the commission of an overt act in furtherance of agreement. Elements (i) and (ii) are essential to proof of conspiracy, but

79. At p. 205.
80. At p. 205.
81. *Mulcapy* (1868) L.R. 3 H.L. at p. 328 *per* Lord Chelmsford.
82. Turner in Kenny, *Outlines of Criminal Law* (18th ed; 1962) p. 412.

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not element (iii). An overt act generally provides cogent evidence of a conspiracy but is not an indispensable constituent of the offence of conspiracy. A physical act, in this form, is not part of the requisites of conspiracy, but the manifestation of agreement which is notionally regarded as the equivalent of a physical act, is necessary to complete the crime of conspiracy.

On the basis of this analysis, it is seen that the constituents of a conspiracy involve both a physical and a mental element and therefore involve no departure from the regular pattern.

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CHAPTER 5

OFFENCES INVOLVING INFLICTION OF DEATH

1. MURDER AND CULPABLE HOMICIDE: STRUCTURE OF THE LAW

The Penal Code contains definitions of the offences of culpable homicide and murder.

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death"[1] is said to commit culpable homicide.

The definition of murder is as follows: "Except in the case hereinafter excepted culpable homicide is murder *firstly* if the act by which the death is caused is done with the intention of causing death; or *secondly* if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or *thirdly* if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or *fourthly* if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid".[2]

It is clear that the broader offence is that of culpable homicide. Murder is significantly more restricted in scope, in that only some cases of culpable homicide are encompassed by the definition of murder. All cases of murder are cases of culpable homicide, but not *vice versa*. If culpable homicide is conceived of as the *genus*, murder would be a species of that *genus*. Culpable homicide, then, consists of (a) murder, and (b) culpable homicide not amounting to murder. These offences are differentiated in the matter of sentence.[3]

The Penal Code contains no definition of culpable homicide not amounting to murder. The elements of this offence are to be ascertained by taking away the requirements of murder from those of culpable homicide. The residue comprises cases of culpable homicide not amounting to murder.

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1. Penal Code, section 293.
2. Section 294.
3. Sections 296 and 297.

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The structure of our law may be investigated at the outset. The Penal Code first defines culpable homicide.[4] The graver offence of murder which falls within the scope of the more extensive category of culpable homicide, is thereafter defined.[5] The *actus reus* of both murder and culpable homicide not amounting to murder is the same, in that the death of a human being is caused in either case. Material differences pertain to the *mens rea*, however.

Gradations or degrees of intention and knowledge establish the distinction between murder and culpable homicide not amounting to murder. An appreciably higher degree of intention or knowledge is required to support liability for murder than that which suffices to sustain a conviction of the lesser offence of culpable homicide not amounting to murder. *Initially*, the nature and extent of the intention or knowledge serve as the operative criterion in regard to identification of an offence as murder or as culpable homicide not amounting to murder. *Secondly*, even where an offence is *prima facie* treated as murder because the higher degree of intention or knowledge can be proved, the offence would yet be reduced from murder to culpable homicide not amounting to murder if any one of the five exceptions to the definition of murder[6] can be shown to be applicable. In the generality of circumstances, the exceptions are not inconsistent with the intention or knowledge required to constitute liability for murder. However, notwithstanding the existence of such intention or knowledge, the gravity of the offence is diminished because, for other reasons, the blame attaching to the accused is not held so great as to justify conviction of murder.

The effect of applicability of the exceptions attached to section 294, then, is that an offence which would otherwise be tantamount to murder, is reduced to culpable homicide not amounting to murder. The first exception incorporating the plea of grave and sudden provocation, is itself subject to three provisos. Where any of these provisos can be invoked, the exception is vitiated. In other words, the mitigatory circumstance is treated as though it did not exist, and liability for the graver offence is restored.

Under our law, then, the offence of murder can be distinguished from culpable homicide not amounting to murder in two ways: (a) Having regard to the degree of the knowledge or intention entertained by the accused, the difference between the graver and the lesser offence may be established; and (b) Even where the degree of intention or knowledge is such as to provide the foundation of the more serious offence, the crime would be reduced from murder to culpable homicide not

4. See note 1, *supra*.
5. Note 2, *supra*.
6. Section 294.

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amounting to murder, if the case is capable of being brought within the purview of any of the exceptions embodied in the statutory definition of murder.

II. MURDER AND CULPABLE HOMICIDE: RELEVANT DISTINCTIONS

The differences in regard to the *mens rea* required for conviction of murder and culpable homicide not amounting to murder, respectively, become apparent from a comparison of sections 293 and 294 of the Penal Code.

Section 293 consists of three limbs, the first two of which deal with forms of intention and the third with knowledge. Following the order reflected in the section, the limbs of the provision setting out the alternative mental requisites of culpable homicide are (i) intention of causing death; (ii) intention of causing such bodily injury as is likely to cause death; or (iii) knowledge that death is likely to be caused.

Section 294 comprises four limbs, the first three of which envisage kinds of intention, while the fourth is concerned with knowledge. The elements of the *mens rea* of murder, as defined in this section, are (i) intention of causing death; (ii) intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (iii) the intention of causing bodily injury to any person, the bodily injury intended to be inflicted being sufficient in the ordinary cause of nature to cause death; or (iv) knowledge that the act is so imminently dangerous that it must in all probability cause *either* death *or* such bodily injury as is likely to cause death.

Intention is dealt with in two limbs of section 293 and in three limbs of section 294. Knowledge is referred to in one limb each of sections 293 and 294. The comparison should be between (a) limb (i) of section 293 and limb (i) of section 294; (b) limb (ii) of section 293 and limbs (ii) and (iii) of section 294; and (c) limb (iii) of section 293 and limb (iv) of section 294. The reason is that intention to kill is dealt with in (a), intention to injure in (b) and knowledge in (c).

(a) Limb (i) of section 293 coincides entirely with limb (i) of section 294. It follows that the offence of culpable homicide defined in limb (i) of section 293 is also an offence of murder, as defined by limb (i) of section 294.[7] There is no difference as to the nature of the intention envisaged in the two cases, for the intention in each case is that of causing death, that is to say, a murderous intention.

7. Penal Code, Sections 293 and 294.

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The existence of a murderous intention has generally to be inferred from the circumstances. In *Bastian Silva* v. *Appuhamy*[8] the accused, after abusing another and tearing out some of his hair, followed him some distance as he was walking towards a court-house and deliberately stabbed him in the back, causing a wound 2½ inches deep and 4 inches long. He later stabbed three other persons who attempted to arrest him. It was held that the circumstances indicated a murderous intention. In appeal, Bonser C.J. acted on the principle that it is not the nature of the wound but the accused's intention which is decisive as to the crime committed, although the character of the injury inflicted may be suggestive of the underlying intention.

More rarely, a murderous intention may be proved by direct, as opposed to circumstantial, evidence. In *Bellana Vitanage Eddin*[9] the medical evidence was to the effect that the deceased had four injuries in the head, three of which caused separate fractures, and that the deceased had been assaulted from all sides with a heavy club. In this case, the inference of a murderous intention was reinforced by evidence of a direct threat on the part of the accused. A witness deposed that the accused had said to the deceased a short time before the fatal assault: "You be on the lookout. Before dawn I will kill you".[10] Similarly, in *Rengasamy*,[11] there was evidence that the accused, soon after aiming a series of determined blows at the deceased, had observed to a witness: "I have killed one; I will kill another".

The nature of the weapon used and the part of the body where the blows were intended to alight, are among the factors to be taken into account in determining whether a murderous intention is imputable to the accused. In *Fernando*[12] Keuneman J., speaking for the Court of Criminal Appeal, observed: "As regards (the second accused's) own offence, regarded as an independent offence, we know that the majority of the jury held that he intended to kill. The injury he inflicted was with a dangerous weapon in a part of the body where danger to life was evident—namely, the back of the abdomen, and the blade had penetrated 1½ inches."[13] These facts were part of the circumstantial evidence, on the basis of which the issue of a murderous intention had to be determined.

(b) A difference is at once observed when limb (ii) of section 293 is compared with limbs (ii) and (iii) of section 294. A clear quantitative distinction emerges in regard to the intention entertained by the accused in the two contexts. While the intention contemplated by limb (ii) of section 293 is an inten-

8. (1900) 4 N.L.R. 47.
9. (1940) 41 N.L.R. 345.
10. At p. 346.
11. (1924) 25 N.L.R. 438.
12. (1945) 30 C.L.W. 22.
13. At p. 23.

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tion of causing such bodily injury as is likely to cause death, the intention adverted to by limbs (ii) and (iii) of section 294 is, respectively, an intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, and an intention to cause such bodily injury as is sufficient in the ordinary course of nature to cause death.

It is clear that limbs (ii) and (iii) of section 294 envisage materially different situations. In limb (ii), the emphasis is on the intention of causing an injury which, to the accused's knowledge, is likely to result in the death of the *particular victim*. This provision applies in circumstances where the victim suffers from some disease, infirmity or other abnormality, and this condition in the victim is within the knowledge of the accused. To take an example, it is conceivable that a relatively light blow which, if directed at a person in sound health, is quite harmless, would prove fatal to one afflicted with a weak heart. In such a contingency, the accused's awareness of the exceptional circumstance is a vital consideration. If the accused strikes the blow with knowledge of the inherent weakness in the victim, he can be said to have acted, knowing that the injury was "likely to cause the death of the person to whom the harm is caused".[14] On the other hand, this assertion cannot be made if the accused was unaware that the deceased was peculiarly vulnerable.

Limb (iii) of section 294, differing in this respect from limb (ii) of the same section, envisages a case where the deceased's condition is in no way extraordinary or idiosyncratic, normative criteria consequently being applicable. The relevant intention in this case is that of inflicting an injury which is sufficient in the ordinary course of nature to cause death.

Comparing limb (ii) of section 293 with limb (iii) of section 294, it is apparent that a stronger and more definite intention is postulated by the latter provision than by the former. An injury which is well within the scope of the former provision, may fall short of the requirements of the latter. The essential difference in this respect is that between mere likelihood, on the one hand, and great antecedent probability, on the other.

In *Mendis*[15] Gratiaen J, on behalf of the Court of Criminal Appeal, observed: "The words 'sufficient in the ordinary course of nature to cause death' in clause (iii) of the definition of murder require that the probability of death ensuing from the injury inflicted was *not merely likely but very great, though not necessarily inevitable*. If, on the other hand, the evidence establishes that there was probability *in a lesser degree* of death

14. Penal Code, section 294, limb (ii).
15. (1952) 54 N.L.R. 177.

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ensuing from the act committed, the finding should be that the accused intended to cause an injury *likely* to cause death, and the conviction should be culpable homicide not amounting to murder."[16] In this case the evidence indicated that toxaemia supervened on a compound fracture which resulted from a club blow inflicted by the accused. The blow shattered the bones in the leg of the injured man who collapsed into a stream and later died of toxaemia. According to the medical evidence, toxaemia was likely to supervene if the injured man fell on contaminated soil or if his skin was infected. The Court of Criminal Appeal held that the injury inflicted by the accused, although "likely to cause death", was not "sufficient in the ordinary cause of nature to cause death". Accordingly, the appropriate conviction, it was held, was not of murder but of culpable homicide not amounting to murder.

It is thus seen that the difference between the intentions contemplated in limb (ii) of section 293 and limb (iii) of section 294, is of practical importance. Only some, and not all, of the cases envisaged by the former, may be accommodated within the scope of the latter. The distinction is explained by H. N. G. Fernando C.J., in *Somapala*,[17] in the following terms: "An injury which is only *likely to cause death* is one in respect of which there is no certainty that death will ensue, whereas the injury referred to in the third limb of section 294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of section 293, and to provide in the third limb of section 294 that only the graver cases (as just explained) will be cases of murder".[18]

The next appropriate comparison is that between limb (ii) of section 293 and limb (ii) of section 294. It is true that the word "likely" occurs in both provisions, but this apparent similarity must not be allowed to obscure an essential difference between them. The likelihood adverted to in limb (ii) of section 293 is a general likelihood, while an additional element is contained in the likelihood provided for by limb (ii) of section 294. In the latter context, what makes the offender aware of the likelihood that the injury will result in the death of the particular victim, is his knowledge of the special weakness or infirmity in the victim. In view of this definite knowledge, the likelihood of death is alluded to by the accused in a special manner which distinguishes a case of this kind from that contemplated by limb (ii) of section 293. The characteristic

16. At p. 180.
17. (1969) 72 N.L.R. 121.
18. At pp. 123-124.

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feature of situations catered for by limb (ii) of section 294 resides in the knowledge available to the accused that "the particular person injured is likely, either from peculiarity of constitution or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death".[19] This knowledge is not attributable to the accused in cases for which provision is made in limb (ii) of section 293.

This principle is illustrated obliquely by the decision in *Kolanda*.[20] In this case there was found on the body of the deceased a contusion on the left side which might have been caused by a kick. It was directly over the spleen, which was much enlarged and covered the whole of the left side. The spleen was ruptured, and the man died of haemorrhage. It was most probable that the blow which caused the contusion, ruptured the spleen. The Supreme Court, in appeal, held that an indictment for causing grievous hurt was not necessarily improper in these circumstances. Lawrie A.C.J. said: "A man who, by his act, causes the death of another, is not necessarily guilty of culpable homicide. His intention is an important part of the issue to be tried. It may be that, though he intended only to hurt, the hurt, from causes beyond his knowledge and control, became grievous and from grievous became mortal".[21] In similar vein was the observation by Moncreiff J. "The deceased died of a ruptured spleen which was diseased. In order to make out a charge of murder, it is necessary that the accused must have known that the spleen was diseased. A charge of culpable homicide involves proof of guilty intention or knowledge".[22]

In this case, the accused could not be convicted of culpable homicide in either of its forms—murder and culpable homicide not amounting to murder. Murder was excluded because the injury was *neither* likely to cause the death of the particular victim, *to the accused's knowledge*, *nor* sufficient in the *ordinary course of nature* (that is to say, but for the abnormality which was latent in the victim) to prove fatal. Moreover, the accused could not be held guilty of culpable homicide not amounting to murder, because he did not have even the intention of causing an injury which was *likely* to culminate in death. An indictment for causing grievous hurt was therefore considered reasonable.

(c) It remains to compare limb (iii) of section 293 with limb (iv) of section 294. Both provisions deal with knowledge, albeit of varying degrees. The knowledge relevant to the former is merely that of likelihood that death will ensue. By contrast, the knowledge required to bring a case within the

19. At p. 125, quoting the Indian case of *Govinda* (1876) 1 Bom. 342.
20. (1901) 5 N.L.R. 236. 21. At p. 238.
22. At p. 239.

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scope of the latter provision, is no less than knowledge that the act "is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death".[23] Obviously, limb (iv) of section 294 postulates knowledge of a more definite degree than does limb (iii) of section 293.

In *Somapala*[24] the Court of Criminal Appeal observed: "Knowledge that an act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death or injury likely to cause death; so that many cases which fall within the third clause of section 293 will not be murder within the meaning of the fourth limb of section 294".[25] H. N. G. Fernando C.J. quoted with approval the following sentence from an Indian judgment: "If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder."[26]

An instance of the high degree of probability contemplated by limb (iv) of section 294 is provided by illustration (d) attached to section 294. "A without any excuse, fires a loaded gun into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual". The case envisaged is that of a man who has "no intention to injure anyone in particular, but who deliberately takes a risk, which may involve the infliction of death on some person or persons undetermined".[27]

In *Rengasamy*[28] Bertram C. J. said: "Dr Gour expresses the opinion that, though the enactment (of the fourth clause) was designed to meet this particular class of case, its application ought not necessarily to be confined thereto, and instances the case of a mother exposing her infant child as a case to which the words of the enactment appropriately extend. I quite agree. Another case which has recently come within my own experience, and to which the words of the enactment appropriately apply, is that of a man who, without any definite intention to injure but out of pure bravado and insolence, discharges a gun in the direction of a man with whom he is engaged in altercation".[29]

It is implicit in the nature of illustration (d) to section 294 that the principle which it embodies is necessarily of very limited

23. Penal Code, section 294, limb (iv).
24. (1969) 72 N.L.R. 121. 25. At p. 124.
26. At p. 125, quoting *Govinda* (1876) 1 Bom. 342.
27. *Rengasamy* (1924) 25 N.L.R. at p. 443.
28. (1924) 25 N.L.R. 438. 29. At p. 444.

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application. In all cases barring those where the probability of death, adverted to by the accused, is of a manifestly extreme degree, knowledge is held to pertain to mere likelihood that death will ensue. Consequently, these cases are placed in the category represented by limb (iii) of section 293, rather than within the purview of limb (iv) of section 294.

In *Dias*,[30] the accused, in the course of a dispute in regard to an encroachment on land, aimed a revolver at his adversary and pulled the trigger several times in vain. The accused then snatched a gun from a member of his party and, without bringing it up to his shoulder, fired when the deceased was standing only a few feet from the muzzle. A fatal wound on the chest was inflicted. In appeal, Layard C.J. declared: "By our law, culpable homicide is not limited to cases where a person causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, but includes the case in which a person does the act with the knowledge that by such act he is likely to cause death. I am bound to assume from the verdict of guilty of homicide returned by the jury, that they thought that the prisoner acted with the knowledge that, by pulling the trigger, he was likely to cause death; that is to say, that he acted with knowledge that the gun was loaded".[31] On the facts, the knowledge imputable to the accused was merely of the lesser kind required by limb (iii) of section 293 and therefore sufficed only for a conviction of culpable homicide not amounting to murder.

In *Santia Susai*[32] the accused, using a pen-knife, inflicted a wound on the deceased's arm. The proper conviction, it was held, was neither murder nor culpable homicide not amounting to murder, but causing grievous hurt. Emphasis was placed on the principle that the offence of culpable homicide not amounting to murder is not committed unless the accused is at least aware, when he performs the fatal act, that he is likely thereby to cause death. In appeal, Clarence J. said: "I have no hesitation in saying that, upon the evidence recorded, it would be impossible to convict the defendant of homicide in any degree".[33] The words "likely to cause death" in limbs (ii) and (iii) of section 293 were construed as meaning "more likely to cause death than not."

The refusal to impose liability for culpable homicide not amounting to murder was based on the finding that the wound caused with the pen-knife could not be regarded as "likely" to cause death, even in this sense. The conviction of causing grievous hurt was supported on the footing that "A lower

30. (1905) 8 N.L.R. 252.
31. At p. 255.
32. (1891) 9 S.C.C. 195.
33. At p. 197.

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degree of 'criminal knowledge', if such a phrase may be coined, is sufficient to convict a defendant of grievous hurt, if it merely endangers life, that is, places life in some appreciable risk, although the probabilities may be against death ensuing".[34] In other words, the accused's knowledge was only that there was a possibility of life being imperilled, not that there was a likelihood of death being caused.

The concept of "knowledge", as it is used in limb (iii) of section 293, was examined by a Bench of three judges of the Supreme Court in *Salamon*.[35] In this case where the accused were convicted of culpable homicide not amounting to murder, the Commissioner of Assize, in his charge to the jury, directed them that "It is not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking a man with a fist and knowledge of the consequences likely to follow from the assault made on the deceased must be inferred from the actual consequences of the attack".[36] This was held not to be a proper direction in law. The view was expressed that it is not justifiable to impute knowledge of the consequences of an act to a person merely because the consequences actually resulted from it.

Abrahams C.J. said: "Knowledge of the probable consequences of an act may be presumed from the nature of the act itself, and the nature of the act should obviously form the basis of an inquiry into whether or not the doer of that act must be held to have had knowledge of its probable consequences, but that form of *a posteriori* reasoning is very different from imputing knowledge of the consequences of an act merely because those consequences happened".[37]

This decision upholds the applicability of a subjective standard in determining intention. A fallacy similar to that which marred the charge to the jury in *Salamon*'s case, characterizes some passages of the judgment in *Dias*.[38] But the better view was expressed in *Kolanda*[39] where Lawrie A.C.J. said: "(The accused's) guilt must be measured by his intention when he struck, rather than by the after, and possibly unforeseen, effects of the blow".[40]

It is of vital importance in practice to distinguish the offence of murder from culpable homicide not amounting to murder, in view of the different penalties applicable. The punishment for murder is death.[41] However, two exceptions are recognized in Chapter III of the Penal Code which deals with punishments. In lieu of death, the law provides for the punishment of deten-

34. ibid.
35. (1936) 38 N.L.R. 113.
36. See at p. 114.
37. At p. 116.
38. See note 30, *supra*.
39. (1901) 5 N.L.R. 236.
40. At p. 238.
41. Penal Code, section 296.

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tion and imprisonment, respectively, for persons under sixteen years of age[42] and for pregnant women.[43] Barring these cases, pronouncement of the death sentence is mandatory, consequent upon conviction of murder.[44] On the other hand, the punishment for culpable homicide not amounting to murder is either (a) imprisonment of either description for a term which may extend to twenty years, and also a fine, if the act by which death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or (b) imprisonment of either description which may extend to a term of ten years, or a fine, or both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.[45]

It has been shown that the elements of the *mens rea* of murder and culpable homicide not amounting to murder are materially different. The courts of Ceylon have insisted repeatedly that, where there is substantial doubt whether the conviction should be of murder or culpable homicide not amounting to murder, the accused should be convicted only of the lesser offence.

Aldon[46] was a case where there was some doubt whether the jury were of opinion that the accused had a murderous intention or merely the knowledge that his act was likely to cause death. The Court of Criminal Appeal presided over by Howard C.J. held that the accused should be given the benefit of the doubt and sentenced for culpable homicide not amounting to murder. A similar view had been expressed in the earlier case of *Ponnasamy*.[47]

In *Periyasamy*[48] the prosecution set out to establish, as against the second accused, the following facts: (a) that he caused two injuries in the deceased's head, and (b) that he entertained the requisite murderous intention.[49] In regard to (b), the prosecution was able to prove only that the second accused had knowledge that, by cutting the deceased, he was likely to cause death.[50] In these circumstances, it was held by Basnayake C.J., speaking for the Court of Criminal Appeal, that only the offence of culpable homicide not amounting to murder, had been made out.

In *Babanis*[51] the Court of Criminal Appeal took the view that a verdict of culpable homicide not amounting to murder should be substituted for one of murder, because of certain inaccuracies contained in the summing-up by the trial judge.

42. Section 53.
43. Section 54.
44. See note 41, *supra*.
45. Penal Code, section 297.
46. (1943) 44 N.L.R. 575.
47. (1942) 43 N.L.R. 359.
48. (1957) 58 N.L.R. 433.
49. At p. 435.
50. ibid.
51. (1944) 45 N.L.R. 119.

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For example, the trial judge, at the outset of his charge to the jury, had stated: "Of course, if a person knows that the injury which he is inflicting is likely to kill, then he intends to kill".[52] The law was unexceptionably stated in a subsequent passage, but the Court of Criminal Appeal observed: "It is impossible to say whether the jury, in coming to a decision, would be more influenced by what they heard at the end of the summing-up, as compared with what the trial judge told them when he commenced his charge. In these circumstances, it is impossible to allow the verdict of murder to stand".[53]

Jeemonis Fernando[54] was a case where four persons were convicted of murder. The defence was that the second accused inflicted some injuries on the deceased in the exercise of the right of private defence, and that later some other persons—not the other accused—came and joined in the attack on the deceased. The trial judge, directing the jury, stated: "Counsel for the defence has referred to culpable homicide not amounting to murder, but I will ask you not to consider that". Wijeyewardene J., on behalf of the Court of Criminal Appeal, commented on this statement as follows: "After careful consideration, we have reached the decision that this was a misdirection. It is not possible for us to speculate as to whether the jury would or would not have returned a verdict of culpable homicide not amounting to murder if they did not receive the direction not to consider such a verdict."[55] On this basis, the lesser verdict was substituted.

In *Nadar*[56] Gratiaen J., delivering the judgment of the Court of Criminal Appeal, criticized the trial judge's charge to the jury in the following terms: "He gave them no direction as to the ingredients of the lesser offence of culpable homicide not amounting to murder, and did not direct them that they should convict the appellant of this offence if they were not satisfied that he acted with an intention to cause death but were satisfied that he caused the death of the deceased by doing an act with the knowledge that such an act was likely to cause death."[57] For this reason, the conviction of murder was set aside and one of culpable homicide not amounting to murder entered.

In similar vein, Gunasekera J. had said in an earlier anonymous case: "The trial judge did not leave it open to the jury to find the appellant guilty of culpable homicide not amounting to murder. His omission to do so may well have led the jury to regard an act done with the knowledge that it was likely to cause death as indistinguishable from an act done with the intention of causing death. We are unable to say that they

52. See at p. 120.
53. ibid.
54. (1947) 34 C.L.W. 94.
55. At p. 95.
56. (1950) 44 C.L.W. 64.
57. At p. 64.

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would without doubt have convicted the appellant of murder even if their attention had been drawn to the distinction between the two states of mind."[58] This approach received the endorsement of the Court of Criminal Appeal in *Nadar*.[59]

In *Joseph Perera*[60] Moseley S.P.J. observed: "The trial judge did not direct the jury, except in the light of the exceptions to section 294 of the Penal Code, as to their competence to return a verdict of culpable homicide not amounting to murder, that is to say, the jury were not told that, if they absolved the first appellant of the intention to cause death, or to cause a bodily injury sufficient in the ordinary course of nature to cause death, but imputed to him the knowledge that he was likely by his act to cause death, they could convict of culpable homicide not amounting to murder".[61] This omission, it was held, vitiated the conviction of murder and necessitated its replacement by a verdict of culpable homicide not amounting to murder.[61] In *Kumarasinghe* v. *The State*[62] it was held that in the absence of any evidence which could bring into operation any of the five Exceptions specified in section 294 of the Penal Code the only alternatives open to the Jury were, *either* to convict the prisoner of the offence of culpable homicide not amounting to murder on the ground that he had only the knowledge that his act was likely to cause the death *or else* to convict him of murder if they were convinced that he had acted with a murderous intention.

It was pointed out[63] that the maximum punishment for culpable homicide not amounting to murder depends on the question whether the accused acted with intention or only with knowledge.[64] There can thus be a doubt not only as to whether the proper conviction is of murder or of culpable homicide not amounting to murder, but in regard to the separate issue whether intention or knowledge furnishes in a particular case the basis of liability for culpable homicide not amounting to murder. In this event, too, the accused is entitled to the benefit of the doubt.

This is illustrated by the decision in *Punchiappuhamy*.[65] The jury, in returning a verdict of culpable homicide not amounting to murder, stated that they found the accused "inflicted an injury which was likely to cause death without a murderous intention". The trial judge passed a sentence of twelve years' rigorous imprisonment—sentence which would have been lawful only on the premise that the accused had been actuated by the intention either to cause death or to cause a bodily injury likely to cause death. In appeal, Soertsz

58. Appeal No. 28, S. C. Minutes of 41 July, 1950.
59. (1950) 44 C.L.W. 64.
60. (1941) 42 N.L.R. 173.
61. At pp. 177-178.
62. (1973) 77 N.L.R. 317.
63. See notes 41-45, *supra*.
64. Penal Code, section 297.
65. (1947) 35 C.L.W. 101.

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S.P.J. held that there was some doubt whether the jury appreciated the real distinction between either of these forms of intention, on the one hand, and knowledge that the act was likely to cause death, on the other. Consequently, the Court of Criminal Appeal reduced the sentence to ten years' rigorous imprisonment—the most exacting sentence available in circumstances where knowledge alone supplies the foundation of the offence of culpable homicide not amounting to murder.[66]

Availability of the benefit of the doubt to the accused both in cases where it is not clear whether the proper conviction should be for murder or for culpable homicide not amounting to murder, and in cases where there is a doubt whether the basis of a conviction of culpable homicide not amounting to murder is intention or knowledge, is in keeping with the fundamental principle in regard to strict construction of penal laws.

III. OTHER RELEVANT ELEMENTS OF MURDER AND CULPABLE HOMICIDE

There are several requirements which apply both to murder and to culpable homicide not amounting to murder. These are conveniently investigated in regard to the *actus reus* and the *mens rea* of the offences.

(*A*) *The Actus Reus*

(i) Explicit provision is made by our law that the causing of the death of a child in the mother's womb is not homicide.[67] The general principle is that the victim either of murder or of culpable homicide not amounting to murder must be a separate life in being. The approach of English law, generally, has been that emergence of the child, followed by severance of the umbilical chord, is necessary to support a conviction of murder or manslaughter.[68] Only then could the life of the child be considered distinct from that of the mother. It would seem that the scope of the corresponding offences in our law is somewhat wider. The requirement in Ceylon is that some part of the child should be brought forth.[69] It is not relevant that the child had not breathed or was not completely born, provided that it was living at the time of partial emergence.[70] Thus, some cases which are excluded from the scope of homicide in English law, are brought within the purview of this offence in Ceylon.

66. At p. 101.
67. Penal Code, section 293, explanation 3.
68. Kenny, op. cit., p. 128.
69. Penal Code, section 293. explanation 3.
70. ibid.

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(ii) A positive act on the part of the accused is not an indispensable element of liability for murder or for culpable homicide not amounting to murder in Ceylon. An omission may suffice in some circumstances.[71]

(iii) There must be an adequate causal link between the accused's act and the infliction of death on the victim. Two specific rules in this regard are laid down by the Penal Code. A person who causes bodily injury to another labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, is deemed to have caused his death.[72] Moreover, where death is caused by bodily injury, the person who causes such bodily injury is deemed to have caused the death, although by resorting to proper remedies and skilful treatment, the death might have been prevented.[73] These rules represent, in some respects, a departure from the prevailing English and American law.[74] Furthermore, the rule of the English Common Law that the accused cannot be considered to have caused the victim's death if the interval between the accused's act and the ensuing of death, is more than a year and a day, does not form part of the law of Ceylon.[75] Causal problems which are frequently encountered in this context, receive detailed consideration elsewhere.[76]

(iv) Not only acts but even words are sufficient, under the law of Ceylon, as the means whereby death is caused. So long as the causal nexus between the uttering of the words and infliction of death is established, the circumstance that no physical act was committed by the accused, does not render the law of homicide inapplicable.

(v) In English law, difficult problems have arisen in connection with the question whether the accused can be held to have caused the victim's death if he makes possible the victim's execution by intentionally giving false evidence, known to be such, at the latter's trial for a capital offence.[77] These difficulties are eliminated in Ceylon by the creation of a distinct offence to cater for situations of this kind.[78]

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71. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pages 100-110.
72. Penal Code, section 293, explanation 1.
73. Penal Code, section 293, explanation 2.
74. G. L. Peiris, *General Principles of Criminal Liability in Ceylon*(2nd ed. 1980) pages 100-104.
75. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pages 104-107.
76. See pages 70 and 71, *supra*.
77. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pages 105-106.
78. Penal Code, section 191.

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(*B*) *The Mens Rea*

(i) The intention to kill a definite or ascertained person is not required. Illustration (a) to section 293 of the Penal Code reads: "A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide". The principle which is given expression in this illustration is that intention to cause death to any person, or knowledge that the death of any person is likely to be caused, is sufficient for purposes of the law of homicide, even though the identity of the person whose death would be brought about, cannot be ascertained beforehand.

(ii) The criminal law of Ceylon does not recognize the doctrine of constructive malice which was an aspect of the felony-murder and misdemeanour-manslaughter rules of the English Common Law[79] until they were abrogated statutorily[80] in 1957. The attitude of Ceylon law is made clear by illustration (c) to section 293. "A by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush, A not knowing that he was there. Here, although A was doing an unlawful act he was not guilty of culpable homicide, as he did not intend to kill B or to cause death by doing an act that he knew was likely to cause death." The death of a human being caused during commission of a felony of violence is not necessarily culpable homicide in Ceylon. The intention or knowledge of the accused is the decisive criterion.

(iii) The offences of murder and culpable homicide not amounting to murder both involve specific requirements relating to the *mens rea*. In either case, the burden of establishing the requisite *mens rea* in the accused devolves on the prosecution. Where there is reasonable doubt as to the intention or knowledge of the accused, in the required form, the case against him cannot be held to have been proved. This principle is universally valid, subject only to the qualification that the burden of establishing any general or special exception on a balance of probability must be accepted by the accused.

The presumption of innocence, which is a fundamental feature of our system, has been upheld in several judgments of the Courts of Ceylon. In *Tikiriya*[81] the accused was convicted of the murder of his nephew. The accused and the deceased were both cultivators who occupied adjoining lands. On the relevant day, the deceased who was weeding among the tea-

79. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pages 32-33.
80. Homicide Act, 1957, section 1(1).
81. (1944) 45 N.L.R. 474.

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bushes in his garden, received gun-shot injuries which culminated in his death two days later. The accused's version was that, on the morning in question, he had fired a shot at some crows without effect. Some hours later the crows returned and he fired again. Only then, according to the accused, did he see the deceased who attracted his attention by crying out. On these facts, the ruling by the Court of Criminal Appeal was that there was no evidence from which it could be inferred that the accused fired at the deceased with a murderous intention or any other mental element satisfying the *mens rea* of culpable homicide, in either of its forms. Accordingly, an acquittal was entered in appeal.

Pintheris[82] was a case where three accused were convicted of murder. The defence of the first and the third accused was that they were not present at the scene of the offence and took no part in it, while the defence of the second accused was that he killed the deceased in the exercise of the right of private defence. Of the three accused, only the second gave evidence at the trial. He stated that he acted in self-defence and that the first and the third accused were not present at the scene. In his summing-up, the trial judge stressed that, if the jury accepted the second accused's testimony that the other co-accused were not present at the scene of the crime, the latter had inevitably to be acquitted. This was held to be too narrow a direction. The Court of Criminal Appeal presided over by Basnayake C. J. held that even if, in the jury's opinion, the burden resting on the second accused in regard to his own defence had not been discharged because they were left in a state of honest doubt whether to accept the material parts of his evidence or not, it was still possible that he raised a reasonable doubt as to the presence of his co-accused. In the result, the first and the third accused were declared entitled to an acquittal.

Tikiriya and *Pintheris*, then, were both cases in which the evidence justified conviction neither of murder nor of culpable homicide not amounting to murder.

A comparable attitude has been adopted in several other cases. In *Appuhamy*[83] it was held that, in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of guilt. Keuneman J., delivering the judgment of the Court of Criminal Appeal, emphatically endorsed the direction by the trial judge that "If the circumstances are consistent with (the accused's) innocence, then it is

82. (1955) 57 N.L.R. 49.
82. (1945) 46 N.L.R. 128.

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your duty to acquit him".[84] In *Jan Singho*[85] Moseley J. said that, where the facts disclosed in evidence are equally consistent with the guilt and with the innocence of the accused, a conviction cannot be supported.

(iv) It is a corollary of the presumption of innocence that, where the prosecution is able to establish that the victim's death was caused either by A or by B, but there is no evidence of common intention between them and it is not possible to ascertain which of them is the guilty party, both A and B must be acquitted. This principle provided the effective ground of acquittal in *Arnolis*.[86]

Karuppiah Servai[87] was a case of murder by manual strangulation. Dias S.P.J. speaking for the Court of Criminal Appeal, observed: "X (the person who strangled the deceased) may be A, B or C. In order to secure the conviction of A, the prosecution had to establish beyond reasonable doubt that X is *not* B or C. It is then, and only then, that the guilt of A can be said to have been established beyond reasonable doubt. In the present case, the prosecution was unable to do that."[88] In *Ponnambalam*[89] two accused were convicted of murder. Despite the absence of evidence relating to any pre-arranged plan between them, the verdict of the jury indicated that they held each accused responsible for the other's acts. The convictions were set aside in appeal. Jayatilleke C.J. said: "The medical evidence shows that the deceased had two stab injuries, one of which was necessarily fatal and the other sufficient in the ordinary course of nature to cause death. On the deceased's statement it is not possible to say which injury was caused by each appellant."[90] It was held that the proper conviction in each case was for voluntarily causing grievous hurt.

In *Kularatne*[91] the case for the prosecution was that the first accused, his mother (the second accused) and their woman servant (the third accused) caused the death of the first accused's wife by arsenic poisoning. One of the arguments urged in appeal was that there was no basis for a reasonable inference that the poison was contained in the food served by the third accused, as the possibility of the presence of the poison in other food served by one C, another cook in the same household who was not called as a witness, had not been excluded. This contention prevailed before the Court of Criminal Appeal. In its judgment, the court stated: "When the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, then the burden

84. At p. 131.
85. (1940) 19 C.L.W. 39.
86. (1943) 44 N.L.R. 370.
87. (1950) 52 N.L.R. 227.
88. At p. 229.
89. (1950) 44 C.L.W. 48.
90. At p. 48.
91. (1968) 71 N.L.R. 529.

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is on the prosecution to effectively exclude one, if it seeks to attach responsibility for that act to the other; and the best way—often the only way—in which this can be achieved is by the prosecution calling as a witness the person sought to be excluded."[92] The proposition emerging from a South African judgment,[93] that "The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn", was endorsed in this context by the Court of Criminal Appeal in *Kularatne*'s case.[94]

In cases where the evidence suggests the guilt of one of several persons, the failure by the prosecution to call any of them as a witness cannot be justified on the ground that there is no evidence of motive. In *Kularatne*, the Court said: "There was no evidence of motive against C, but at the same time there was no evidence to show that she had no motive".[95]

Where it is established that death was caused by the act of one of several persons but the prosecution is unable to isolate the person who committed the fatal act, the conviction of all can be sustained only in the light of unassailable proof of a common intention.[96]

(v) If the accused intended to kill one person but in fact killed another, a conviction of murder may be upheld. In *Edwin*[97] the accused fired at A, intending to murder him, but instead caused the death of B who was not intended to be killed. The accused was held guilty of murder. Soertsz J., delivering the judgment of the Court of Criminal Appeal, endorsed the following direction by the trial judge: "It is quite immaterial that the death caused was that of a man other than his whose death was intended. If A fires at B with the intention of killing him and accidentally hits C, and B goes scot free, the intention of the person who shot C is the same as if B was killed according to plan."[98]

The doctrine governing this type of case is that of transferred intent.[99] The crucial limitation is that only an equivalent or coeval intention can be transferred. Thus, where the accused intended only to commit theft but in fact caused the death of a human being, the doctrine of transferred intent is inapplicable, since this requirement is not satisfied. This is confirmed by illustration (c) to section 293 of the Penal Code. In *Edwin*'s case[100] the conviction was sustained only because the

92. At p. 534.
93. *Blom*, quoted by Hoffman, *South African Law of Evidence*, at p. 31.
94. At p. 534.
95. At p. 534.
96. See note 89, *supra*.
97. (1943) 44 N.L.R. 297.
98. At p. 298.
99. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pages 33-34.
100. Note 97, *supra*.

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intention actually entertained by the accused was one which enabled imposition of liability for murder.

(vi) The only situation in which knowledge is sufficient to support a conviction of murder is where the person committing the act by which death is caused "knows that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act *without any excuse for incurring the risk of causing death or such injury*".[101] In regard to the last phrase, two principles are established by the judgment of the Court of Criminal Appeal in *Wijeyeratnam*.[102]

(a) The phrase "without any excuse" is not coterminous with the five exceptions to section 294, but is of wider scope. In other words, circumstances which do not fall within the purview of these exceptions may have the effect that the court is prevailed upon to hold that the act was not committed "without any excuse". In *Wijeyeratnam*, Moseley J. quoted with approval the following sentence from an Indian judgment:[103] "A jury or a court is at liberty to affirm upon proof of circumstances other than or falling short of an exception not that these circumstances form an excuse for murder, but that, in view of them, the jury or the court is unable to affirm that the particular act of homicide was committed without any excuse, and is therefore unable to pronounce the act to be culpable homicide amounting to murder, as defined in clause 4 of section 294."[104]

(b) The requirement relating to absence of an excuse is an essential element of the statutory definition, and must be established by the prosecution. Mere knowledge on the part of the accused that the act is so imminently dangerous that it must in all probability cause death, does not *per se* constitute the offence of murder.[105] Such knowledge, without more, would support only a conviction of culpable homicide not amounting to murder. The act assumes the complexion of the graver offence only when "it can be positively affirmed that there was no excuse...It must be a wholly inexcusable act by extreme recklessness".[106]

IV. REDUCTION OF MURDER TO CULPABLE HOMICIDE NOT AMOUNTING TO MURDER

The offence of murder is reduced to culpable homicide not amounting to murder if any of the five exceptions to section 294 can be shown to apply. The exceptions relate to (A)

101. Penal Code, section 294, clause 4.
102. (1941) 43 N.L.R. 25.
103. *Barkatulla* (1887) P. R. No. 32 of 1887, p. 64.
104. (1941) 43 N.L.R. 25 at p. 29.
105. ibid.
106. ibid.

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grave and sudden provocation; (B) exceeding in good faith the right of private defence; (C) bona fide overstepping of the limits of his authority by a public servant; (D) the plea of sudden fight; and (E) the case of a mother who causes the death of her child under the age of twelve months while the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child.[107]

Each of these exceptions warrants separate investigation.

(*A*) *The Plea of Grave and Sudden Provocation*

This plea will be discussed under the following heads: (i) the meaning of 'provocation'; (ii) the requirement of 'grave' provocation; (iii) the requirement of 'sudden' provocation; (iv) loss of the power of self-control by the person provoked; (v) the causing of death whilst deprived of self-control; (vi) the element of proportionality between the provocation and the retaliatory act; (vii) the burden of proof in regard to the plea of provocation; (viii) the category of persons whose death may be caused; (ix) the consequences of an inadequate direction to the jury in respect of provocation; and (x) circumstances which defeat a plea of provocation.

Before embarking on a detailed analysis of these elements, two basic features of the plea of provocation may be identified. Firstly, it is a *special* exception, in that it is limited in its application to the offence of murder. Secondly, it is a *mitigatory* exception, in that its effect is not to eradicate, but only to diminish, criminal responsibility.

(i) As to the meaning of 'provocation', Bertram C.J. said, in *Punchirala*:[108] "Provocation is, in my opinion, something which a reasonable man is entitled to resent."[109] In *K. D. J. Perera*[110] Nagalingam S.P.J. observed: "Provocation, according to the dictionary, would be any annoyance or irritation, and for our purpose it must be defined as anything that ruffles the temper of a man or incites passion or anger in him or causes a disturbance of the equanimity of his mind. It may be caused by any method which would produce any one of the above results—by mere words which may not amount to abuse, by a blow with hands or stick or club or by a pelting of stones or by any other more serious method of doing personal violence."[111] The existence of provocation in some form represents the starting point for establishment of this defence, but several other elements have to be proved.

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107. Exceptions 1 to 5 attached to section 294 of the Penal Code.
108. (1924) 25 N.L.R. 458.
109. At p. 463.
110. (1951) 53 N.L.R. 193.
111. At p. 202.

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(ii) The requirement that the provocation should be 'grave' is embodied in the statutory statement of the exception. The Explanation contained in the Penal Code declares that "Whether the provocation was grave enough to prevent the offence from amounting to murder is a question of fact". In *Punchirala*, Bertram C.J. said: "Although the term is a relative one, nevertheless the provocation must still be grave. It must have some element of gravity. The merest idle word or gesture...is not sufficient."[112] However, the proper construction of the word 'grave' has been the subject of acute controversy in Ceylon.

Several different interpretations of "gravity" have been suggested in the cases:

(a) Provocation is grave when a reasonable man would be prompted to retaliate against it;

(b) Gravity of provocation requires that the provocation offered should be such as to result in loss of self-control in the person provoked;

(c) The element of gravity of provocation is satisfied in circumstances where the reasonable man would resent deeply the provocation offered;

(d) Provocation is grave only where the reasonable man is likely to lose his self-control in consequence of the provocation.

Standard (a) was supported in *K. D. J. Perera* where the majority of the Full Bench of the Court of Criminal Appeal observed: "Provocation would be grave where an ordinary or average man of the class to which the accused belongs, would feel annoyed or irritated by the provocation given to the extent that he should, smarting under the provocation given, . . . retaliate against the act of provocation".[113] However, doubts were later cast on the reliability of this criterion. In *David Appuhamy*[114] Nagalingam S.P.J., delivering the judgment of a majority of the Court of Criminal Appeal, said: "It seems to us that the retaliatory test is not quite satisfactory to determine the question whether a particular provocation is grave or not; for retaliation is an uncertain and remote result of provocation and therefore cannot be made the true standard by which the gravity of provocation may be measured. Grave provocation need not necessarily produce retaliation in every case; in one case, as a result of grave provocation, there may be retaliation while in another the identical provocation may result in no retaliation; again, a slight provocation as well as a grave provocation may both equally lead to retaliatory acts".[115]

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112. (1924) 25 N.L.R. 458 at p. 463.
113. (1951) 53 N.L.R. 193.
114. (1952) 53 N.L.R. 313.
115. At p. 315.

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The criticism, in *David Appuhamy*'s case, of the criterion emerging from *K. D. J. Perera*, seems justified. Whether the act of provocation leads to retaliation or not depends on a variety of factors, some of which involve idiosyncrasies and coincidences like the temperament and disposition of the person receiving the provocation. It follows that the test is unacceptable because the result is left substantially to chance.

Standard (b) was vigorously contended for by Crown Counsel in *David Appuhamy*'s case. But this suggestion was rejected by the Court of Criminal Appeal. The ruling by the Court turned primarily on a consideration of the words of the exception. Nagalingam S.P.J. stated: "The exception does not say that there should be such grave provocation *as* would result in a deprivation of the power of self-control. Nor does it say that loss of self-control should always be the result of grave provocation".[116]

It would seem, at bottom, that standards (a) and (b) are unsatisfactory for the same reason. Just as the recipient of provocation need not necessarily retaliate, although the provocation was grave, so is it possible that he would not even lose his self-control. In either case, the determinant factor is the strength of will possessed by the recipient of the provocation—obviously, a variable element which cannot be availed of as the basis of a test of general application. This objection is expressed cogently in the judgment of Nagalingam S.P.J. in *David Appuhamy*: "It would be apparent that the provision of the law fully recognizes that there may be cases where a deprivation of the power of self-control may not follow as a result of an undoubtedly grave provocation. Indeed, a little reflection would show that loss of self-control need not result in every case where grave provocation may be given."[117] In the result, the assumption may safely be made that neither of the standards reflected in (a) and (b) is accepted as valid for purposes of the law of provocation in Ceylon today.

Standard (c) was adopted by the majority of the Court of Criminal Appeal in *David Appuhamy*. "Grave provocation would be such as would cause deep resentment in the mind of a man, not that he should resent by acts violent or otherwise the provocation given; or, again, provocation may be said to be grave when it arouses violent anger or violent passion. Here, 'violent anger' or 'violent passion' which is the equivalent of 'rage' merely describes a state of mind and not that the person subject to such anger or passion should act violently or use physical violence".[118]

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116. ibid.
117. ibid.
118. At p. 316.

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This standard differs from (b) in a significant respect, in that the criterion postulated contains an objective element. The question is not whether the particular person to whom the provocation was offered lost his self-control as a result of the provocation or retaliated against it, but whether the reasonable man would entertain deep resentment in his mind in respect of the provocation given. In this sense, the test propounded by the court in *David Appuhamy*'s case represents a departure from the other tests which had been suggested and is closer to the test which prevails today. However, as will be seen, the standard by which the gravity of provocation is measured according to the currently accepted test, does not coincide entirely with that emerging from the judgment of the majority of the Court of Criminal Appeal in *David Appuhamy*.

Nagalingam S.P.J. justified the rejection of a subjective test of gravity in the following terms: "It is easy to conceive of cases where the same act of grave provocation may produce different results in different individuals. In the case of a man who has cultivated self-restraint, he would not lose his power of self-control, while a man of quick temper would lose his powers of self-control. Is it, then, to be held that the identical act of provocation is grave in the latter case while not in the former case? Can it be said that the policy of the law is to deal lightly with a man who has a quick temper as against a man who has control of his passions?"[119]

While the adoption of an objective test of gravity was established by the judgment in *David Appuhamy*, the reasonable man did not represent an unreservedly objective conception but was invested for the relevant purpose with characteristics peculiar to the class of society to which the accused belonged.[120] It was by reference to the reaction of the reasonable man, so conceived and not to the accused's own susceptibilities that the gravity of provocation was to be assessed.

Nevertheless, an important feature of the test of gravity of provocation which commended itself to the majority of the Court in *David Appuhamy* was that the result turned on the likelihood not that the reasonable man would lose his self-control but that anger or passion would be roused in his mind. The latter element is less exacting in its effect than the former. Thus, if the provocation offered was such that the reasonable man belonging to the same class of society as the accused would profoundly resent it, although he is not necessarily likely to lose his self-control in consequence of it, the provocation may be considered grave according to the test which secured acceptance in *David Appuhamy*'s case.

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119. At p. 317.
120. At pages 317-318.

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Standard (d) has in common with standard (c) the feature that a fundamentally objective criterion of gravity is reflected, but there is the difference that (d) embodies an appreciably more stringent test. Standard (d) was accepted in emphatic terms by a majority of the Court of Criminal Appeal in *Jamis*.[121] In this case, the trial judge had directed the jury, in effect, that if they were convinced that the accused had intentionally killed his victim, the plea of provocation could not succeed so as to reduce his offence to one of culpable homicide not amounting to murder "unless they were satisfied upon a balance of probability that the provocation alleged to have been offered not only deprived him of his power of self-control but was also of a kind which was likely to have caused an average man of the class of society to which the accused belonged, to lose his self-control".[122] Gratiaen J., speaking for three out of five judges of the Court of Criminal Appeal, held that "This was an unexceptionable direction in law".[123]

The crucial development signified by the decision in *Jamis* is that the distinction between provocation of a kind which may excuse a mere loss of temper and provocation which was likely (although not necessarily certain) to result in an ordinary man losing his power of self-control[124]—a distinction which was accepted as sound by two out of three judges of the Court of Criminal Appeal in *David Appuhamy*—was held invalid. The principle acted upon in *Jamis* is that, before provocation can be considered grave, it is necessary not merely that the reasonable man should deeply resent the provocation but that he should probably be deprived of his self-control as a result of it.

It is interesting to note that this test of 'gravity', far from being formulated for the first time in *Jamis*' case, was explicitly suggested in the previous case of *Naide*[125] where Gunasekera J. said: "The test is whether it is sufficient to deprive a reasonable man of his self-control".[126] This test appears to have been accepted for Ceylon law as being free from controversy at the time *Naide*'s case was decided. Doubts were raised later only because of the majority decision to the contrary in *David Appuhamy*. But the effect of *Jamis* is that *David Appuhamy* must be regarded as overruled to the extent that it is incompatible with the ruling by the majority in the later case.

While there is a vital point of contrast between the approach of the court in *David Appuhamy* and in *Jamis*, the concept of the reasonable man was interpreted in the identical sense in both cases. Thus, in *Jamis*, Gratiaen J. said: "The reasonable

121. (1952) 53 N.L.R. 401.
122. *Jamis* (1952) 53 N.L.R. 401 at p. 403.
123. ibid.
124. ibid.
125. (1951) 53 N.L.R. 207. 126. At p. 216

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man is a hypothetical person who, in this context, is an average man of the class of society to which the prisoner belongs".[127] This is indistinguishable from the definition emerging from *David Appuhamy*'s case.

Cogent considerations of policy are seen to support the stricter view adopted by a majority of the court in *Jamis*. Gratiaen J. declared: "It would be illogical and dangerous indeed if the true principle imposed by statute 'in order to teach men to entertain a peculiar respect for human life' were, by a process of judicial interpretation, to be gradually whittled down and in due course completely superseded by some different principle recognizing a lower objective standard of gravity than the law demands before provocation can be permitted to mitigate the intentional killing of a human being. It is impracticable to measure guilt always by degrees of moral culpability, howsoever much the latter may be relevant for assessing the quantum of punishment or for exercising the prerogative of mercy."[128]

The essential criticism of the test of gravity formulated in *David Appuhamy* is that it entails a concession which defeats the object of the law and is fraught with danger. This trend has been effectively reversed by *Jamis*' case. The attitude of the majority of the court in *Jamis* derives from the premise that, in so fundamental a matter as the destruction of a human life, unrestrained and excessive action is to be firmly discouraged. Provocation has the effect of reducing the offence from murder to culpable homicide not amounting to murder only where the objective norms postulated by the law are satisfied.

Some special points in regard to 'gravity' of the provocation may now be considered:

(1) The question has arisen whether provocation offered by words only may be regarded as 'grave' within the framework of the test which applies under our law.

In English law, the answer to the corresponding question is clearly in the negative. Representative of English law on the point is the statement by Ridley J. in *Mason* that "Mere words of provocation or abuse could not, but words of provocation coupled with such an act as spitting upon the appellant might (though they need not necessarily) have the effect of reducing the crime from murder to manslaughter".[129]

The law of Ceylon adopts a different approach, however. There are indications in the Penal Code that mere verbal provocation could satisfy the requirement of gravity. Illustration (d) attached to proviso 1 of section 294 states: "A appears

127. (1952) 53 N.L.R. 401 at p. 405.
128. (1952) 53 N.L.R. 401 at p. 408.
129. 8 Cr. App. Rep. 121.

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as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition and that A has perjured himself. A is moved to sudden passion by these words and kills Z. This is murder". In *Coomarasamy*[130] Mosely A.C.J. said: "That the offence of A (in the illustration) is not reduced is undoubtedly due to the fact that the provocative words were uttered by a public servant in the lawful exercise of his powers, and not for the reason that the words in themselves did not amount to provocation."[131]

In *Coomarasamy*'s case it was held that provocation caused by words of abuse only is sufficient in Ceylon to establish the mitigatory plea of provocation. By way of justification for this view, the court referred with approval to a passage in Meyne's *Criminal Law of India*: "We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but proof that he is a man of a peculiarly bad heart".[132]

In *Kirigoris*[133] the Court of Criminal Appeal presided over by Keuneman A.C.J. reasserted that mere abuse unaccompanied by some physical act may, in certain circumstances, be held sufficient provocation in this context. A verdict of culpable homicide not amounting to murder was substituted for one of murder on the ground that "The jury were not definitely instructed that mere abuse may in certain circumstances be regarded as sufficient provocation, and that they were the sole judges as to whether there was sufficient provocation to support the plea of grave and sudden provocation".[134]

A similar view was taken in *Kanapathipillai*.[135] In appeal, Jayatilleke S.P.J. stated: "The question whether the words uttered by the deceased provoked the accused and whether they provoked the accused gravely and suddenly, was one for the jury to decide. In the opinion of the majority of us, had the jury been invited to consider the applicability of exception 1 (to section 294) to the evidence in the case, they may have found, as it was open to them to find, that the accused was not guilty of the offence of murder."[136] This approach was endorsed by Gratiaen J. in *Piyasena*.[137]

A *cursus curiae*, then, had the effect of establishing the position under our law that the use of words only as the means of

130. (1940) 19 C.L. Rec. 105.
131. At p. 107.
132. 4th edition, p. 490.
133. (1947) 48 N.L.R. 407.
134. At p. 408.
135. (1949) 52 N.L.R. 186.
136. At p. 187.
137. (1956) 57 N.L.R. 226.

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provocation is not necessarily at variance with the requirement of gravity of provocation.

Provocation offered by words in a specific context has received particular consideration in English law. Contrary to previous authority,[138] the House of Lords held in *Holmes* v. *Director of Public Prosecutions*[139] that a confession of past adultery made without warning by a wife to her husband does not furnish an adequate ground for reducing the husband's offence from murder to manslaughter if he instantly killed the wife. However, the position in this respect has been changed for English law by section 3 of the Homicide Act, 1957, under which a confession of adultery may properly be taken into account by the jury for this purpose.

The English law on the point accepted two cardinal distinctions: (i) the distinction between a confession of past adultery by the wife and the actual detection by a husband of his wife's adultery with her paramour; and (ii) the distinction between adultery by the wife and sexual intimacy with a third party in circumstances where the man and woman are living together, although not married.

In regard to the first distinction, the general rule used to be that a confession of past adultery was not sufficient for invocation of the mitigatory plea, although the benefit of this plea was available to the husband where he had actually surprised the wife *in flagranti delicto*. The subsequent change in the law was attributable to statutory provisions. Notwithstanding that some cases, decided prior to the ruling by the House of Lords in *Holmes* v. *D. P. P.* preferred the view that even a confession of past adultery was sufficient for this purpose,[140] it was clearly established for English law that a wife's confession of her intention to commit adultery in the future was not enough.[141]

As to the second distinction, most[142] of the English cases have insisted that the mitigatory defence may be availed of only where the man and woman are lawfully married and not where they are merely living together.

Neither of these distinctions need be applied rigidly under the law of Ceylon. The qualified defence of grave and sudden provocation is not necessarily rejected in Ceylon on the ground that the provocation was caused by the wife's confession of a past act of adultery or that the woman was not the lawful wife of the accused. Nor, for that matter, need an arbitrary distinction between a confession of past adultery and a confession

138. *Rothwell* (1871) 12 Cox 145, *Jones* (1908) 72. J.P. 215.
139. (1946) A.C. 588. 140. See note 138, *supra*.
141. *Ellor* (1921) 15 Cr. App. Rep. 41.
142. *Palmer* (1913) 2 K.B. 29, *Greening* (1913) 3 K.B. 846.
Contra: *Gauthier* (1943) 29 Cr. App. Rep. 113, *Larkin* (1943) K.B. 174.

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that adultery is intended in the future, be recognized as part of our law.

In all these cases the same general test of "gravity" of provocation is applied without resorting to sub-rules confined in their application to specific contexts, the peculiar features of which inhere in such elements as the relationship between the parties or the means whereby the provocation is given. Unlike in English law before it was changed by statutory provisions, an uniform criterion governs all these situations in Ceylon. Naturally, where words only are used or where the words relate to an act which is envisaged in the future, these are factors which a Ceylon court would take into account in deciding whether the provocation offered was grave, but the mere fact that the provocation arose from a verbal statement or even that the statement referred to the future, would not be treated, *per se*, as a ground for excluding the plea invariably.

(2) A further issue is whether the intoxicated condition of the accused can be taken into account in determining whether the provocation was grave.

This question was answered in the affirmative in the early case of *Punchirala*.[143] Bertram C. J. said: "The court may take into account the justly enraged condition of the person who received what might otherwise be deemed insufficient provocation. It seems impossible to deny the reasonableness of this. If a man receives comparatively slight provocation at a time when he has been the victim of a series of slights and insults of themselves sufficient to strain his self-control to breaking point, it seems impossible to deny that the court should take this condition of mind into account. Is it possible to draw any logical distinction between such a state of mind created by the wrongful acts of others and a susceptibility induced by voluntary intoxication? I think that we may well hesitate to do so."[144]

Several reasons can be extracted from the judgment of Bertram C.J. for the view that voluntary intoxication on the part of the recipient of provocation is relevant in regard to gravity of the provocation. Firstly, Bertram C. J. appears to have drawn an analogy with certain subjective considerations which may have the effect of investing with the attribute of gravity provocation which would otherwise not have been regarded as grave. Thus, the court stated: "It is agreed by everybody that, in considering whether the provocation is 'grave', the court may take into consideration the status of the accused and the mentality incident to persons of his class of life. It appears also to be agreed that it would be right that

143. (1924) 25 N.L.R. 458. 144. At p. 462.

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the court should take into consideration any peculiar susceptibility naturally incident to the offender's race or religion".[145] The assumption seems to have been made that voluntary intoxication of the offender should be treated as *in pari materia*. Secondly, it was said that the word 'grave' "is not an absolute but a relative term and, in determining whether in any particular case the provocation received was grave, the court or jury may take into account the intoxication of the person receiving it".[146] Thirdly, some emphasis was placed on the presumption in favour of life and liberty. "All the text writers who have considered the subject, affirm the proposition that drunkenness may be taken into account in estimating the gravity of the provocation, and although their remarks appear to be based upon an insufficient examination of the authorities they cite, such a consensus of opinion *in favorem vitae* cannot lightly be ignored".[147]

However, after the decision in *Jamis* established that the accused, in order to succeed in the mitigatory defence, must prove *inter alia* such provocation as is likely to destroy the self-control of an average man of the class of society to which the accused belonged, a difficulty arose in reconciling the objective criterion expressed in this form with the *ratio decidendi* of *Punchirala*'s case. In *Jamis*, however, Gratiaen J. deliberately refrained from declaring *Punchirala*'s case wrongly decided. While leaving this issue open, Gratiaen J., pronouncing the judgment of the majority of the court, said: "We certainly reject the argument that, so long as the dictum in *Punchirala*'s case is allowed to stand, its *ratio decidendi* must logically be extended to every other case where a prisoner charged with murder pleads that he was peculiarly prone to loss of self-control under the stress of provocation which was insufficient in point of degree to produce a similar effect on the mind of an average person".[148]

This involves a patent anomaly, however. In *Jamis*, Gratiaen J. endeavoured to avoid overruling *Punchirala* by holding that the modified test of 'gravity' prescribed in the earlier case as a special concession to a person in a state of self-induced intoxication, should not be extended to cases where the person pleading provocation relies on an idiosyncrasy or weakness of the will induced by some other condition peculiar to himself.[149] But this position is manifestly unsatisfactory, in that it implies conferment on a person who has voluntarily consumed intoxicants, a privilege which is withheld from persons subject to congenital or other infirmities in regard to the existence of which no responsibility is imputable to them.

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145. ibid. 146. At p. 463.
147. ibid.
148. (1952) 53 N.L.R. 401 at p. 408. 149. At p. 407.

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The case Law of other jurisdictions has accepted unequivocally that infirmities peculiar to the accused, such as impotency, cannot be considered in determining whether the provocation offered was grave.[150] The Ceylon courts have also insisted that the test of gravity of provocation contains significant objective elements. If, then, as a general principle, idiosyncrasies which are characteristic of the accused himself are irrelevant for the purpose in hand, it is difficult to justify the recognition of an exception founded on a state of voluntary intoxication.

The inconsistency of the decision in *Punchirala* with the ruling by the majority of the court in *Jamis*, was rightly conceded by the Court of Criminal Appeal in *Muttu Banda*[151] where Rose C.J., overruling *Punchirala*, held that self-induced intoxication of the accused is not to be regarded as effecting the gravity of the provocation offered.[152] The effect of the decision in *Muttu Banda* is that voluntary intoxication is equiparated with the total range of mental and temperamental attributes which distinguish the accused from the reasonable man, in that deviation from the norm in any of these respects is not taken into account in regard to determination of gravity of the provocation. The position, therefore, is now quite clear in Ceylon that self-induced intoxication is altogether extrinsic to gravity of the provocation given.

(3) Reference may be made in passing to the doctrine of continuing provocation which has secured judicial acceptance in some jurisdictions, notably in India. The effect of this doctrine is that the history of the relationship between the deceased and the accused may be adverted to by the court for the purpose of ascertaining whether the provocation offered on a specific occasion was sufficiently grave. In other words, the doctrine requires that a particular act of provocation should be regarded not as an isolated event but in the overall context of an exacerbated relationship. Thus, provocation which, if offered on a single occasion, would not be treated as grave, may assume a different complexion in the light of proof of a continuing and increasing strain to which the accused was subject. The notion of continuing provocation is founded on a valid rationale and, although the matter is *res integra*, there is no reason why it should be excluded from the law of Ceylon. The doctrine introduces, in circumstances to which it applies, a qualification on the basically objective character of the test of provocation.[153]

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150. See, for example, *D. P. P.* v. *Bedder* (1954) 1 W.L.R. 1119.
151. (1954) 56 N.L.R. 217.
152. At p. 218.
153. See, on this aspect, M. Sornarajah, *The Doctrine of Continuing Provocation.* Journal of Ceylon Law, June 1971, pages 101-117.

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(iii) In addition to being 'grave', the provocation is required to be 'sudden' if the mitigatory plea is to succeed.

In *K. D. J. Perera*'s case[154] Nagalingam S.P.J. said: "There should be a close proximation in time between the acts of provocation and of retaliation. This element is of importance in reaching a decision as to whether the time that elapsed between the giving of provocation and the committing of the retaliatory act was such as to have afforded and did in fact afford the assailant an opportunity of regaining his normal composure, in other words, whether there had been a 'cooling' of his temper".[155]

The qualified defence of provocation enshrines, at bottom, a concession to human frailty. An essential element of the plea is that the accused acted on the spur of the moment without the opportunity of premeditation or calm and detached reflection. There is, of course the intention to kill at the time the retaliatory act is committed, but what is lacking is any attempt on the accused's part to make plans or to set about his act in a cold and calculating manner. On the other hand, where the opportunity of controlling his emotions was available to the accused, provocation cannot be considered 'sudden'. This requirement implies that the accused's reaction should be almost instinctive, without any element of scheming or contriving. This is difficult to prove in cases where there has been a considerable interval of time between the act of provocation and the act of retaliation. The length of the intervening period is not governed by rigid rules, but is a question of fact which has to be decided in the light of the circumstances of each case. Apart from this rudimentary principle, no further explanation as to the requirement of 'sudden' provocation is made by the Penal Code.

The substance of this requirement may be illustrated by the cases. In *Ran Banda*[156] the accused was charged with the murder of the man with whom the accused's wife was living at the time of the incident. One of the pleas tendered by the accused was that the act was committed under grave and sudden provocation. He sought to support this plea on the basis of evidence that "the accused suddenly coming up after dinner to sleep with his wife, or for some other purpose to enjoy the society of his wife or to see his child, he saw these two people on a mat or in the act of copulation and he was incensed".[157] In *Premaratne*[158] the fatal stabbing occurred soon after an altercation in a boutique. The provocative statement by the deceased preceded the accused's act of stabbing only by a few minutes. In *Michael*[159] the evidence suggested that the

154. (1951) 53 N.L.R. 193.
155. At p. 202.
156. (1949) 40 C.L.W. 33.
157. At p. 34.
158. (1947) 34 C.L.W. 32.
159. (1947) 35 C.L.W. 15.

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accused surprised his wife and her paramour at home one afternoon. On being questioned by the accused, the deceased slapped him. The accused then left the house and began to brood over the incident. About an hour later, the deceased came past him on a bicycle, tried to ride him down and struck against his leg. When the deceased hit him with his hands, the accused pulled out a knife and stabbed the deceased. The renewed act of provocation by the deceased took place only a short time before the stabbing.

The question has arisen in Ceylon whether the existence of a common intention is necessarily inconsistent with admission of the plea of grave and sudden provocation. This was answered in the negative by the Court of Criminal Appeal in *Anthony*.[160] Gunasekera J. said: "We can see nothing contrary to reason in a view that several persons affected by rage may while still deprived of the power of self-control, form a common intention to kill or to cause bodily injury to the person who gave them provocation. A common intention does not necessarily and in all cases imply an express agreement and a plan arranged long before the assault. The agreement may be tacit and the common design conceived immediately before it is executed".[161]

(iv) Actual loss of self-control is an indispensable element which the accused is bound to prove. In *K. D. J. Perera*,[162] Nagalingam S.P.J. stated: "We are of opinion that, once the conclusion is reached that the provocation, taking the case of the given average man, was grave and sudden, the next question that need receive the attention of the jury is whether the prisoner himself, as a result of the provocation received, did lose his power of self-control".[163]

That the accused himself was deprived of his power of self-control, has to be established in addition to the grave and sudden character of the provocation, judged by reference to the standard of the reasonable man. In *Jamis*, Gratiaen J. observed: "Unless the subjective and objective tests demanded by our law are both satisfied, a plea of provocation necessarily fails."[164] The principle requiring satisfaction of both the subjective and the objective criteria is in keeping with the primary object of the law in this area.

The first question to be asked is whether a reasonable man, situated as the accused was, would have been likely to lose his self-control, if given the provocation which the accused received. If the answer is in the negative, the plea of provocation should perforce be rejected. If, on the other hand, the

160. (1952) 55 N.L.R. 35.
161. At p. 38.
162. (1951) 53 N.L.R. 193.
163. At p. 204.
164. (1952) 53 N.L.R. 401 at p. 404.

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answer to the first question is in the affirmative, the inquiry has yet to be completed. The accused will not succeed in his plea of provocation if he himself did not lose his self-control, although the average member of his class of society may be expected to have done so. This may happen for one of a variety of reasons—for instance, because the accused had an unusually imperturbable temperament or because he was aware that the statement in question was untrue, even though the reasonable man may not have had such knowledge. In this event, in view of absence of actual deprivation of self-control, the defence proves abortive.

In *David Appuhamy*'s case Nagalingam S.P.J. said: "For a proper appreciation of what the exception does imply, one must give full purport to the adverb 'whilst' and the meaning would then be clear that only in such cases where there is a deprivation of the power of self-control as a result of grave and sudden provocation can the benefit of the exception be claimed by a prisoner".[165] If the accused retained his self-control, the basis of the plea of grave and sudden provocation is inapplicable, in that no concession on the ground of human weakness may be made appropriately in the interest of one who, while being in complete control of himself, deliberately killed his victim. The slaying in such a case proceeds from venom or malignity and is clearly extrinsic to the province of the mitigatory plea.

Since actual loss of self-control contemplates an entirely subjective matter, peculiarities and idiosyncrasies of the accused person which are outside the purview of the objective criterion of gravity, may be properly accommodated at this stage. Thus, as to the condition of self-induced intoxication, Rose C.J. said in *Muttu Banda*[166]. "The true position would seem to be that the intoxication of the accused in such a case as is contemplated in *Punchirala* only becomes relevant for the consideration of the jury when they are considering the question whether the accused was in fact provoked by provocation which would, in the opinion of the jury, have provoked a normal or reasonable man."[167] *A fortiori*, infirmities in the accused which are independent of his will have a bearing on actual deprivation of self-control.

Implicit in this requirement is the element that loss of self-control should be caused by, or be attributable t , no other factor than the giving of grave and sudden provocation. This is a matter of causation and gives rise to no special difficulties.[168]

(v) It is a further requisite that the act of retaliation should have been committed *whilst* the accused was deprived of the

165. (1952) 53 N.L.R. 313 at p. 315.
166. (1954) 56 N.L.R. 217. 167. At p. 220.
168. See G.L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), Chapter 3.

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power of self-control. This element received emphasis in the judgment in *David Appuhamy*'s case.[169] Proof that the provocation (a) was objectively grave and sudden, and (b) caused the accused himself to lose his self-control, would not avail him if it transpires that the retaliatory act was done only after the accused regained his self-control. Not only must the accused lose his self-control, but his act must coincide in point of time with deprivation of self-control. The benefit of the exception may be claimed only so long as the loss of self control continues. Thereafter the act of slaying is held to be perpetrated from vindictive or revengeful motives, since the natural inhibitions restraining the accused from fatal violence have once more come into play. It follows that the normal consequences attendant on a conviction of murder are visited upon the accused.

(vi) A vexed issue under the law of Ceylon has been the question whether some proportionality is required between provocation and retaliation. In *Naide*[170] the trial judge directed the jury in the following terms: "Now, making every allowance for the person provoked, you must ask yourselves whether the mode of resentment, even if you accept the whole of the accused's story as true, was or was not grossly disproportionate to the nature of the provocation given".[171] In *Naide*'s case the majority of the Court of Criminal Appeal held that this was a correct direction in law. However, Nagalingam J., expressing a different view in the same case, said: "It seems to me wholly untenable to say that the nature of the retaliatory act has any bearing on the question whether the offender received grave and sudden provocation. Provocation is something offered or given to the offender and must proceed from an adversary and cannot proceed from the offender himself. It is fallacious to say that the offender had been given provocation by something he himself had done, for what the offender does is the result of the provocation received and not what induces or contributes to the provocation caused or given. To my mind it is clear that the brutality with which the resentment of the offender is carried out, is foreign to the question whether he received grave and sudden provocation."[172]

In *K. D. J. Perera* the majority of the Court of Criminal Appeal held that the trial judge's direction, in this respect, in *Naide*'s case was unsupportable. Nagalingam S.P.J. expatiated further on the views he had expressed in *Naide*, and put the following illustration: "Take the case of one Muslim putting a piece of hog's flesh on a plate off which another Muslim was dining; could it be said that if the diner retaliated by mauling the provoker with hands, the provocation would be regarded as

169. (1952) 53 N.L.R. 313 at p. 315.
170. (1951) 53 N.L.R. 207. 171. At p. 214.
172. At pages 208-209.

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grave, but if the retaliation took the shape of stabbing and killing the provoker with a dagger which the person provoked had on his person, the provocation would not be regarded as grave but only as venial? The lack of reason underlying the determination of the gravity of provocation by reference to the nature or mode of the retaliatory act becomes manifest".[173] The conclusion reached by four out of five judges in *K. D. J. Perera* was expressed as follows: "The invitation to the jury to approach their task of determining whether the provocation was grave and sudden by reference to the test whether the mode of retaliation was violently disproportionate to the kind of provocation given cannot be justified under our law and would have tended to direct the jury to apply their minds to false issues in the case, thereby resulting in serious prejudice to the prisoner".[174]

The view which appeared convincing to the majority of the Court of Criminal Appeal in *K. D. J. Perera*'s case was that the gravity of provocation had to be assessed quite independently of the mode and the extent of retaliation, the latter considerations being irrelevant to the issue of gravity of provocation. It was sought to base this conclusion on a principle of statutory construction. Nagalingam S. P. J. observed: "It would have been simple enough, if the Legislature was so minded, to have very effectively stated that, where the mode of resentment is shown to be out of all proportion to the provocative act, the benefit of the plea should not be available, and added it to the existing provisos to the exception as an additional one."[175]

In *Jamis* it was noted that the decision in *Naide*'s case was overruled by a majority of the Court of Criminal Appeal in *K. D. J. Perera.*[176] At the time *Jamis*' case was decided the Crown had obtained special leave to appeal to the Privy Council against the majority decision in *K. D. J. Perera.* Pending the ruling of the Judicial Committee on the matter, the Court of Criminal Appeal, in *Jamis*, assumed that *K. D. J. Perera*'s case was correctly decided with regard to the particular issue on which the Court had made a considered pronouncement."[177]

The view of the majority of the Court of Criminal Appeal in *K. D. J. Perera* was overruled by the Privy Council. According to the case presented at the trial, ill-feeling had long existed between the accused and the deceased's family. On the day in question, he shot and killed the deceased, and it was sought to reduce the crime from murder to culpable homicide not amounting to murder on the ground of provocation which consisted

173. (1951) 53 N.L.R. 193 at p. 203.
174. At p. 204.
175. At p. 203.
176. (1952) 53 N.L.R. 401 at p. 403.
177. ibid.

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of a series of acts of stone-throwing by the deceased woman's family and threats uttered by them. According to the accused, he was suddenly provoked, he felt serious danger to his life and did not know what happened as he had lost control over himself. Nagalingam S.P.J.'s contention founded on the words of the statutory provision was refuted by Lord Goddard who said: "In the opinion of their Lordships, it is quite wrong to say that, because the Code does not in so many words say that the retaliation must bear some relation to the provocation, it is true to say that the contrary is the case".[178]

The conclusion reached by the Privy Council was that a consideration of the method and degree of the retaliation was necessarily integral to assessment of the gravity of provocation. Their Lordships observed: "In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind of provocation which they as reasonable men would regard as sufficiently grave to mitigate the actual killing of the woman, in the opinion of their Lordships, the trial judge was merely directing the jury as to how they should determine whether the provocation was grave. The words 'grave' and 'sudden' are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation; otherwise, some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation and provocation which may cause the sufferer to lose a degree of control, but will not excuse the use of a deadly weapon".[179]

The attitude reflected in the Judicial Committee's opinion is that the requirement postulating a reasonable, although not necessarily an exact, relation between the act of provocation and the retaliatory act, is not a distinct or separate element but is an aspect of the issue of gravity. It is interesting to note that this approach is foreshadowed in some passage of the judgments in *Naide*'s case.[180] For example, Gunasekara J. said: "Acceptance of the whole of the accused's story as true might involve a conclusion that the provocation alleged by him was sufficient so to deprive him of self-control as to lead him to make a fatal attack *with a lethal weapon*; but the jury had still to consider whether it was sufficient to deprive a reasonable man of self-control *to a like extent*, that is to say, whether the provocation was grave. In the passage in question, the learned judge has in effect directed the jury to consider whether the provocation was sufficient to deprive a reasonable man of his self-control."[181]

178. (1952) 54 N.L.R. 265 at p. 269
179. ibid.
180. (1951) 53 N.L.R. 207.
181. At p. 215.

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This approach received unqualified acceptance in the opinion of the Privy Council in *K. D. J. Perera.*[182] The resulting position is that the provocation is not held to be grave, in the absence of an approximate correlation between the provocative and retaliatory gestures. In other words, there is no inherent inconsistency in the act of provocation being held to be grave in relation to one act of retaliation but not in regard to another.

Finally, it may be pointed out that the principle established in the law of Ceylon that verbal provocation is not necessarily incompatible with the requirement of gravity, is in no way affected by the ruling of the Privy Council in *K. D. J. Perera*'s case.[183] Subject to this qualification, the effect of the Judicial Committee's decision in *K. D. J. Perera* is to bring the law of Ceylon in line with English law on this particular aspect of the principles governing provocation.

(vii) Some reference may be made to the burden of proof in respect of the plea of grave and sudden provocation. This embodies a special exception from criminal liability recognized by the Penal Code. The operative provision in regard to the *onus probandi* is contained in the Evidence Ordinance.

Section 105 of this Ordinance provides that "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence is upon him, and the Court shall presume the absence of such circumstances". In section 3 of the Evidence Ordinance, the expression 'proved' is defined as follows: "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

While the burden of proof in regard to special exceptions is assigned to the accused by statutory provisions, the degree of the burden is not explicitly provided for. This matter, however, has now been settled by the decision of the Court of Criminal Appeal in *James Chandrasekera.*[184] Six out of the seven judges who constituted the Bench in that case held that, in a case where a general or special exception under the Penal Code is pleaded, a reasonable doubt created in the minds of the jury as to applicability of the exception does not render the accused entitled to its benefit.[185] The relevant provisions of the Evidence Ordinance, read with the majority judgments in *James*

182. See note 178, *supra.*
183. *Piyasena* (1956) 57 N.L.R. 226.
184. (1942) 43 N.L.R. 97. 185. ibid.

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Chandrasekera, have the effect that the plea of grave and sudden provocation is required to be established by the accused on a balance of probability.

This principle was acted upon in *Banda*.[186] Howard C.J., delivering the judgment of the Court of Criminal Appeal, said: "It was incumbent on the accused to show by a preponderance of weight of evidence that he was acting under grave and sudden provocation. The accused, in giving evidence, did not himself say that he was provoked in any way by the trespass committed by the deceased. On the other hand, he (counsel) argued that such evidence of provocation was supplied by the prosecution. We do not think that it does arise from the evidence of the prosecution".[187] The basis of the decision is that provocation must be averred and established affirmatively by the accused.

(viii) Our law as to provocation is of particularly extensive scope in one respect—namely, that death may be inflicted not only on the person who gave the provocation but on any other person by mistake or accident.[188] In regard to the former category, the applicable limitations have already been discussed. As to the latter, it may be noted that all the requirements mentioned earlier must be proved—that is to say, the provocation must be grave and sudden, objectively assessed, and the accused should have lost his self-control and retaliated before he had the opportunity to regain it. In addition to these requisites where the death of a third party has been caused in consequence of provocation, there is the vital condition that death should have been inflicted "by mistake or accident".[189]

The deliberate killing of X on the pretext of provocation offered by Y obviously falls outside the scope of the exception. This is demonstrated by illustration (a). "A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation". This may be contrasted with the facts of illustration (b). "Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him but out of sight". Here, A is held to have committed not murder but merely culpable homicide not amounting to murder, since the killing of Z was a purely fortuitous circumstance. The qualification in regard to mistake and accident, clearly, is essential to protect blameless third parties from the

186. (1941) 20 C.L. Rec. 7. 187. At p. 8.
188. Exception 1 to section 294 of the Penal Code.
189. See note 182, *supra*.

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effects of the latitude shown by the law in cases of grave and sudden provocation.

(ix) The position has been established in Ceylon by a *cursus curiae* that failure to direct the jury adequately on the issue of provocation necessitates, in appeal, the substitution of a verdict of culpable homicide not amounting to murder in place of one of murder. The principle stated in section 5 (1) of the Court of Criminal Appeal Ordinance which empowers the court to dismiss an appeal, notwithstanding acknowledgement of some technical merit in the appeal, so long as the court is satisfied that no miscarriage of justice has resulted from the lapse on the part of the trial judge, has no application in these circumstances.

In *Mohideen Meera Saibo*[190] the acrimony between the accused and the deceased stemmed from matters connected with a debt which the deceased owed the accused. In appeal, Moseley J. declared: "In our view, that part of the story of the accused should have been put to the jury, describing the journey, eighteen miles in all, made by the accused for the purpose of obtaining payment of the debt due to him, the hope held out by the deceased that payment would be made at Bandarawela, the attempt made by the deceased to elude the accused on their arrival in the town and, finally, the apparent blunt refusal of the deceased to settle the debt. Another factor to be considered was the state of the accused's mind when he was told, as he says that he was, that his children were starving".[191]

In *Premaratne*[192] Howard C.J., on behalf of the Court of Criminal Appeal, said: "The trial judge goes on to deal with the facts in the case and, having done so, asks the jury to consider those facts, so far as the defence based on the exercise of the right of private defence is concerned. The jury, however, is not asked to consider the facts and decide as to a defence based on the fact that the accused had lost his power of self-control by reason of grave and sudden provocation".[193] In *Michael*,[194] Howard C. J. stated: "In dealing with the defence of the accused, the learned judge, it is true, puts before the jury the defence of the accused that he was acting in the exercise of the right of private defence and also puts to them the question as to whether there was a sudden fight, but with regard to the question of grave and sudden provocation....he finishes his remarks on that point by saying that the question of grave and sudden provocation really fails. In other words, he has withdrawn that issue from the jury. We think, however, that there was evidence of grave and sudden provocation which should have been left to the jury".[195] In all these cases, the Court of

190. (1940) 19 C.L.W. 129.
191. At p. 130.
192. (1947) 34 C.L.W. 32.
193. At p. 32.
194. (1947) 35 C.L.W. 15.
195. At p. 16.

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Criminal Appeal, on the basis that applicability of the special exception of grave and sudden provocation had not been put clearly to the jury, intervened to alter convictions of murder to those of culpable homicide not amounting to murder.

(x) The exception relating to grave and sudden provocation is subject to three provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;[196]

(b) that the provocation is not given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant;[197]

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.[198]

Each of these provisos has the effect of defeating the exceptions and of preventing a reduction of the offence from murder to culpable homicide not amounting to murder.

(a) A difficulty of construction has arisen in regard to the first proviso. The question is whether the plea of provocation can be availed of by an accused in mitigation of the offence of murder under the first proviso, if the provocation was itself sought by the accused, although not with the intention of making it an excuse for killing or doing harm to the deceased. In other words, the controversy revolved round the issue whether the words "as an excuse for killing or doing harm to any person" qualify only the phrase "is voluntarily provoked" or whether they qualify both phrases "is sought" and "is voluntarily provoked".

There would appear to be two ways of construing the proviso: (I) (a) that the provocation is not sought, and (b) that the provocation is not voluntarily provoked by the offender as an excuse for killing or doing harm to any person; and (II) (a) that the provocation is not sought by the offender as an excuse for killing or doing harm to any person, and (b) that the provocation is not voluntarily provoked by the offender as an excuse for killing or doing harm to any person. No guidance may be derived directly from the statutory provision itself, since the whole of the proviso is not punctuated in any manner. Accordingly, both methods of construction are consistent with the language of the proviso.

This matter was the subject of careful consideration by Koch J. in *Ridley de Silva*.[199] The first of the possible interpretations

196. The first proviso to Exception 1.
197. The second proviso to Exception 1.
198. The third proviso to Exception 1.
199. (1936) 38 N.L.R. 251.

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of the proviso was preferred by His Lordship. The view which commended itself to the court was that the words "that the provocation is not sought" should stand by themselves without qualification by any other words which follow,[200] The necessary effect of this view is that the accused is not entitled to the benefit of the plea of provocation if the provocation was itself sought by the accused, although not with the intention of making it an excuse for killing or doing harm to the deceased.[201]

Koch J. justified his approach to the problem in the following terms: "To think differently would be to introduce a most dangerous principle. For example should a person who goes up to another, slaps him and courts a kick in return and thereupon shoots that other dead, be permitted to say that his act of shooting that other under the immediate provocation offered him, reduces the offence of murder to one of less degree? If he be permitted to plead the provocation caused him by the kick, should not this plea be discounted by the fact that the treatment he complains of was the necessary result of his own seeking, the *causa causans*?"[202] The interpretation of the proviso which was adopted by the Ceylon court, is in conformity with the position under Indian law."[203]

In *Ridley de Silva*'s case, the provocation offered to the accused arose from an indecent remark, accompanied by an offensive gesture, made by the deceased. However, according to the admission of the accused himself what provoked the indecent remark was a serious charge made by the accused to a third party who was the employer both of the accused and of the deceased. In these circumstances, the exception of grave and sudden provocation was held to be excluded by the first proviso.

Several points relating to the burden of proof in this connection were commented on by the Court of Criminal Appeal in *Batcho*.[204] The first question is whether the prosecution should establish the applicability of the proviso or whether the accused is bound to prove the absence of circumstances which bring the first proviso into play. The former alternative was accepted by Pulle J. who delivered the judgment of the Court of Criminal Appeal in *Batcho*'s case. Consequently, the position is that, once the accused has brought himself within the scope of Exception 1, he is entitled to the lesser verdict of culpable homicide not amounting to murder. It is then for the prosecution to show, if they can, that the benefit of the exception should not be available to the accused because a proviso to the Exception is applicable. This can be done only by means of positive averments which justify invocation of the proviso."[205]

200. At p. 253.
201. At p. 251.
202. At p. 253.
203. At pages 253-254.
204. (1955) 57 N.L.R. 100.
205. At p. 105.

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While the burden of resorting to one of the provisos to the Exception devolves on the prosecution, the further question as to the extent or degree of that burden remains to be resolved. In *Batcho*'s case, Counsel for the accused contended that the prosecution is required to prove beyond reasonable doubt the facts necessary for the application of the proviso.[206] This contention was rejected by the Court, Pulle J. holding that so exacting a standard of proof is postulated by the law only in respect of the ingredients which constitute *prima facie* the offence of murder.[207] "The proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as, and no higher than, that resting on an accused person who claims the benefit of the Exception to which section 105 of the Evidence Ordinance applies".[208] The effect of this view is that the burden of proof in regard to relevance of the proviso has to be discharged by the prosecution on a preponderance of probability.

In *Batcho*, the accused's version was that the deceased girl, who was engaged to be married to him, had grossly insulted and humiliated him by throwing a cup of tea at the accused and burning him with an iron when he attempted to speak to her. According to the prosecution, these provocative acts on the part of the deceased were due to the resentment she entertained against the accused because of an offensive letter he had addressed to her. On these facts, the Court of Criminal Appeal expressed the view that the trial judge ought to have directed the jury that the burden was on the Crown to bring itself within the proviso. Failure to do so, it was held, amounted to a misdirection vitiating a conviction of murder.

(b) The scope of the second proviso is made clear by illustrations (c) and (d) attached to Exception 1. A is lawfully arrested by Z, a Fiscal's officer. A is excited to sudden and violent passion by the arrest and kills Z.[209] To take another case, A appears as a witness before Z, a magistrate. Z says that he does not believe a word of A's deposition and that A has perjured himself. A is moved to sudden passion by these words and kills Z.[210] In both these cases, the offence is not reduced from murder to culpable homicide not amounting to murder, since "the provocation was given by a thing done by a public servant in the exercise of his powers".[211] It may be noted that the second proviso applies only so long as the public servant is acting strictly within his powers.

(c) Illustration (c) supplies an instance of the third proviso. "A attempts to pull Z's nose. Z, in the exercise of the right

206. At p. 105. 207. ibid.
208. ibid.
209. Illustration (c) to Exception 1.
210. Illustration (d) to Exception 1. 211. Illustration (c), *supra*.

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of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence."[212] Here, again, a precondition of applicability of the proviso is that the deceased should have been acting within the confines of the right of private defence.

Finally, it must be pointed out that, where two persons participate in the killing, one as abettor[213] and the other as direct perpetrator of the deed, the ability of the latter to invoke the plea of grave and sudden provocation does not necessarily diminish the criminal liability of the former. The abettor, conceivably may be responsible to a greater extent than the person abetted. This is made explicit by the facts of illustration (f) to Exception 1. "Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed culpable homicide, but A is guilty of murder".[214] The mitigatory defence is limited in its application to the direct actor, while the abetto, who exploits the situation to pay off a personal grudge against the deceased, incurs liability for the graver offence.

(*B*) *Bona Fide Excess of the Right of Private Defence*

Exception 2 to section 294 of the Penal Code provides that "Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence". The illustration reads as follows: "Z attempts to horse-whip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith that he can by no other means prevent himself from being horse-whipped, shoots Z dead. A has not committed murder but only culpable homicide (not amounting to murder)".[215]

The position arising from this exception and from other relevant provisions of law, may be stated as follows:

(i) Where the accused acts in the exercise of his right of private defence, whether of person or of property, and

212. Illustration (e) to Exception 1.
213. For a discussion of the law of abetment generally, see G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), chapter 11.
214. Illustration (f) to Exception 1.
215. Illustration to Exception 2.

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restricts himself to the legitimate limits[216] of that right, any harm caused to the aggressor, including infliction of death, does not involve the accused in criminal liability at all. The doctrine of private defence, in this type of case, provides a complete exculpatory plea.

(ii) Where the right of private defence could properly have been availed of, but the accused, in killing the deceased, exceeds that right in good faith without premeditation and without the intention of doing more harm than is required for the purpose of self-defence, the accused is neither convicted of murder nor released from liability altogether. The appropriate verdict in such a case is the lesser verdict of culpable homicide not amounting to murder.

(iii) If the accused exceeds the right of private defence not bona fide but with premeditation and with the deliberate intention of inflicting more harm than is necessary for the purpose of self-defence, liability for murder may be imposed if the victim's death is brought about.

These principles have been applied uniformly in the case law. In *Muttu*[217] the accused was convicted of murder on the basis that the right of private defence had been exceeded. However the Court of Criminal Appeal held that, on a charge for murder, where there is sufficient evidence relating to justifiable exercise of the right of private defence, it amounts to a substantial misdirection if the summing-up by the trial judge conveys to the jury the impression that the accused had travelled beyond the limits of the right of private defence. Keuneman S.P.J. declared: "These are misdirections relating to a very vital matter. The distance at which the fatal shot was fired was of the utmost significance and had an immediate bearing on the question whether the accused exceeded the right of private defence or not. Had the correct facts been put to the jury, we think they may well have considered that the accused had justification for firing as he did, with fatal results".[218] The conviction of murder was quashed, and the accused was acquitted in appeal, on the ground that he had acted entirely within his right of private defence.

This case may be contrasted with *Soysa*.[219] The appellant, who was convicted of murder, gave evidence at his trial that he had killed the deceased in self-defence. As regards the

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216. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pages 297-307.
217. (1946) 47 N.L.R. 516.
218. At p. 518.
219. (1952) 55 N.L.R. 252.

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second Exception to section 294 of the Penal Code, the presiding judge told the jury that, if the accused exceeded the right of private defence, he was guilty of culpable homicide not amounting to murder. In appeal, it was contended on behalf of the accused that the jury should also have been directed to consider whether the accused had acted without any intention of doing more harm than was necessary for the purpose of self-defence. The omission in this regard, it was argued by the accused, was tantamount to a misdirection. Here it was held by the Court of Criminal Appeal presided over by Gunasekra J., that there was no misdirection adversely affecting the accused but that, on the contrary, the direction impugned was unduly favourable to him.

Clearly, this was an unexceptionable decision. The trial judge told the jury, in effect, that they should consider whether the accused exceeded his right of private defence or not and that, if he did, he should be held guilty of culpable homicide not amounting to murder. The possibility of a conviction of murder was not mentioned at all. But a conviction of murder would have been proper if the evidence indicated not merely that the accused had exceeded his right of private defence but that he had done so with malice or premeditation.

The concept of "intention" in the phrase "without any intention of doing more harm than is necessary" was examined by the Court of Criminal Appeal in *Kirinelis*.[220] Keuneman S.P.J. said: "The jury may have understood that, if the accused in fact exceeded the right of private defence, he was to be convicted of the offence of murder—and they would never have applied their minds to the question whether the accused had an *intention* to do more harm than was necessary for the purpose of defence. This *intention* is a special intention."[221] "Intention", in this context, would seem to connote some element of ill-will or vindictiveness. The Court of Criminal Appeal referred with approval to Gour's statement that, if the accused is to be allowed the benefit of the mitigatory plea, his action should not have been "maliciously excessive or vindictively unnecessary."[222]

Several cases have considered the burden of proof in circumstances involving the infliction of death during action taken in excess of the right of private defence. The principle applicable is that, since Exception 2 to section 294 represents a special exception from criminal liability, the accused has to establish the applicability of the exception on a balance of probability.[223]

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220. (1946) 34 C.L.W. 13. 221. At p. 15.
222. At p. 15.
223. See sections 3 and 105 of the Evidence Ordinance and *James Chandrasekera*'s case, *supra*.

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In *Banda*[224] Howard C.J., delivering the judgment of the Court of Criminal Appeal, observed: "The onus was on the accused to prove that he comes within the ambit of this exception. We are of opinion that there is no evidence whatsoever to show that the applicant was exercising in good faith the right of private defence of his property. In fact, the evidence is all the other way. Nor is there any evidence to show that, in doing what he did, he had no intention of doing more harm than was necessary for the purpose of such defence".[225] On this basis the conviction of murder was affirmed in appeal.

The Privy Council had occasion to consider an allied problem in *Jayasena*.[226] The accused, who was charged with murder, admitted at the trial that the deceased died of wounds deliberately inflicted by the accused with a murderous intention. The defence rested entirely on the ground of private defence. The Privy Council ruled that the accused cannot maintain that he was not required to provide any kind of proof that he was acting in private defence. In their Lordships' view, it is not sufficient for the accused to raise a doubt as to whether he is entitled to the benefit of the plea of private defence. He must go further and discharge the probative burden on a balance of probability.

Their Lordships, however, conceded that the position is materially different when the accused denies the intention to kill. This envisages, for example, cases where the accused states that he did not intend to kill or to cause serious bodily injury but adds that, in any event, he was acting in self-defence. Lord Devlin, speaking for the Judicial Committee, said: "It is frequent for an accused to deny the intention....In such a case, it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution".[227] However, once this burden is discharged by the prosecution, the standard of proof which an accused person has to satisfy in bringing himself within the purview of a general or special exception, is of a lesser degree.[228] This applies, among other special exceptions, to the plea that the accused had bona fide exceeded his right of private defence.

(C) *Bona Fide Overstepping of Authority by a Public Servant*

Exception 3 to section 294 provides that "Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and

224. (1941) 20 C.L.W. 129.
225. At p. 130.
226. (1969) 72 N.L.R. 313.
227. At p. 318.
228. See note 223, *supra*.

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necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused". The limiting factors here are contained in the requirements that death should have been caused (i) in good faith, (ii) in the purported exercise of the functions of a public servant, and (iii) without malice towards the victim.

(*D*) *The Plea of Sudden Fight*

The effect of Exception 4 to section 294 is that "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner".

The following points may be made in regard to the applicability of this Exception:

(i) The word "premeditation", in the context of this Exception, does not have the same meaning as "intention". The accused is entitled to the benefit of the Exception of sudden fight, although he intended to cause death, so long as he acted in anger during the quarrel and the other elements of the Exception are capable of being established. In *N. A. Fernando*[229] Soertsz S.P.J., delivering the judgment of the Court of Criminal Appeal, made the following criticism of the summing-up in the case: "The trial judge explained 'premeditation' as if it was synonymous with 'intention'. There was, then, misdirection in that respect. The jury, in view of that misdirection and also in view of the observation made by the judge that if they were not satisfied that the condition 'without premeditation' was present on the evidence, they need not consider that exception any further, probably refrained from such further consideration".[230] A conviction of murder was therefore set aside and one of culpable homicide not amounting to murder substituted.

(ii) Where the plea of sudden fight is taken, it is immaterial which party offers the provocation or commits the initial assualt. This principle is set out explicitly in an Explanation to Exception 4. A contrary view would appear to emerge by implication from the trial judge's direction to the jury in *Hewage Romel*.[231] The jury were directed as follows: "If A hits B, B returns the blow, A hits again and B also returns the blow and then A takes his knife and plunges it into the abdomen of B and B dies, it would be very difficult—almost impossible—for any reasonable human being to come to the conclusion that it took place in a sudden fight, because it has not the characteristics

229. (1945) 46 N.L.R. 254. 230. At p. 256.
231. (1948) 37 C.L.W. 70.

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of what is wanted in the case of a sudden fight".[232] Wijeyewardene A.C.J., pronouncing the judgment of the Court of Criminal Appeal, rejected this view. His Lordship said: "We think that there is much force in Counsel's submission that, most probably, the jury erred in thinking that the opinion, expressed by the trial judge with some emphasis, on a question of fact, was a direction on a question of law and concluded that, even on the facts as stated by the defence, the accused was not entitled in law to claim the benefit of the plea of sudden fight".[233] A similar view was expressed by Howard C.J. in *Lewis Singho*.[234]

(iii) A fundamental principle of evidence was established by the judgments of the majority of the Court of Criminal Appeal in *Chandrasekera*'s case—namely that if the existence of circumstances which would bring the case within one of the exceptions is involved in doubt, the existence of these circumstances cannot be said to have been proved.[235] The accused must satisfy the jury, on a balance of probability, that these circumstances existed. However, this principle has no bearing on a situation where, in regard to a charge of murder, Exception 4 to section 294 is pleaded on behalf of an accused person and circumstances are in evidence which bring the case within the ambit of the Exception.

In *Johanis*[236] Hearne, J., commenting on the scope of the decision in *Chandrasekera*'s case, observed: "(That decision) does not lay down that, if two possible views may be taken of a set of *proved* circumstances, the jury is precluded from adopting *either* of those two views...If, for instance, an accused rests his defence on a sudden fight and circumstances are in evidence which the jury regard as having been proved, they may or may not hold that those circumstances established that there was a sudden fight, upon a sudden quarrel, and that the accused did not take undue advantage. It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within Exception 4 of section 294 of the Penal Code, that the existence of such circumstances cannot be said to have been proved".[237]

(iv) The circumstances in which the plea of sudden fight should be put to the jury, have been considered in a series of cases. In *Vidanalage Lanty*[238] there was evidence on which it was open to the jury to conclude that the accused was guilty only of culpable homicide not amounting to murder on the ground that Exception 4 applied. No plea of sudden fight was put forward on behalf of the accused, however. In the course

232. At p. 71.
233. ibid.
234. (1941) 43 N.L.R. 491.
235. (1942) 44 N.L.R. 97.
236. (1943) 44 N.L.R. 145.
237. At p. 147.
238. (1941) 42 N.L.R. 317.

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of his charge to the jury, the presiding judge made reference to this testimony as part of the version presented by the defence but not as evidence on which the lesser verdict could properly be based. In the Court of Criminal Appeal, Moseley S.P.J. held that it was the duty of the trial judge to have directed the jury in the latter sense and that, in view of the omission to do so, the accused was entitled to the benefit of the lesser verdict.[239]

In *Jinasekere*[240] Howard C. J. said: "There was evidence to support the argument that the injuries found on the deceased were received in the course of a sudden fight without premeditation in the heat of passion upon a sudden quarrel. In these circumstances, we think that the jury should have been asked by the trial judge to say whether the case came within this Exception".[241]

Murugesu[242] was a prosecution for murder where the accused pleaded that he acted in self-defence. The jury were adequately directed by the trial judge in regard to the law governing private defence. However, the Court of Criminal Appeal held that, as the mitigatory pleas of grave and sudden provocation and sudden fight would also have arisen for consideration by the jury in a possible view which they might well have taken of the evidence, the trial judge should have given the jury sufficient direction on that aspect of the case as well. Gratiaen J. said: "Upon an examination of the summing-up as a whole, we think it unlikely that when the jury finally retired to consider their verdict, they sufficiently appreciated that, if the plea of self-defence was rejected by them, the issues of 'provocation' and 'sudden fight' still remained for their consideration".[243] For this reason, the verdict was altered from murder to culpable homicide not amounting to murder.

In *Chandradasa*[244] the Court of Criminal Appeal, presided over by Rose C.J., accepted the principle that, in a trial for murder, questions of sudden fight or grave and sudden provocation should be left to the jury and clearly explained by the trial judge if the facts, or necessary inferences from them, render it possible for the jury to arrive at a verdict based on either of these grounds. The mere fact that the accused has contended for a complete acquittal on the ground of self-defence does not absolve the trial judge from his duty to direct the jury as to whether the true facts would necessitate a verdict of culpable homicide not amounting to murder on the basis that a special exception applies.

A necessary caution, however, is that the plea of sudden fight must be based on firm evidence and cannot be resorted to by

239. At p. 320.
240. (1945) 46 N.L.R. 243.
241. At p. 246.
242. (1951) 53 N.L.R. 469.
243. At p. 471.
244. (1953) 55 N.L.R. 439.

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way of speculation. In *M. J. Fernando*[245] the evidence led by the prosecution and by the defence did not suggest a sudden fight, but the trial judge, in his charge to the jury, suggested that, by disregarding portions of the evidence presented by both sides and accepting certain unconnected items of evidence, the jury would be justified in returning a verdict that the killing took place in the course of a sudden fight between the accused and the deceased. L. M. D. de Silva J., pronouncing the judgment of the Court of Criminal Appeal, held that the conviction of culpable homicide not amounting to murder should be set aside and an acquittal ordered, since the jury's verdict was patently based on surmise and conjecture.

The basis of mitigation in circumstances falling within the purview of the plea of sudden fight lies in the consideration that, although the accused intended to kill, this intention does not spring from malice or vindictiveness but is the product of passions generated instantaneously by a quarrel. The court does not inquire which party initiated the quarrel for the reason that, quite independently of this question, both parties could easily be excited to strong passion in the midst of a bitter altercation. So long as the retaliation resorted to by the accused takes a form which may reasonably be associated with a sudden fight, the indulgence shown by the law in permitting mitigation of liability, is available. Diminution of liability in this type of context represents an accommodation of human weakness. However, the reasons underlying the concession cease to be relevant when the accused has acted with unusual cruelty or when a deliberate design to exploit the situation is attributable to him.

It is noteworthy that the qualified defences of bona fide excess of self-defence, grave and sudden provocation and sudden fight may be inextricably interlinked in some circumstances. Let it be supposed, for example, that A strikes B and B, in turn, retaliates against A, causing A's death. These facts may be consistent with any one of the mitigatory pleas enumerated above, the material differences among them being subtle. Where B returned A's blow only for the purpose of protecting himself against a renewed attack, but used excessive force, a plea founded on overstepping in good faith the limits of private defence, would be appropriate. However, if B acted not in order to safeguard himself but as the result of loss of self-control stemming from provocation, the mitigatory plea would have to be placed on that footing. The third alternative envisages the development of a scuffle from the exchange of words or blows. In view of this significant interrelation among the three pleas, it is salutary practice, in proper circumstances, to put all three defences to the jury and to direct them specifically that rejection of one does not render consideration of the others superfluous.

245. (1952) 48 C.L.W. 67.

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(*E*) *Exceptional Strain Caused By Pregnancy or Lactation*

Exception 5 to section 294 provides that "Culpable homicide is not murder if the offender, being the mother of a child under the age of twelve months, causes its death whilst the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child".

This envisages a situation in which the guilt of the accused is not thought to be reprehensible enough to warrant a conviction of murder. This exception was not incorporated in the Penal Code originally, but was introduced by section 3 of Ordinance No. 62 of 1939.

V. CAUSING DEATH BY A RASH OR NEGLIGENT ACT NOT AMOUNTING TO CULPABLE HOMICIDE

Section 298 of the Penal Code recognizes the offence of causing death by doing any rash or negligent act not amounting to culpable homicide.

Rashness or negligence, in some circumstances, may provide the basis of a conviction of culpable homicide not amounting to murder and, in one instance, of a conviction of murder.[246] This is so in cases where a certain state of knowledge is relied on as the foundation of criminal liability. However, even where the case falls outside the scope of culpable homicide, whether in the form of murder or culpable homicide not amounting to murder, liability for causing death by a rash or negligent act may be recognized in appropriate circumstances.

It is important to note that rashness or negligence, if it is to support criminal liability, must be of a relatively high degree. This is brought out clearly in several Ceylon cases which have followed the English law on the point. The following statement emerging from the decision by the House of Lords in an English case,[247] has been adopted entirely in three Ceylon cases[248]: "In order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".

In some Ceylon cases, convictions have been set aside in appeal on the ground that negligence was not of such a kind or

246. Clause 4 of section 294 of the Penal Code.
247. *Andrews* v. *D. P. P.* (1937) 2 All E.R. at p. 556, following *Bateman* (1925) 94 L.J.K.B. 791.
248. See the cases cited at notes 250, 254 and 256, *infra*.

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degree as to warrant imposition of criminal liability. Where death has resulted from the accused's negligence, a charge may be made appropriately under section 298 of the Penal Code. On the other hand, the fact that the accused's conduct was such as to endanger human life is sufficient to create liability under several other sections of the Code, even if death has not been caused in consequence of the negligence imputable to the accused.[249] In either situation, however, the negligence alleged must satisfy the stringent requirements necessary for acknowledgement of criminal liability.

In *Lourenz* v. *Vyramuttu*[250] the accused was charged with causing hurt and grievous hurt by doing one or more acts specified in the indictment and with driving a motor van in a manner so rash or negligent as to endanger human life. The particulars of the negligent acts alleged against the accused were that he drove a motor van recklessly; that he drove it at an excessive speed; that he failed to take proper precautions, including maintaining a proper look-out and sounding the horn while approaching a junction, and that he drove the van along a road on which such traffic was not allowed.

Howard C. J. observed in appeal: "In view of the principle laid down by the highest tribunal in England, it is necessary to peruse the Magistrate's judgment to discover whether he has addressed his mind to the question as to whether the negligence of the accused, as inferred from the marks on the vehicles and the road and the evidence of the Examiner of Motor Cars, amounted to the high degree required to be proved before the offences of which the accused was convicted were established".[251] The conclusion was reached that, in view of the unsatisfactory evidence regarding the speed at which the vehicle was driven and the question whether the driver was keeping a proper look-out or not, the prosecution had not discharged its heavy burden of establishing criminal negligence.

The appellate court approached the facts of the case on the basis of the general test laid down by the House of Lords in *Andrews* v. *Director of Public Prosecutions*.[252] "The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law, there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established".[253] This is true also of the law of Ceylon where no distinction between felonies and misdemeanours is recognized.

249. Penal Code, sections 272, 328 and 329.
250. (1941) 42 N.L.R. 472.
251. At p. 474.
252. (1937) 2 All E.R. at p. 556.
253. ibid.

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Again, in *Leighton*,[254] Howard C.J. and Canekeratne J. in appeal expressed the view that the accused's conduct fell far short of the standard of criminal negligence. In this case the accused, who was charged under section 298 of the Penal Code, was alleged to have driven a truck recklessly and run down the deceased. The court, setting aside the conviction, declared: "There was no other vehicular traffic on the road at the time. Nor would it appear that the road was crowded with passengers on foot. In these circumstances the speed of the truck, even if driven at its maximum of thirty-five miles per hour, was not excessive. It has not been proved that the truck went on to the grass. The medical evidence indicates that the deceased was struck on the right side of the face. It may be that, as the truck approached the deceased turned round and stepped into the road. The accident may have been due not to reckless driving but to an error of judgment".[255]

Ranhamy[256] is a case where the accused was charged with murder but convicted by the jury of causing death by a rash or negligent act. In appeal, it was held by Lyall Grant J. that the latter verdict was justified by the circumstances of the case. The accused's negligence in handling his gun, it was proved, was so great as to bring the case within the ambit of criminal liability. Much of the argument in appeal, however, was concerned with the question whether it was competent for the jury to bring in a verdict under section 298 when the indictment was for murder. This issue was answered in the affirmative.

It may be noted that section 298 of the Penal Code envelopes the concepts of both rashness and negligence in regard to an act causing death. The essential difference between rashness and negligence is that the accused, in the former case, actually foresaw the probability of harm being caused by his conduct and persisted nevertheless in behaving as he did while, in the latter case, he lacked such actual foresight although, as a reasonable man, he should have appreciated the danger attendant on his behaviour. Both these situations are catered for by the provision contained in section 298 and in other sections like 272, 328 and 329 which deal with voluntary commission of dangerous acts.[257]

The difference between civil and criminal negligence was adverted to by Keuneman A.J. in *Scharenguivel* v. *Charlie*.[258] The Magistrate, in discussing negligence, had stated; "Negligence is the absence of due care, the omission to take such care as under the circumstances it is the legal duty of a person to take."[259] This definition, although acceptable in relation to

254. (1946) 47 N.L.R. 283.
255. At p. 285.
256. (1931) 32 N.L.R. 160.
257. See note 249. *supra*.
258. (1938) 10 C.L.W. 85
259. At p. 86.

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civil negligence, has no bearing on criminal negligence. The conviction was set aside in appeal, on the ground that the distinction between civil and criminal negligence had not been borne in mind adequately by the Magistrate. The operation of two distinct standards is clearly, justifiable, in view of the widely divergent objectives of a criminal and of a civil action. While the former is concerned with meting out punishment, the latter generally contains no punitive element but is restricted to adjustment of the rights of parties *inter se* by means of monetary compensation.[260]

VI. PROVISIONS IN REGARD TO ATTEMPT AT HOMICIDE AND ABETMENT OF HOMICIDE

The Penal Code contains some special provisions in regard to attempted homicide—for example, section 300 which recognizes the offence of attempted murder, section 301 which renders punishable attempts to commit culpable homicide and section 302 which imposes liability for an attempt to commit suicide. The problems which arise in these contexts have been analyzed in a separate work.[261]

Again, section 299 which constitutes the offence of abetment of suicide has to be construed against the background of the general law of abetment which has been considered elsewhere.[262]

260. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), p. 11.
262. G. L. Peiris, op. cit., chapter 10.
263. G. L. Peiris, op. cit., chapter 11.

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CHAPTER 6

OFFENCES AFFECTING THE HUMAN BODY

I. OFFENCES INVOLVING MISCARRIAGE OR HARM TO UNBORN CHILDREN AND INFANTS

Section 303 defines the offences of causing miscarriage. This offence is said to be committed when a person voluntarily causes a woman with child to miscarry unless the miscarriage is caused in good faith for the purpose of saving the life of the woman. The words "voluntarily" and "in good faith" are defined elsewhere in the Penal Code. "A person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it".[1] It is also provided that "Nothing is said to be done or believed in good faith which is done or believed without due care and attention".[2]

The Explanation to the section provides that "A woman who causes herself to miscarry is within the meaning of this section". The courts of Ceylon have accepted that the term "miscarriage", in this context, must be given its normal dictionary meaning—namely, "premature expulsion of the contents of the womb before the term of gestation is complete".[3]

Section 303 prescribes two alternative penalties—(a) imprisonment, of either description for a term which may extend to three years, or a fine, or both, in all cases of voluntarily causing miscarriage, and (b) imprisonment of either description which may extend to seven years in cases where the woman is quick with child.

The lighter sentence may be imposed when the following elements are established: (i) the accused should have committed an act which had the effect of causing a woman with child to miscarry; (ii) the act should have been accompanied either by intention to cause a miscarriage or by knowledge that a miscarriage was likely to be caused; (iii) the miscarriage should not have been caused in good faith to save the woman's life.

A condition precedent to imposition of the heavier sentence is the establishment of these ingredients and, in addition, the element that the woman is quick with child.

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1. Penal Code, section 37. 2. Penal Code, section 51.
3. *Waidyasekera* (1955) 57 N.L.R. 202 at p. 208, *per* Basnayake A.C.J.

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A significant feature of section 303 is the burden of proof in regard to the element that the miscarriage was not caused "in good faith for the purpose of saving the life of the woman".[4] This is incorporated in the statutory definition as one of the essential requisites of the offence. It is clear that the burden is not placed on the defence to prove that the act was committed in good faith to save the woman's life, but that the duty is cast on the prosecution to satisfy the court that the miscarriage was *not* effected for this reason. In other words, the circumstance that the miscarriage was caused in good faith to save the woman's life is not an excuse which has to be averred and shown to be applicable by the defence, but rather it is for the prosecution to exclude this contingency affirmatively. Moreover, this element, being an essential prerequisite of guilt, has to be established by the prosecution beyond reasonable doubt and not merely on a balance of probability.

The rationale underlying this element of the offence was explained by the trial judge to the jury, in *Waidyasekera*'s case,[5] in the following terms: "You have to consider carefully whether the circumstances arising from the performance of the act were intended to save the life of the mother. If there were such circumstances, the law allows the sacrifice of one rudimentary life to save another comparatively more valuable. That is the stated point of the law which is availed of in accord with common sense...What was of primary importance was to save the life of the mother, not the foetus".[6] The priorities established by the law in this context receive detailed consideration in a separate work.[7]

The offence constituted by section 304 adopts as its basis the elements of the offence set out in the section immediately preceding it, and superimposes one further ingredient on the requirements postulated by the offence which emerges from section 303. The distinguishing characteristic of the offence embodied in section 304 is that the miscarriage has been caused without the consent of the woman. The fact that the miscarriage was committed with the woman's consent removes the case from the ambit of section 304, while this is not a bar to liability under section 303. The only difference which the woman's consent makes is that, where consent has been obtained, the accused can be liable only to imprisonment for a maximum period of three years or seven years, depending on the question whether the woman was quick with child or not,[8] while the more exacting penalty of imprisonment for a period which may extend

4. Penal Code, section 303.
5. (1955) 57 N.L.R. 202. 6. At pages 207-208.
7. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), p. 242.
8. Penal Code, section 303.

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to twenty years is appropriate in cases where the act causing the miscarriage was performed without the woman's consent.[9]

Two further differences between section 303 and section 304 may be noticed: (a) While a woman who causes herself to miscarry may be guilty of the offence created by section 303, obviously she cannot commit the offence recognized by section 304. (b) Unlike section 303, section 304 does not advert to a distinction as to the quantum of punishment by reference to the question whether the woman was quick with child or not.

Section 305 constitutes the offence of causing death by an act done with intent to cause miscarriage. The Explanation is attached to the section that "It is not essential to this offence that the offender should know that the act is likely to cause death". The punishment prescribed for the offence is simple or rigorous imprisonment for a maximum term of twenty years and also a fine.[10]

In *Waidyasekera*'s case,[11] the elements of this offence were summarized by Basnayake A.C.J., delivering the judgment of the Court of Criminal Appeal, as follows: "The essential elements of an offence under section 305 are that (a) the accused did any act, (b) which caused the death of a woman with child and (c) that the act was done with intent to cause the miscarriage of the woman".[12]

In *Waidyasekera* the evidence led by the prosecution was to the effect that the accused's acts in inserting surgical instruments into the vagina of the deceased resulted in her death. A nurse who was present at the relevant times, testified that the same operation had been performed repeatedly and that, on the last occasion, portions of the foetus were removed. The uterus was seriously damaged during these operations, and the medical evidence established that death which occurred a few hours after the final operation, was due to shock and haemorrhage following perforation of the pregnant uterus.[13]

The defence presented on behalf of the accused was that he did not intend to cause a miscarriage but that, when he was convinced a miscarriage was inevitable, he took steps to remove the uterus for the purpose of saving the life of the deceased. Furthermore, it was argued by the defence that the onus was on the prosecution to prove that the miscarriage was not caused in good faith in order to save the deceased's life.[14]

In appeal, Counsel for the accused contended that, in a charge under section 305, the prosecution must prove the following elements: (a) that the accused did an act, (b) which caused the death of a woman, (c) with intent to cause a mis-

9. Penal Code, section 304.
10. Penal Code, section 305.
11. (1955) 57 N.L.R. 202.
12. At p. 209.
13. At p. 206.
14. At p. 208.

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carriage, and (d) that the miscarriage was not caused in good faith for the purpose of saving the life of the woman. Rejecting this contention, the Court of Criminal Appeal observed: "Unlike section 304, section 305 contains no pointer to section 303, nor is there any indication in that section that the Legislature intended that it should be controlled by section 303...An interpretation such as the one learned Counsel sought to place on section 305 involves the interpolation in that section of words which do not occur in it and the recasting of the entire section. Such an interpretation is not warranted by the rules of interpretation and does not commend itself to us".[15]

It would appear from a comparison of the elements of this offence, as formulated by Counsel for the accused, and the requisites of liability as laid down by the court, that the material difference pertains to the question whether the prosecution is bound to prove that the miscarriage was not caused in good faith for the purpose of preserving the life of the woman. This issue was answered in the negative by the court, clearly on cogent grounds. An important difference between sections 303 and 304, on the one hand, and section 305, on the other, is apparent. Unlike in the case of the former provisions, the element that the act had not been committed in good faith to preserve the woman's life, is not part of the definition of the offence contained in section 305. Accordingly, this requirement need not be established, in a charge under section 305, as part of the prosecution's case. On the contrary, the burden devolves on the accused to make a particular averment as to the applicability of a general exception and to establish the facts giving rise to the exception on a preponderance of probability.

In the opinion of the Court of Criminal Appeal, the defence set up by the accused in *Waidyasekera* properly fell within the scope of section 81 of the Penal Code which encompassed a general exception from criminal liability. However, on the facts of the case, the accused was held not to have adequately discharged his persuasive burden in regard to invocation of the exception. Basnayake A.C.J. said: "The exception in section 81 of the code required the accused to show that the deceased expressly or impliedly gave her consent to suffer the harm caused or to take the risk of that harm—in the present case, death. While the jury might have held on the evidence adduced by the defence that the deceased consented *to be treated* medically and surgically by the accused, there was in our opinion scarcely any evidence to justify a finding that she consented *to suffer or to take the risk of the harm which was actually caused to her*".[16] It was held, on this basis, that the defence was not entitled to succeed.

15. At p. 209.
16. At p. 210.

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It may be noted that both section 303 and section 304 envisage the actual causing of a miscarriage. By contrast, the causing of a miscarriage is not an indispensable element of liability under section 305. The requirements of the latter provision are satisfied so long as there is *intent* to cause miscarriage, even if no miscarriage actually takes place. In *Waidyasekera*'s case, Basnayake A. C. J. declared: "It is not essential that, in a prosecution under section 305, it should be proved that the accused caused a miscarriage. What is material is the intent to cause a miscarriage."[17]

Moreover, liability under section 305 may be founded on a fatal act which is accompanied by the intention to cause a miscarriage, even where the accused was unaware that the act was likely to cause death.[18] It follows that, while the *actus reus* is the causing of the death of a woman, the *mens rea* does not relate either to the intention to cause death or to knowledge that death is likely to be caused, but consists merely of the intention to cause a miscarriage.

The distinct problems arising in circumstances where the accused, believing that the woman is with child, attempts to cause a miscarriage, but the woman is in fact found not to be pregnant, are considered elsewhere under the head of attempts to commit impossible crimes.[19]

Section 306 recognizes the offence of doing an act with intent to prevent a child from being born alive or to cause it to die after birth. This provision presents a feature of comparison with sections 303 and 304, and a point of contrast with section 305. In a charge under section 306, the prosecution is required to establish that the accused's act was not committed in good faith for the purpose of saving the mother's life. That the act was done for this purpose is not looked upon as a plea which has to be set up and established by the accused. Apart from this requirement, the *actus reus* and the *mens rea* of the offence may be formulated separately. The *actus reus* consists of preventing a child from being born alive or causing it to die after birth. The *mens rea* resides in the intention, before the birth of the child, of preventing the child from being born alive or the intention of causing the child to die after its birth.

In this connection, as in other contexts, it may be noted that words which refer to acts done generally extend also to illegal omissions[20] and that the word 'act' denotes a series of acts as well as a single act.[21] Accordingly, the offence under section 306 may be committed in circumstances where an illegal omission

17. At p. 209.
18. Explanation to section 305.
19. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), p. 379 et. seq.
20. Penal Code, section 30.
21. Penal Code, section 30(1).

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or a series of acts has the result of preventing a child from being born alive or causing it to die after birth.

The offence of causing the death of a quick unborn child by an act amounting to culpable homicide, is constituted by section 307. The elements of this offence are as follows: (i) the doing of an act under such circumstances that, if death was caused, the act would be tantamount to culpable homicide; and (ii) causing the death of a quick unborn child as the result of such an act. While the *actus reus* may be identified with bringing about the death of a quick unborn child, the *mens rea* required is the same as that relevant to culpable homicide, for it is a condition precedent to imposition of liability under section 307 that the ingredients involved in the *mens rea* of culpable homicide should be shown to exist.

The difference between culpable homicide and the offence recognized by section 307 pertains to an element of the *actus reus*. The offence of culpable homicide may be committed only in circumstances where any part of the child has been brought forth out of the mother, even though the child may not have breathed or been completely born.[22] But the causing of the death of a child in the mother's womb is not homicide.[23] However, causing the death of such a child constitutes a distinct offence under section 307.

Nevertheless, the appropriate punishment is materially different. The punishment for culpable homicide depends on the question whether the particular offence amounts to murder or only to culpable homicide not amounting to murder. In the former case, the offence is punishable with death,[24] and in the latter case, with imprisonment of either description for a term which may extend to twenty years if the act was done with the intention of causing death or such bodily injury as is likely to cause death,[25] or with imprisonment of either description for a maximum term of ten years if the act was done with the knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death.[26] By contrast, the punishment prescribed for causing the death of a quick unborn child by an act amounting to culpable homicide, is imprisonment of either description for a term which may extend to ten years.[27] The position, then, is that the punishment for the latter offence is comparable with the quantum of the penalty only or the least serious of the forms of culpable homicide.

The illustration attached to section 307 is as follows: "A, knowing that he is likely to cause the death of a pregnant woman,

22. Explanation 3 to section 293 of the Penal Code.
23. ibid.
24. Penal Code, section 296.
25. Penal Code, section 297.
26. ibid.
27. Penal Code, section 307.

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does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured but does not die; but the death of an unborn quick child with which she is pregnant, is thereby caused. A is guilty of the offence defined in this section".

Section 308 imposes liability for the offence of exposure and abandonment of a child. Responsibility for this offence is dependent on proof of the following elements: (i) the accused must be the father or the mother of a child; (ii) the child must be under the age of twelve years; (iii) the accused should have had the care of the child; (iv) the accused should have exposed or left the child in some place; and (v) the accused must have had the intention of wholly abandoning the child. In regard to the last element, emphasis should be placed on the word "wholly". The effect of this is to insist on the need for complete or total abandonment of the child and to exclude from the ambit of this offence cases where the abandonment was of a limited character, whether in relation to purpose or in point of time. Each of these requirements amounts to an essential part of the definition of the offence and must be proved by the prosecution beyond a reasonable doubt.

A feature of this provision is that "It is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child dies in consequence of the exposure".[28] Liability for the offence under section 308 arises no sooner than exposure and abandonment by the relevant category of persons with the requisite intention is established. It makes no difference to the issue of liability under this section that the child was found and rescued a short time after it was abandoned. Whether any harm was actually caused to the child or not is irrelevant in this context. But where the child's death is brought about in consequence of the abandonment, the gravity of the offence is heightened and liability for murder or for culpable homicide not amounting to murder, depending on the degree of the intention or knowledge entertained by the offender, may be imposed.

Section 309 incorporates the offence of concealment of the birth of a child by secret disposal of the dead body. In *Weerai* v. *Samarakoon*[29] H. N. G. Fernando J. said: "Section 309 of the Penal Code requires proof of three matters: firstly that there has been a dead body of a child; secondly that the person charged secretly buried or otherwise disposed of the dead body; and thirdly, that there was an intention to conceal the birth of the child".[30]

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28. Explanation to section 308.
29. (1960) 62 N.L.R. 212.
30. At p. 212.

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In this case, there was ample circumstantial evidence suggesting that the accused, a short time earlier, had given birth to a full-term child. However, it was held in appeal that the first two elements had not been established and that the third element, therefore, did not arise for consideration. The Magistrate's conclusion that the accused disposed of the child's dead body was based on the circumstance that the infant could not be found either dead or alive. H. N. G. Fernando J. rejected this conclusion. His Lordship observed: "While an inference of guilt can of course be made from the circumstances, many other inferences arise, none of which can with certainty be excluded: assuming that the child was 'unwanted' for the reason that its mother was unmarried the child may still be alive in some place the identity of which the mother and her relatives are unwilling to disclose, again, the accused may have abandoned the child while alive and thus may be guilty of an act punishable under section 308, but not under section 309; yet again, it may have been not the accused herself, but some relative, anxious to protect her reputation, who disposed of the child alive or dead. At the best, the evidence in this case was only sufficient to create a suspicion that the accused or some other person may have committed an offence under section 309 or else under section 308 or else some more serious offence. But such a suspicion alone does not justify the conviction".[31]

A similar result was reached in the early case of *Vinasitamby*.[32] In this case, the doubt was whether the third element—namely, the intention to conceal the birth of the child—had been established adequately. The facts were that three women were present at the confinement, including the midwife and a married daughter of the woman confined, and the still-born child was handed to two men for burial. They buried it according to the custom of the village not in a cemetery but in a private compound. The District Judge had concluded that the only inference which could be drawn reasonably from the facts was that the accused intentionally endeavoured to conceal the birth.

Reversing this finding in appeal, Withers J. stated: "It is not alleged that either of the accused even denied the birth of the child. Further, it is proved that it is customary to bury a still-born child in the compound of the house in which it was born. Here it was not buried in the mother's compound because the ground was all under water at the time. It was a wet day when the body was buried, and the first accused says there was no other place to bury it but his compound....Taking all the circumstances into consideration, it is in my opinion not made

31. At p. 213.
32. (1899) 3 N.L.R. 304.

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out by the prosecution that the accused intended to conceal the birth of the child".[33]

In both *Veerai* v. *Samarakoon* and *Vinasitamby*'s case, convictions for concealment of birth by secret disposal of the body were set aside in appeal. In the former case, the first two elements of the offence were held not to have been proved sufficiently while, in the latter case, the third element remained a matter of obscurity. The attitude was correctly adopted in both cases that, though all the elements of the offence may be established legitimately by circumstantial evidence, the inference of guilt cannot be supported by mere speculation but must be irresistible. This applies with particular force to the third element which relates specifically to the question of intention.

II. CAUSING HURT

(*a*) *The Structure of Ceylon Law*

The Penal Code begins by stating a definition of "causing hurt". According to section 310, "Whoever causes bodily pain, disease or infirmity to any person is said to 'cause hurt'." It may be noted in this context that "hurt" has a narrower meaning than "injury". "Injury", as defined by the Penal Code, denotes "any harm whatever illegally caused to any person in body, mind, reputation or property".[34] "Hurt", on the other hand, envisages only harm inflicted on the human body.[35]

Section 311 sets out the kinds of hurt which fall within the definition of "grievous hurt". "Hurt" which does not amount to "grievous hurt" is not described by any special term in the Penal Code, but for convenience the term "simple hurt" is frequently used in judgments.

Section 310 is of wider scope than section 311, in that the latter covers only part of the area of the former. All "grievous hurt" satisfies the elements of "hurt" but not *vice versa*. The difference is one of degree, grievous hurt encompassing harm of a more serious nature than other kinds of hurt.

Sections 312 and 313 constitute, respectively, the offences of voluntarily causing hurt and voluntarily causing grievous hurt. Sections 310 and 311 are concerned with the definition of the *acts* of causing hurt and causing grievous hurt, while the corresponding *offences* are recognized by sections 312 and 313.

The punishment for voluntarily causing hurt is prescribed by section 314. Section 315 has the effect of aggravating the punishment in circumstances where hurt is voluntarily caused by dangerous weapons or means.

33. At p. 305.
34. Penal Code, section 43.
35. Section 310.

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A similar pattern is followed by sections 316 and 317. The former provision lays down the punishment for voluntarily causing grievous hurt. The latter prescribes a more severe penalty in circumstances where grievous hurt has been voluntarily caused by dangerous weapons or means.

Sections 318-324 deal with the voluntary causing of simple hurt or grievous hurt for specified purposes. Sections 320, 322 and 324 govern the causing of grievous hurt, while this element does not characterize sections 318, 319, 321 and 323. However, subject to this difference, all the sections from 318 to 324, inclusive of both these provisions, have the common characteristic of envisaging the causing of hurt for an object which invests the offence with a particularly serious character and renders a relatively exacting penalty applicable. Thus, the voluntary causing of simple hurt or grievous hurt, as the case may be, for the purpose of extorting property or facilitating the commission of an offence,[36] extorting a confession or compelling restoration of property,[37] or deterring public servant from performance of his duty,[38] or with intent to commit an offence[39] is made punishable by separate sections. In these cases, the superimposition of a serious criminal purpose on the infliction of simple hurt or grievous hurt warrants separate treatment which includes the stipulation of a heavier penalty.

Section 319 contains a special feature, in that it is concerned with the special case of hurt caused by poison or "any stupefying, intoxicating or unwholesome drug or other thing". In this sense, section 319 is of significantly limited scope, in that it applies only where hurt is caused by the means indicated. No comparable requirement as to the mode employed in causing hurt emerges from the other provisions.

Sections 325 and 326 embody a mitigatory ground in circumstances where the offences of causing hurt and grievous hurt, respectively, are established. It may be noted that the punishment prescribed by sections 314 and 315 for voluntarily causing hurt and voluntarily causing hurt by dangerous weapons or means is qualified in terms by the exclusion of circumstances catered for by section 325. In the same way, the punishment set out in sections 316 and 317 for voluntarily causing grievous hurt and voluntarily causing grievous hurt by dangerous weapons or means does not apply to cases governed by section 326. Sections 325 and 326 refer to cases where simple hurt or grievous hurt is caused on grave and sudden provocation. The fact that provocation has been received by the offender reduces his punishment and makes applicable only the appreciably lighter penalty prescribed by sections 325 and 326.

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36. Sections 318 and 320.
37. Sections 321 and 322.
38. Sections 323 and 324.
39. Section 319.

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Sections 328 and 329 create, respectively, the offences of causing hurt and causing grievous hurt by an act which endangers the life or the personal safety of others. These two provisions differ significantly from the others in that, in these cases, rashness and negligence alone, to the exclusion of intention, are recognized as the basis of criminal liability. These provisions have a special character, in that they contemplate the non-intentional infliction of simple hurt or grievous hurt.

The unique quality of section 327 is that, in cases to which it applies, no hurt whatever, simple or grievous, need be caused. A condition precedent to invocation of all the other provisions is the actual causing of hurt of either kind. But it suffices for the application of section 327 that the accused's act was done "so rashly or negligently as to endanger human life or the personal safety of others".[40] In other words, all that is required is rashness or negligence in a degree which constitutes a *potential* threat to human life or bodily safety.

It is clear from this survey that the basic offences in this regard are voluntarily causing hurt[41] and voluntarily causing grievous hurt.[42] The provisions other than those constituting these rudimentary offences assume the form of a superstructure erected on this base. Each of these provisions has the effect of aggravating or extenuating the quantum of liability. The primary grounds of aggravation are (i) the use of dangerous weapons or means, and (ii) the infliction of hurt for a heinous criminal purpose. Sections 315-317 are representative of category (i), and sections 318-324 of category (ii). Conversely the chief grounds of mitigation are (i) proof of provocation offered to the person causing hurt, and (ii) the absence of an intention[43] to cause hurt on the part of the person who actually caused hurt[44] or who may well have caused it.[45] Ground (i) is typified by sections 325 and 326, and ground (ii) by sections 327-329.

(B) *The Definition of 'Hurt'*

"Hurt" is a narrower concept than "injury", in the sense in which these terms are used in the Penal Code, in two respects: (a) "Injury" connotes harm caused to any person in any one of four major areas of interest—body, mind, reputation or property.[46] Of these, only the first is included in the notion of "hurt"—an idea restricted to bodily harm.[47] (b) Moreover, the kinds of bodily harm catered for by the concept of "hurt"

40. Section 327.
41. Section 312.
42. Section 313.
43. It is here sought to distinguish intention from rashness and negligence.
44. Penal Code, sections 328 and 329.
45. Section 327.
46. Section 43.
47. Section 310.

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are less extensive than those embraced by "injury". Thus, "injury" connotes *any harm whatever* illegally caused to any person in respect of his body,[48] while a limiting criterion is inherent in the stipulation that "hurt" relates exclusively to "bodily" pain, disease or infirmity.[49] In practice, the second difference is marginal, but the first is important.

The notion of "hurt" was construed in *Samaranayake* v. *Thabrew*.[50] The Magistrate before whom the case came up for trial disposed of it on the ground that the accused had caused no "hurt" to the police headman but that he had only exercised "force"[51] on him. The evidence indicated that the complainant was struck both with hands and with a stick. In appeal, Wood Renton C.J. held that the harm sustained by the complainant came within the scope of "hurt", as defined by the Penal Code.

(C) *The Offence of 'Voluntarily Causing Hurt'*

The act of causing hurt is defined in section 310. The offence, however, is that of *voluntarily* causing hurt. The word "voluntary" is the subject of a separate definition incorporated in the Penal Code. "A person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it."[52] This requirement was further expatiated upon in an early anonymous case.[53] The word "voluntarily", it was said, means "of one's own accord" and a person is said to act voluntarily if, for instance, he uses a knife knowing that he was likely to cause injury.[54]

The offence of voluntarily causing hurt[55] requires proof of (a) the act of causing hurt, and (b) *either* the intention to cause hurt *or* knowledge that hurt is likely to be caused. Moreover, hurt must be caused to any person by the act which was intended to cause hurt or which was known to be likely to cause hurt. The elements of liability for this offence are thus divisible into the *actus reus* and the *mens rea*, coupled with a causal requirement.

While the *actus reus* resides in the effect of causing hurt, it is not necessary that there should be some visible marks left by the blows. This was emphatically asserted by Dias A. J. in *Silva* v. *French*.[56] In this case, where the accused was indicated for causing hurt, the Magistrate refused process on the ground that the complainant had no marks on his face and that the

48. Section 43.
49. Section 310.
50. (1917) 4 C.W.R. 331.
51. Penal Code, section 340. 52. Section 37.
53. D.C. Crim. Anuradhapura 3697 (1905) 5 C.L. Rev. 71.
54. ibid.
55. Penal Code, section 312. 56. (1920) 21 N.L.R. 498.

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principle *de minimis non curat lex*, embodied in section 88 of the Penal Code, was applicable to the circumstances of the case. It was held in appeal, however, that process ought to have been issued because it could not be maintained that "a person of ordinary sense and temper"[57] would not resent the accused's conduct.

Several points in connection with the appropriate sentence in cases where the accused is convicted of voluntarily causing simple hurt, have been considered in the case law. In *Packeer* v. *Inspector of Police, Pettah*[58] the issue canvassed in appeal was whether a person convicted of causing simple hurt could properly be bound over to keep the peace in terms of section 80 of the Criminal Procedure Code. The contention on behalf of the accused was that, unless the offence in question is one which involves a breach of the peace, no order can be made directing a convicted person to enter into a bond, in addition to serving a sentence of imprisonment. It was further argued on his behalf that it was not sufficient for the prosecution to establish that a breach of the peace might result from the offence committed. In addition, so Counsel for the accused contended, there must be proof that the offence committed embodies in itself, as a necessary ingredient, the element of a breach of the peace.

This argument was rejected by Nagalingam J. His Lordship said: "The offence of which the accused has been convicted is that of causing simple hurt. It is no doubt true to say that the offence of causing hurt does not involve, as an ingredient, a breach of the peace....But, in my opinion, what is meant by the phrase 'offence which involves a breach of the peace' does not mean anything more than that the commission of the offence must be attended by a breach of the peace".[59] This latter requirement was held to have been satisfied. "In the present case, there is the fact that the person assaulted was subjected to violence in his person, and therefore the commission of the offence was attended by a breach of the King's peace".[60] The ruling by Nagalingam J. in *Packeer*'s case is in conformity with the previous decision of Bertram C.J. in *Abeywardena* v. *Fernando*.[61]

The decision of Howard C.J. in *Indrasena* v. *Welikada Police*[62] establishes the principle that, where a person is convicted of causing simple hurt, the trial judge cannot, in determining sentence, take into account a previous conviction of causing grievous hurt. Howard C.J. said· "The offences of which the appellant was convicted were of a very trivial character and I do not think that, in those circumstances, it was right or proper

57. At p. 499.
58. (1951) 54 N.L.R. 164.
59. At p. 164.
60. At p. 165.
61. (1924) 27 N.L.R. 97.
62. (1948) 49 N.L.R. 319.

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for the Magistrate to take into consideration three other convictions, although those convictions were of a very serious character".[63]

In *Dingihamy* v. *Jansz*[64] the conviction was of voluntarily causing simple hurt. However, as a factor affecting the quantum of punishment, the Magistrate had taken into consideration other acts of ill-treatment or cruelty towards the complainant by the accused. This was held to be improper. In appeal, Basnayake J. said: "The Magistrate appears to have been influenced by the girl's story of the cruel treatment of her by the appellant. This is not a charge of cruelty or ill treatment. We have no enactment corresponding to section 1 of the English Children and Young Persons Act, 1933."[65]

(D) *The Offence of Voluntarily Causing Grievous Hurt*

Here, again the offence is that of *voluntarily* causing grievous hurt. The word "voluntarily" has the same meaning in this context as that explained in relation to the offence of voluntarily causing hurt.[66]

The offence consists of two distinct elements: (1) the *Factum*, and (II) the *Animus*.

1. THE *FACTUM*

Since grievous hurt is a species of hurt the accused must initially be proved to have caused hurt. In addition, it must be shown that the hurt inflicted was one of eight kinds: (i) emasculation; (ii) permanent privation of the sight of either eye; (iii) permanent privation of the hearing of either ear; (iv) privation of any member or joint; (v) destruction or permanent impairing of the powers of any member or joint; (vi) permanent disfiguration of the head or face; (vii) fracture or dislocation of a bone or tooth; and (viii) any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain or unable to follow his ordinary pursuits".[67]

Some of these instances of grievous hurt have given rise to problems of interpretation.

In regard to element (v), the question has arisen whether the eye is a "member or joint" within the meaning of the relevant sub-section of section 311, so as to make permanent impairment of the eye grievous hurt. In *Dissanayake* v. *Bastian*[68] this question was answered in the negative. It was stated that permanent impairment of the eye without actual privation of

63. At p. 320.
64. (1951) 46 C.L.W. 16.
65. ibid.
66. Penal Code, section 312.
67. Section 311.
68. (1891) 1 C.L. Rep. 67.

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sight is not tantamount to grievous hurt. The latter element comes within the purview of sub-section (ii) of section 311 and hence suffices to support a conviction of causing grievous hurt.

The word "fracture" which occurs in sub-section (vii) has been the subject of controversy. In *Inspector of Police* v. *Pedrick*[69] the accused was convicted of voluntarily causing grievous hurt with a knife. The medical evidence was to the effect that the victim had an oblique stab wound half an inch long on the left hip, cutting into the hip-bone. The Magistrate expressed the view that the injury amounted to grievous hurt, since the bone had been cut. In appeal, Jayatilleke J. said: "Under section 311 of the Penal Code, an injury to a bone would not be considered grievous unless there is a fracture or dislocation of the bone".[70] Again, it was stated: "It may be that the bone was cut to some extent, but there is nothing to indicate that it was broken or cracked".[71] On this basis the conviction of voluntarily causing grievous hurt was altered to one of voluntarily causing simple hurt.

However, this view has been dissented from in subsequent cases. In *Geeris Appu* v. *Seydeen*[72] the injury was described by a medical witness as a "curved incised wound just behind the right ear, two inches long and half an inch deep, cutting into the bone of the skull and chipping off a piece of bone half an inch long".[73] In appeal, Howard C. J., refusing to follow *Inspector of Police* v. *Pedrick*, held: "In view of the fact that a piece of the bone was chipped off, it is impossible to contend that there was no fracture or dislocation of the bone".[74] The latter is probably the better view, supported as it is by authoritative medico-legal usage.[75]

As to sub-section (viii), the phrase "any hurt which endangers life" has caused some difficulty. If hurt is to be held grievous on this ground, it is not sufficient that a medical witness testifies that the injury "might have endangered life".[76] There must be evidence that the injury did in fact endanger life.[77] This was asserted in *David Sinno*'s case.[78]

The requirement that the victim should have been "during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits",[79] has been commented on in two

69. (1944) 45 N.L.R. 62. 70. At p. 62.
71. ibid. 72. (1948) 50 N.L.R. 287.
73. At p. 288. cf. *Arnolis Appuhamy* v. *Mahil* (1948) 50 N.L.R. 263 where it was said that "A fracture of a bone is a crack or break which need not necessarily extend right through it" (at p. 264).
74. (1948) 50 N.L.R. 287 at p. 288.
75. (1948) 50 N.L.R. 263 at p. 264.
76. *Appu* (1915) 3 Bal. N. of C. 44. 77. ibid.
78. (1894) 7 C.L. Rev. 3.
79. Penal Code, section 311, sub-section (viii).

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cases. In *Dingiri Banda* v. *Aranayake*[80] it was held that the mere fact that a person was in hospital for twenty days is not sufficient to prove that he was suffering from grievous hurt. The injury in this case was an incised wound on the left forearm, cutting the muscles. The injured man described himself as a cultivator and a contractor. Sirimane J. observed: "He has not said that he was unable to follow his ordinary pursuits, and one cannot infer this from the meagre evidence available in this case".[81] Sirimane J. approved of and followed the previous decision in *Silva* v. *Gunasekera*.[82]

A general observation may be made in regard to all eight sub-sections of section 311. In an early anonymous case Withers J. declared: "It is not for the medical witness to say whether a hurt is grievous or not. He has to describe the nature and character of the injuries and it is for the judge to find whether they are grievous".[83] Once the details of the injuries are recounted by the medical witness, the trial judge, on the basis of this information, is required to decide whether the injuries fall within the scope of any of the sub-sections of the provision defining grievous hurt.

II. THE *ANIMUS*

The *mens rea* of the offence of voluntarily causing grievous hurt resides in either (a) intention to cause grievous hurt or (b) knowledge that grievous hurt is likely to be caused.[84] In the absence of proof of either of these elements, a conviction of causing grievous hurt cannot be sustained. The Explanation is statutorily provided that "A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind".[85]

In *Menikrala*[86] Dias J. said: "There can be no doubt that the prisoner intended to cause hurt, but there is no direct evidence or any other evidence from which it may be reasonably presumed that he either intended to cause or knew himself likely to cause a grievous hurt".[87] In *Salamon*[88] Abrahams C. J. posed the question: "Did the four accused, when they assaulted the deceased, intend to injure him in such a way that his life would be endangered or short of that intention, did they have the knowledge that they were likely to inflict upon him injury likely to put his life in danger?"[89] The question, formulated

80. (1966) 69 N.L.R. 143. 81. At p. 143-144.
82. (1942) 43 N.L.R. 404.
83. (1899) D. C. Kurunegala 2594 reported in (1899) Koch's Rep. 41.
84. Penal Code, section 313. 85. Explanation to section 313.
86. (1887) 8 S.C.C. 115. 87. At p. 116.
88. (1936) 38 N.L.R. 113. 89. At p. 116.

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in this manner because the prosecution sought to bring the case within the scope of the eighth sub-section of section 311, was answered in the negative. In both these cases, it was held that only convictions of voluntarily causing simple hurt could be supported.

(a) *Intention*

Where direct evidence of intention is available, no difficulty arises. However, where the only evidence which exists is circumstantial evidence, the case law reflects a conflict of opinion as to the manner in which intention has to be proved.

In *Tajudeen*[90] several constables who were engaged in arresting a person prod him with batons and beat him with fists. During the assault the latter sustained a fracture of his rib. In appeal, Bonser C.J. said: "It was argued that they did not intend to break the man's rib and, therefore, they could not be convicted of grievous hurt. No doubt, they had not in their mind at the time they struck him with their batons and with their fists any definite idea that they were going to break his ribs or any particular rib; but when people cause injuries to a man, their intent must be judged by the result of their action. They must be deemed in law to have intended what they did".[91]

A direction in similar tenor was given to the jury by the Commissioner of Assize in *Salamon*.[92] The Commissioner said: "It is not necessary that the Crown should prove definitely that each of the accused knew that death could be caused by striking a man with the fist and knowledge of the consequences likely to follow from the assault must be inferred from the actual consequences of the attack".[93]

This approach cannot be considered satisfactory. The mere fact that a particular consequence arose is not a sufficient basis for holding that the consequence was intended. There must generally be some kind of proof of intent *aliunde*. As Abrahams C.J. aptly observed in *Salamon*'s case, "Knowledge of the probable consequences of an act may be presumed from the nature of the act itself and the nature of the act should obviously form the basis of an inquiry into whether or not the doer of that act must be held to have had knowledge of its probable consequences, but that form of *a posteriori* reasoning is very different from imputing knowledge of the consequences of an act merely because those consequences happened".[94]

It is indisputable that, where intent is sought to be predicated on foresight of consequences, only natural and probable consequences must be considered capable of anticipation. In

90. (1902) 6 N.L.R. 16.
91. At p. 19.
92. (1936) 38 N.L.R. 113.
93. At p. 114.
94. At p. 116.

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Menikrala's case Burnside C. J. said: "The law, in the absence of direct evidence of intent, will presume an intent from the act itself, but the presumption would be that the accused intended only that which was the reasonable and natural consequence of his act....It cannot be said that a thrust with a stick upon the trunk of the body would in ordinary cases reasonably or naturally endanger life. It might endanger life, but the possibility of it doing so would certainly be too remote to make it an ingredient in considering the intent with which the thrusts were given".[95] In this case it was held by Burnside C.J. and Dias J. (Clarence J. dissenting) that an assault committed by thrusting an unpointed stick twice against the body of a woman both thrusts striking her in the stomach and causing the rupture of her spleen which was at the time of rupture in its normal condition, was not an assault likely to endanger life. Consequently, a conviction of voluntarily causing grievous hurt was set aside in appeal.

A comparable note of caution is sounded by Bonser C.J. in one part of his judgment in *Tajudeen*: "Of course, if the result were so improbable and such that no man could reasonably expect that a man's ribs would be broken by the act, then it may be argued, and possibly argued successfully, that there was no intent, either actually or in law."[96]

However, a passage of the judgment of Burnside C.J. in *Menikrala* seems open to criticism. His Lordship observed: "There are some kinds of grievous hurt which a man may intentionally commit, for instance knocking out a tooth, and which may result in death, and yet he could not be said to have done an act with the knowledge that he would cause, or be likely to cause, death so as to make him liable for murder although he would undoubtedly be liable for voluntarily causing grievous hurt. But if a man does an act which he knows will 'endanger life' with intention to endanger life, and it causes death, it seems to me that he would necessarily be guilty of murder, because he had done 'an act with the intention of causing bodily injury and the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death', this being one of the definitions of murder".[97]

The second part of this statement is based on faulty reasoning. A defect in the analysis by Burnside C.J. is the omission to consider cases where there is no intention to endanger life, but the accused acts with knowledge that life is likely to be endangered. In this type of case, a conviction of murder can be sustained only if the act is known to the accused to be "so imminently dangerous that it must in all probability cause

95. (1887) 8 S.C.C. 115 at p. 116.
96. (1902) 6 N.L.R. 16 at pages 19-20.
97. (1887) 8 S.C.C. 115 at pages 116-117.

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death, or such bodily injury as is likely to cause death".[98] If the knowledge is of a lesser degree—that is to say, if the accused had knowledge only of the likelihood and not of the certainty or virtual certainty that death would be caused—the appropriate conviction would be of culpable homicide not amounting to murder.[99] Even the latter conviction requires, however, that the accused should have been aware that the ensuing of death was "more likely than not".[100] If even this state of knowledge in the accused is not established, a conviction of culpable homicide in either of its forms is excluded, but it may still be possible to secure a conviction of voluntarily causing grievous hurt, so long as either intention to cause grievous hurt or knowledge that grievous hurt is likely to be caused, is properly imputable to the accused.

The dictum by Burnside C.J. in *Menikrala*'s case has so far been criticized on the ground of a material omission—namely, the failure to advert to cases where knowledge, rather than intention, is resorted to as the basis of liability. However, even the case of intention which is expressly dealt with by Burnside C. J. is treated in a misleading manner. Thus, Burnside C. J. appears to assume that an intention to endanger life is synonymous with an intention to cause such bodily harm as is sufficient in the ordinary course of nature to result in death. But this assumption is unwarranted. The accused may have intended to endanger life in the sense that he intended to inflict an injury which was likely to cause death, although the injury was not such as to be sufficient in the ordinary course of nature to result in death. The former entails a lesser degree of probability than the latter that death would ensure. In this event, the proper conviction is of culpable homicide not amounting to murder.

(b) *Knowledge*

Even where there is no evidence of intention to cause grievous hurt, a conviction under section 313 may be supported on the basis of knowledge that grievous hurt is likely to be caused.

In *Allis*[101] the complainant and the accused who were respectively thirteen and eighteen years of age, went fishing and quarrelled with each other. In the course of the quarrel the accused kicked the complainant on the abdomen. The kick produced distension and pain in the stomach and retention of urine. The doctor deposed that the boy's life was in danger for almost a week. In appeal, Lawrie J. said: "I cannot hold

98. Penal Code, section 294, clause 4.
99. Section 293, clause 3.
100. *Santia Susai* (1891) 9 S.C.C. 195.
101. (1898) 3 N.L.R. 109.

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this to be grievous hurt. To be guilty of voluntarily causing grievous hurt, the offender must be proved not only to have caused that grievous hurt but to have known he was likely to cause it."[102]

It is an incontrovertible proposition that, where the person who suffers grievous hurt is in such a condition as could not be reasonably known to the person inflicting the injury, and where the grievous hurt arises by reason of that condition, the assailant cannot be convicted of voluntarily causing grievous hurt. The reason is that the accused could not have had knowledge, in these circumstances, that the hurt was likely to endanger life or to culminate in any other serious injury. However, in *Sub-Inspector of Police* v. *Lewis*,[103] this principle was held to have no application to an assault by kicking a married woman. The decision in this case was based on the premise that such a woman may at any time be pregnant and that a man who kicks her in the region of the abdomen must be deemed to incur a serious risk. The analogy of the enlarged spleen cases is inapplicable because, in these cases, unlike in the case of a pregnant woman, the likelihood of infliction of a grievous injury is so remote that the accused cannot be invested with the requisite knowledge. The distinction between the two types of case is established by reference to the degree of the foreseeable risk.

Defences

While the prosecution is obliged to establish either intention or knowledge, in the sense explained above, beyond a reasonable doubt, the accused is entitled to exoneration if he successfully invokes a general exception from criminal liability. In this event, the burden devolving on the accused is that of proof on a preponderance of probability.[104]

However, the accused may also seek to assail evidence relating to intention or knowledge without necessarily resorting to a general exception. The accused may then succeed on the basis that the prosecution has failed to establish its case beyond a reasonable doubt.

In *Abdul*[105] two men purported to treat a woman for insanity, by burning her in various parts of the body. They maintained that this course was adopted in accordance with the Arabic system of medicine. The court held that the burden was on the accused to prove the statement that burning was a cure for insanity, by production of Arabic medical works or by expert

102. At p. 110.
103. (1920) 8 C.W.R. 82.
104. Section 105 of the Evidence Ordinance, as interpreted in *Chandrasekera, supra.*
105. (1895) 6 C.L. Rev. 82.

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evidence. It was further held that the absence of such evidence militated against the successful invocation of an exculpatory plea.

Punishment

Certain principles by which the courts are expected to be guided in imposing punishment for voluntarily causing grievous hurt, emerge from the cases.

In *Rapiel Appu* v. *John Singho*[106] it was said that this offence must be punished with imprisonment and that a court trying the offence cannot punish with fine only. In addition to a sentence of imprisonment, the punishment of whipping for this offence is provided for by some sections of the Penal Code.[107] In an early anonymous case Withers J. said: "Lashes should be inflicted when hurt is caused in a brutal or cruel way, or without provocation".[108] However, where the accused is charged with voluntarily causing grievous hurt, lashes can be inflicted only if the victim is a woman or child.[109]

(E) *Aggravation of Liability on the Ground of the Means Employed*

The offences both of causing simple hurt and of causing grievous hurt attract a heavier penalty in circumstances where dangerous weapons or means are used.

(i) *Simple Hurt*

Subject to the mitigatory circumstance of provocation catered for by section 325, the punishment for voluntarily causing simple hurt is imprisonment of either description for a term which may extend to one year, or a fine which may extend to one thousand rupees, or both.[110] However, where simple hurt is voluntarily caused by dangerous weapons or means, the appropriate punishment is imprisonment of either description for a maximum period of three years, or a fine, or both.[111] Moreover, where hurt is caused by means of poison, a sentence of imprisonment for a term which may extend to ten years, in addition to a fine, may be imposed.[112]

(ii) *Grievous Hurt*

The relevant punishment for voluntarily causing grievous hurt, again subject to the mitigatory factor of provocation,[113] is imprisonment of either description for a term which may extend to seven years, in addition to a fine and, where the person

106. 1899 Koch's Rep. 23.
107. Sections 316, 317, 320.
108. 1899 Koch's Rep. 55.
109. 1899 Koch's Rep. 64.
110. Penal Code, section 314.
111. Section 315.
112. Section 319.
113. Section 326.

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to whom grievous hurt is caused is a woman or a child, whipping.[114] But where grievous hurt is voluntarily caused by dangerous weapons or means, the punishment ordained by law is imprisonment of either description for a maximum period of ten years in addition to a fine and, where the victim is a woman or a child also whipping.[115]

Thus, the principle relating to aggravation of liability on the ground of use of dangerous weapons or means applies to the voluntary causing of both simple hurt and grievous hurt. In both cases, the requirement for increasing the quantum of liability is that simple hurt and grievous hurt, respectively, should have been caused "by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow or to receive into the blood, or by means of any animal".[116] The question of weaponry becomes relevant in this context.

The decided cases offer some guidance in the interpretation of the words "dangerous weapon"[117] and "cutting weapon".[118] The governing principle is that the question whether a particular instrument is a "dangerous weapon" or not has to be decided in the light of the circumstances of each case without the aid of any rigid definition. In *Lassama*[119] it was said that the character of the weapon must be identified upon the evidence in the case. A similar view was taken in *Mye Appu*[120] where the court stated that the character of a weapon is given to it by the manner in which, and the intent with which, it is used. A stone or a club, it was held, was a deadly weapon because it could be used with a deadly purpose in view. The decision in *Unga*[121] that a club is not a deadly weapon must be confined to the peculiar facts of that case.

The phrase "cutting weapon" was construed in four Ceylon cases. In *Marihami* v. *Robartu*[122] the charge against the accused was that he had stabbed and wounded the complainant with a knife. The Magistrate had held: "There can be no doubt that he struck the complainant, and her account is that (the accused) was cutting a mango at the time; if this is true, it is possible that he hit her without intending to stab her".[123] In appeal, Clarence J., setting aside the conviction, said: "If the defendant

114. Section 316.
115. Section 317.
116. Section 315 and 317.
117. Marginal note to sections 315 and 317.
118. Sections 315 and 317.
119. (1896) 6 C.L. Rev. 87.
120. (1890) 6 C.L. Rev. 29.
121. (1892) 6 C.L. Rev. 50.
122. (1890) 9 S.C.C. 68.
123. At p. 69.

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intentionally used his knife to stab or cut the complainant or the man with whom he was fighting, the case falls under section 315. But if the cuts were inflicted accidentally, without any intention on the defendant's part, in consequence of the defendant's happening to have the knife in his hand for the purpose of cutting the mango, then the defendant is not guilty of any offence under section 315 and ought not to receive any punishment based on his having used the knife".[124]

Philippu Pillai v. *Naganathar*[125] is authority for the proposition that, although a sickle is not used by an assailant to cut with its sharp side, yet if he uses the back of it with such force as to cause an incised wound, the assailant is guilty of the offence of voluntarily causing hurt with a cutting instrument. Counsel for the appellant argued that, to justify a conviction under section 315 of the Penal Code, the weapon should have been *used* as a cutting instrument. Rejecting this contention Moncreiff J. observed: "I am not disposed, unless I am authorized by a superior court, to hold that a cutting instrument is not to be regarded as a cutting instrument within section 315 so long as the blows which were given with it, are given with the blunt side."[126]

In *Andris* v. *Nicholas*[127] Wood Renton J. attempted to evaluate these conflicting views. His Lordship declared: "I am not sure that the apparent contradiction between these two cases could not be satisfactorily explained. But, if there is any real conflict between them, I prefer to follow the judgment of Mr Justice Moncreiff, to the effect that the use of the blunt side of a sharp cutting instrument to cause hurt falls under section 315 of the Penal Code. It will be observed that that section does not say that the injury caused by the sharp cutting instrument must be injury in the nature of an incised wound, and I am not prepared to read any such limitation of the scope of the section into its provisions".[128]

However, the contrary view was preferred by Abrahams C. J. in *Marshall* v. *Veero*.[129] In this case, the handle of a closed clasp knife was held not to be an instrument for cutting within the meaning of section 315. Abrahams C. J. said: "To follow (the contrary view) to its logical outcome would be to convict of causing hurt by means of an instrument for shooting a person who struck another on the head with the butt end of a revolver. In my opinion, the section means to penalize those persons who employ instruments intended or adapted for shooting, stabbing or cutting, in the way in which they were intended or adapted for use."[130]

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124. ibid.
125. (1901) 5 N.L.R. 90.
126. At p. 92.
127. (1911) 14 N.L.R. 207.
128. At pages 208-209.
129. (1936) 38 N.L.R. 321.
130. At p. 131.

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In *Marshall* v. *Veero* Abrahams C.J. directly expressed disagreement with the approach of Dalton J. in an earlier anonymous case.[131] Dalton J. had observed: "After hearing part of the evidence, the Magistrate came to the conclusion that the injury was caused probably by a knife which was closed at the time of the offence. He then goes on to hold that a closed clasp knife cannot be said to be an instrument for cutting. I am quite unable to agree with him. Whether a clasp knife is closed or opened, it is still a knife and one of the primary uses of the knife is for the purpose of cutting."[132] On this decision Abrahams C.J. commented: "I regret I am unable to agree with the learned judge, and I have not the slightest doubt that it would be a serious misconstruction of section 315 to hold that the handle of a closed knife was an instrument for cutting."[133]

The two strands of decision on this point are not readily reconcilable. It may be noted that the argument which Counsel urged without success in *Philippu Pillai* v. *Naganathar* was unhesitatingly accepted in *Marshall* v. *Veero*. No guidance can be derived from the Indian cases on the point. The High Court of Lahore has held that a pen knife not more than four inches long is not a cutting instrument,[134] but this decision was disapproved of by the High Court of Kerala.[135] In *Marshall* v. *Veero* Abrahams C.J. justified his approach in the following terms: "A closer way of looking at the true construction of this section is by analysis of the word "instrument'. The actual instrument for cutting is that part of the knife which actually inflicts the cut, namely, the blade".[136] This is probably too refined an interpretation. The broader view taken by Moncreiff J. in *Philippu Pillai* v. *Naganathar* and by Wood Renton J. in *Andris* v. *Nicholas* seems warranted by the words of the provision. According to this approach, the vital consideration is the identity of the weapon and not the manner in which it is used.

The proper construction of the word "poison" was considered in *Alahakoon*.[137] There it was held that a person who applies chilly in another's eyes, cannot be said to cause grievous hurt by means of poison, within the meaning of section 317 of the Penal Code.

(F) *Aggravation of Liability on Account of the Purpose for Which Hurt was Caused*

The normal punishment for voluntarily causing hurt is imprisonment of either description for a term which may extend

131. Referred to in (1936) 38 N.L.R. 321.
132. ibid. 133. (1936) 38 N.L.R. 321 at p. 322.
134. *Ghulam Muhauddin* A.I.R. 1922 Lah. 26.
135. *Varkey Joseph* A.I.R. 1960 Ker. 301.
136. (1936) 38 N.L.R. 321 at p. 322. 137. (1924) 2 Times of Cey. 138.

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to one year, or a fine which may extend to a thousand rupees, or both.[138] But this punishment is aggravated in circumstances where hurt is voluntarily caused for a serious criminal purpose. Thus, where the purpose is extortion of property or facilitation of an offence, the period of imprisonment of either description may extend to ten years.[139] If the purpose is to extort a confession or to compel restoration of property, the appropriate punishment is imprisonment of either description for a maximum period of seven years, and also a fine.[140] Where hurt is voluntarily caused to deter a public servant from performance of his duty, the proper sentence is imprisonment of either description for a term which may extend to three years, or a fine, or both.[141]

A similar principle in regard to aggravation of liability applies to cases where grievous hurt is voluntarily caused for a serious criminal purpose. The normal punishment for voluntarily causing grievous hurt is imprisonment of either description for a maximum period of seven years, and also a fine; and if the victim is a woman or child, the additional punishment of whipping.[142] But where grievous hurt is voluntarily caused to extort property or to constrain to an illegal act, the punishment is enhanced to imprisonment of either description for a term which may extend to twenty years, and also to a fine and whipping.[143] Where the purpose for which grievous hurt is inflicted is the forcible obtaining of a confession or compulsion to restore property, a sentence of imprisonment of either description for a maximum period of ten years, and also a fine, may be imposed.[144] If grievous hurt is voluntarily inflicted to deter a public servant from performing his duty, the appropriate punishment is imprisonment of either description for a term which may extend to ten years, in addition to a fine.[145]

In the last case, grievous hurt should have been caused voluntarily to any person, "being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant".[146]

It has been held in this connection that it is not necessary that the public servant should have been acting strictly within his lawful powers. Imputability of bona fides to the public servant and proof that he was acting *colore officii* may be sufficient. in *Podi Baba*[147] a warrant of arrest had been issued against the

138. Penal Code, section 314.
139. Section 318.
140. Section 321
141. Section 323
142. Section 316.
143. Section 320.
144. Section 322.
145. Section 324.
146. Sections 323 and 324.
147. (1895) 1 N.L.R. 24.

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accused. The warrant was addressed to a Deputy Fiscal who entrusted it for execution to the complainant, a police headman. When he attempted to arrest the accused, the latter caused him hurt by cutting him with a knife. On appeal, the argument on behalf of the accused was that the complainant had no authority to arrest him and that the warrant was invalid because it did not state the district over which the signing Magistrate had jurisdiction. This plea did not avail the accused. Withers J. observed: "This is not a complete defence in the circumstances. (The complainant) was a public servant... acting in good faith under colour of his office. He was executing a warrant signed by the Police Magistrate which had been handed to him for execution. He himself believed he had a right to execute it. In acting under it, he did nothing to excite the reasonable apprehension of death or grievous hurt to the accused or to anyone".[148] On this basis a conviction under section 323 was affirmed. In *Van Haught* v. *Seraphim*[149] it was held that a Local Board constable was a public servant for this purpose.

However, a distinction must be made in this context between acts by public servants which are not strictly lawful and acts by them which are altogether unlawful.[150] Where grievous hurt is sustained by a public servant while he is engaged in acts of the former category, a conviction under section 323 may be supported, but the position is different if the act performed by the public servant at the time hurt was inflicted on him belonged to the latter category. In the latter situation, a conviction of voluntarily causing simple hurt or grievous hurt, as the case may be, can be sustained, but not a conviction of voluntarily causing simple hurt or grievous hurt to deter a public servant from performing his duty.

This is illustrated by the case of *Gunasekera*.[151] The third accused who was seen in the act of handing a cup of toddy to another man was arrested by an Excise officer. However, he was immediately rescued by the first and the second accused who assaulted the Excise officer in their attempt to liberate the third accused. It was held that the first and the second accused could not be convicted of causing hurt to a public officer in order to prevent or deter him from doing his duty because the arrest was wholly illegal. Soertsz J. stressed in his judgment that "The custody was not lawful".[152]

A similar result was reached in *Pillai*.[153] Here the indictment charged the accused with voluntarily causing hurt to a police constable with intent to prevent him from doing his duty—

148. At pages 24-25.
149. (1897) 6 C.L. Rev. 100.
150. cf. G.L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), pp. 312-316.
151. (1937) 39 N.L.R. 58.
152. At p. 60.
153. (1913) 17 N.L.R. 235.

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namely, arresting X on a charge of quitting service without notice. It was held that the indictment, on the face of it, disclosed no offence and that the conviction could not be sustained. Pereira J. declared: "Now, arresting a person on a warrant duly issued by a competent court of justice is one thing: arresting a person on a charge of quitting service without notice is quite another. Quitting service without notice alone is no offence, and quitting service without notice or reasonable cause is not a cognizable offence, that is to say, it is not an offence for which the offender can be arrested by the police....The statement in the indictment negatives the idea of a valid and legal arrest."[154]

The applicable principle, then, is that a charge of causing simple hurt[155] or grievous hurt[156] to deter a public servant from his duty cannot always be resisted on the ground of exercise of the right of private defence merely because the public servant was not acting entirely within his lawful powers. However, a conviction of these offences is not defensible if the public servant's act is altogether unlawful.

(G) *Mitigation of Liability on the Ground of Grave and Sudden Provocation*

The punishment for voluntarily causing simple hurt and grievous hurt, respectively, is imprisonment of either description for a maximum period of one year[157] and seven years,[158] and also a fine. But where simple hurt or grievous hurt is caused on grave and sudden provocation, the sentence is reduced to imprisonment of either description for a maximum period of one month or a fine which may extend to fifty rupees or both,[159] or imprisonment of either description for a term which may extend to four years or a fine of up to two thousand rupees or both.[160] Sections 325 and 326 which deal with voluntarily causing simple hurt and grievous hurt, respectively, on grave and sudden provocation are declared to be subject to the same provisos as Exception 1 to section 294.[161]

The words "grave and sudden provocation" have the same meaning in this context as in relation to the first Exception to section 294. All the elements of that proviso which were investigated in a previous chapter, are relevant for the present purpose.[162] Equally, principles in regard to the burden of proof which were examined in that context[163] are also applicable here.

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154. At p. 237.
155. Penal Code, section 323.
156. Section 324.
157. Section 314.
158. Section 316.
159. Section 325.
160. Section 326.
161. Explanation to section 326.
162. Chapter 5, the text at notes 108-214.
163. Chapter 5, the text at notes 197-214.

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In *Coomaraswamy*[164] an attempt was made, but without success, to establish a material difference in regard to the principles operative in these distinct areas. In this case, counsel for the appellant contended that, under sections 325 and 326, there was no necessity to prove such a degree of provocation as would deprive the offender of the power of self-control—the latter element being expressly required as a condition precedent for resorting to the principle of mitigation contained in Exception 1 to section 294. This contention did not prove acceptable to the court. Moseley A. C. J. said: "There would appear to be no justification for drawing a distinction to this extent between the provocation required by section 294 and that contemplated in section 326. Indeed, to relax the requirements in case of section 326 might well lead to an absurdity, such as an offender who had received grave and sudden provocation, but who had admittedly not been deprived of his self-control, proceeding, in cold blood, to break every bone in his provoker's body, knowing that he was protected by the law against adequate punishment".[165] It may be taken as settled law, then, that the requisites of "grave and sudden provocation" are indistinguishable in these two contexts.

M. G. P. Fernando[166] was a case where the accused appealed against a conviction of voluntarily causing grievous hurt. The charge preferred against him was that he attempted to commit the murder of the injured man, his brother. The verdict of the jury was that he was guilty of voluntarily causing grievous hurt but that there was "latent provocation". The Court of Criminal Appeal held that the trial judge had dealt adequately with the charge of attempt to commit murder and with the charge of attempt to commit culpable homicide not amounting to murder. But the trial judge had failed to direct the jury that, in the circumstances of the case, it would be relevant to consider whether the attack on the injured man was an attack made by the accused on grave and sudden provocation. In the latter event, the jury should have been directed that they were entitled to return a verdict of voluntarily causing grievous hurt on grave and sudden provocation. "In other words, the existence of such an offence was not brought to the attention of the jury".[167] Accordingly, a conviction under section 326 was entered in appeal.

Soertsz A. C. J. observed: "The verdict of the jury indicates clearly, we think, that in their view there was neither a murderous intention nor the requisite knowledge for the constitution of the offence of attempt to commit culpable homicide not amounting to murder, because the verdict they returned was one of voluntarily causing grievous hurt. Having returned that

164. (1940) 41 N.L.R. 289.
165. At p. 293.
166. (1946) 33 C.L.W. 101.
167. At p. 102.

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verdict, they went on to say that in their opinion there was 'latent provocation' .... This seems to indicate to us that what the jury meant to convey somewhat artlessly was that they thought the injury was caused on provocation".[168] The principle deducible from this decision appears to be that the offences embodied in sections 325 and 326 should be clearly explained to the jury wherever the evidence led suggests that they may be relevant. Failure to do so necessitates the substitution, in appeal, of a conviction of the lesser offences incorporated in these sections.

(H) *Liability Based on Rashness or Negligence*

The provisions which have so far been considered, deal with the causing of hurt or grievous hurt intentionally. But intention is not necessarily the basis of liability in this context. Causing simple hurt or grievous hurt by rashness or by negligence is made punishable by distinct provisions of the Penal Code—namely, sections 327, 328 and 329.

A significant difference may be noticed between section 327, on the one hand, and sections 328 and 329, on the other. Section 327 may be invoked even in circumstances where no harm whatever has been caused to any person. The foundation of liability is the potential danger inherent in a voluntary act by the accused. By contrast, sections 328 and 329 contemplate the causing of simple hurt and grievous hurt, respectively, by a rash or negligent act. The feature which all three sections have in common is that they are concerned with non-intentional forms of causing simple hurt or grievous hurt.

All that is necessary for a conviction under section 327 is that the accused should have acted "so rashly or negligently as to endanger human life, or the personal safety of others".[169] An intrinsic limitation is that the danger posed should have been to life or bodily safety, and to no other interest. The required standard of rashness or negligence is the same as that explained in relation to sections 328 and 329."[170]

Rashness and negligence are distinct conceptions. The essence of the former is that the accused adverted to the risk but persisted in his conduct with willingness to incur the risk.[171] The latter concept, on the other hand, signifies inadvertence to the risk, although the accused ought to have contemplated it if he had shown proper care or diligence.[172] This difference has been recognized in the cases. Thus, in *Nagaiah* v. *D. R. O.*[173] Basnayake J. said that "It is wrong to allege, as in the instant

168. ibid. 169. Penal Code, section 327.
170. See the text at notes 173-178, *infra*.
171. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), p. 38
172. ibid. 173. (1949) 41 C.L.W. 42.

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case, both rashness and negligence in one and the same charge".[174] The provisions of our law on this point may be criticized justifiably on the ground that no difference in regard to the quantum of the maximum penalty permissible is acknowledged as between rash and negligent conduct.[175] However, at other levels, a difference is defensible and may be recognized.

The relevant degree of negligence has been explained in the cases. The basic principle applicable has been formulated as follows: "In order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a matter of mere compensation between subject and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".[176] In several cases it was held that the accused's negligence was only of a degree sufficient to support civil liability and that conviction of a criminal offence was not warranted. In *Jonklaas* v. *Silva*[177] Moseley S.P.J. declared: "I do not think that the evidence of the witnesses for the prosecution differing as it does in some important particulars, can be accepted as overwhelming proof of the criminal culpability of the appellant. As has often been said, it is not every little trip or mistake that will make a person criminally liable.... The distinction between the negligence which is sufficient ground for a civil action and the higher degree which is necessary in criminal proceedings has been sharply insisted on".[178]

In *Wickramasinghe* v. *Thomas Singho*[179] the charge against the appellant was that he had driven a motor bus negligently, and caused grievous hurt to a person who was boarding a stationary bus. The Magistrate who convicted the appellant, found on the evidence that the latter had accelerated too near the bus halting place and that he had not adopted the usual precaution of reducing the speed of the vehicle before stopping. In appeal, the conviction was quashed. Moseley J. said: "It may be that, in the case before me, the appellant had given a slightly coloured version of the facts....But his statement as to the brakes giving way is borne out by the evidence of the examiner as to the broken clevis pin. It seems highly probable that, had the brakes acted, the collision would not have occurred. In my opinion, the prosecution has failed to prove that high degree of negligence which has to be proved before the offence is established".[180]

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174. At p. 43.
175. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), p. 40.
176. *Bateman* 19 Cr. A.R. 13, followed in *Scharenguivel* v. *Charlie* (1938) 10 C.L.W. 85; *Perera* v. *Wickremanayake* (1940) 4 C.L. J. 142; *Lourensz* v. *Vyramuttu* (1941) 42 N.L.R. 472.
177. (1940) 42 N.L.R. 128.
178. At pages 130-131.
179. (1937) 17 C.L. Rec. 58.
180. At p. 59.

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Sub-Inspector of Police, Kengangamuwa v. *Dingiri Mahatmaya*[181] was a case where the evidence against the accused indicated that the lorry which he drove collided with a cart while he was attempting to overtake it at a spot where there was sufficient space to do so. There was no motive for the accused to harm the persons in the cart. It was held that the negligence proved was not sufficient to substantiate a criminal charge.

In *Scharenguivel* v. *Charlie*[182] the accused was convicted of causing grievous hurt to the complainant by driving an omnibus negligently. The Magistrate, in discussing negligence, had stated: "Negligence is the absence of due care, the omission to take such care as under the circumstances it is the legal duty of a person to take".[183] It was held in appeal that, although this was an accurate definition of negligence in civil cases, it did not apply to the concept of criminal negligence. Keuneman A.J. set aside the conviction on the ground that "The Magistrate does not appear to have taken into consideration the rule with regard to criminal negligence".[184] Similarly, it was held in *Simon Perera* v. *Wickremanayake*[185] where again the charge related to negligent driving of a motor car, that the evidence did not reveal negligence of a sufficiently high degree to warrant conviction of a criminal offence.

However, in some circumstances, the facts may point so clearly to negligence that, if an adverse inference is to be avoided, the accused must undertake to provide a plausible explanation inconsistent with negligence of a high degree. This situation is illustrated by the cases of *Kalansuriya* v. *Johoran*[186] and *Perera* v. *Amarasinghe*.[187]

In the former case, the accused was driving a lorry and the evidence showed that the lorry left the road, went a distance of fifty feet and injured a person standing eight feet away from the edge of the road. Wijewardene S.P.J. said: "This is a case where the mere happening of the accident affords *prima facie* evidence of negligence casting upon the party charged with it the onus of proving the contrary, for owing to the nature of the accident, *res ipsa loquitur*....The version given by the accused is so inherently improbable and inconsistent that it must be rejected. The circumstances of the case show that the accused must have driven his lorry at an inordinately excessive speed, and that he was guilty of a very high degree of negligence in the means adopted by him to avoid the risk consequent on the speed of the lorry".[188]

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181. (1936) 1 C.L.J.N. 40.
182. (1938) 10 C.L.W. 85.
183. At p. 86.
184. ibid.
185. (1940) 4 C.L.J. 142.
186. (1947) 48 N.L.R. 400
187. (1949) 41 C.L.W. 92.
188. (1947) 48 N. L. R. 400 at p. 402.

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In the latter case, the accused's lorry went across the road to its wrong side and collided with another vehicle which was travelling at a moderate speed along the extreme edge of its own side. This evidence was held to create a presumption of negligence. "It symbolizes the argument that the occurrence of an injury from such a thing as a motor car which is harmless in normal operation but capable of doing serious human injury if not properly handled, raises a presumption of culpability on the part of the driver."[189] However, the accused sought to rebut this presumption by means of evidence that, as it rained during the last lap of the journey when the accident occurred, he drove with particular care; that at no time did the accused drive at an excessive speed, having regard to the nature of the road and the traffic on it; and that the accident was due to a skid. A skid, it was held, was *per se* a neutral contingency, but Basnayake J. accepted that "In the instant case, the accused's testimony that the skid was not due to his negligence is supported by evidence".[190] Accordingly, the Court concluded: "The prosecution evidence falls short of that necessary to establish the ingredients of the charge".[191]

The primary distinction to be borne in mind in these cases is that between standards of civil and of criminal negligence. While the onus of establishing negligence of the required degree has to be discharged by the prosecution, there are cases in which the circumstances attendant on the act are clearly indicative of negligence. In these cases, the burden devolves on the accused not to disprove negligence but to suggest an explanation which is incompatible with negligence on his part. Once the accused succeeds to the latter extent, the initial advantage secured by the prosecution is negatived, and negligence of a high degree has to be proved by the prosecution beyond a reasonable doubt.

(J) *Procedural, Jurisdictional and Sentencing Aspects*

The following principles derive support from the case law:

(i) The Penal Code stipulates the maximum penalty for the offence in question, but subject to this, the court has an extensive discretion in determining the appropriate penalty. In *Munasinghe* v. *Salman*[192] the court held that it is for the Magistrate to decide whether the offence is of such a nature as to be punished adequately by a small fine. In regard to the quantum of punishment, an appellate tribunal would not ordinarily interfere with the decision of the trial judge. This was reasserted in *Sedris* v. *Singho*.[193]

189. (1949) 41 C.L.W. 92 at p. 93.
190. At p. 94.
191. ibid.
192. (1922) 1 Times of Cey. 24.
193. (1921) 23 N.L.R. 171.

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The plea of sudden fight constitutes a mitigatory exception which has the effect of reducing liability for murder to liability for culpable homicide not amounting to murder.[194] This principle has been applied by way of analogy to offences which involve the causing of hurt. In *Silva* v. *Silva*[195] the accused cut with a knife one of the parties to a drunken brawl. There being no evidence of unusual cruelty, it was held that the appropriate conviction was only for using criminal force.

(ii) The courts will not permit a complainant to add a charge to the indictment merely for the purpose of depriving a tribunal of jurisdiction. In *James* v. *Silva*[196] the accused was charged with causing hurt and with robbery but was convicted only of the offence of causing hurt. Since it appeared that the complainant had tacked on the charge of robbery only to evade the jurisdiction of the Village Tribunal, it was held that the Magistrate should not hear the case.

(iii) Section 178 (1) of the Code of Criminal Procedure provides that "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it".

The scope of this provision has been examined in several cases. *Mendis*[197] is a case where it was held that, in appeal, a conviction of causing hurt cannot be substituted for one of rioting, since causing hurt is not a minor offence in relation to rioting within the meaning of the relevant statutory provision.

In *Romel Appu*[198] it was held that a person who had been convicted of voluntarily causing hurt under section 314 of the Penal Code cannot be convicted, on the same facts, of voluntarily causing hurt by means of an instrument for cutting under section 315. The accused would be protected against the latter charge by the plea of *autrefois convict*. There is no doubt that the plea is properly applicable to this situation, since the facts relevant to the two charges are the same, subject only to the difference that, in the latter case, there is the additional circumstance that hurt is caused by an instrument for cutting. This factor aggravates the offence, but as there is no other difference between the two charges, the prosecution is required to make a choice between them. The accused, accordingly, cannot be convicted of both offences on the identical facts. In *Modder* v. *Perera*[199] a similar view was taken by Wood Renton J. in regard to a conviction of two other offences.

194. Exception 4 to section 294 of the Penal Code.
195. (1893) 6 C.L. Rev. 75.
196. (1943) 44 N.L.R. 300.
197. (1937) 39 N.L.R. 182.
198. (1894) 3 S.C.R. 26.
199. (1913) 16 N.L.R. 87.

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The facts of these cases may be contrasted with those of *Amadoris* v. *Rajasin*.[200] There it was held that a person charged with causing hurt while committing robbery can be convicted of voluntarily causing hurt even if the charge of robbery fails. The two are distinct charges, and the suggestion by the prosecution was that hurt was voluntarily inflicted in the course of a robbery. Since each charge is maintainable independently of the other, the failure of one does not necessarily require rejection of the other.

(iv) The fact that the complainants themselves are guilty of an offence does not deprive them of the right to institute a prosecution for voluntarily causing simple hurt or grievous hurt against other persons. This is illustrated by the decision in *Avaliya* v. *Khan*.[201] Ten persons were convicted of committing an affray under section 157 of the Penal Code. Thereafter three of those who were convicted of this offence, charged the other seven in the case under section 314 of the Penal Code with causing hurt to them. The conclusion was reached that the conviction of the complainants in the previous affray case was not a bar to the conviction of the others of a distinct offence in the present case. This approach is clearly in keeping with principle.

III. WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

(A) *Wrongful Restraint*

This offence is created by section 330 of the Penal Code which declares that "Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said 'wrongfully to restrain' that person". The punishment for wrongful restraint is simple imprisonment for a term which may extend to one month, or a fine which may extend to fifty rupees, or both.[202]

The essential elements of the offence are as follows: (i) There must be obstruction by the accused; (ii) The obstruction must be to a person; (iii) The obstruction must be voluntary; (iv) The effect of the obstruction must be to prevent a person from proceeding in one direction; (v) The person obstructed must have a right to proceed in the direction in which he endeavoured to proceed; (vi) The obstruction should not have been caused in good faith by a person who believed himself to have a lawful right to obstruct.

Each of these elements may be examined in turn.

200. (1935) 4 C.L.W. 19.
201. (1914) 17 N.L.R. 222.
202. Penal Code, section 332.

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(i) As to the meaning of "obstruction", Lyall Grant J. in *Herath* v. *William Silva*[203] declared that "The word 'obstruct' in section 330 has not, so I am informed, been the subject of descision in Ceylon".[204] Nevertheless Lyall Grant J. accepted as applicable to Ceylon the following principles which had been formulated for Indian law: (a) Obstruction may consist of a physical impediment or the use of physical force to restrain movement.[205] (b) However, obstruction need not necessarily consist of the actual application of physical force. The element of obstruction may be satisfied by a threat or order which operates on another's will and in consequence of which the natural operation of the will is changed or subverted.[206] In other words, harm actually inflicted is not necessary; threatened harm is sufficient. (c) The crucial consideration is not the *act* by the accused but the *effect* it produces on the mind of the other party. Whatever the nature of the accused's act may be, the legal requirement of obstruction would be satisfied if the result of the accused's act was to prevent a person from proceeding in a direction in which he had a right to proceed—this consequence being voluntarily brought about.[207]

A significant limitation on the scope of the offence is that there must be a direct, and not merely an oblique, connection between the act committed by the accused and the other person's being prevented from proceeding on his way. The application of this principle depends, of course, on the facts of the case. For instance, where A threatens B that if B continues to proceed on his way, A would not give him a gift, as he had earlier intended to do, B may be prevented from proceeding by A's threat, but this kind of restraint obviously does not amount to obstruction. The threat is too indirect because all that it entails is the withholding of benefits which A was under no legal obligation to confer on B. Similarly, B would not be held to have been wrongfully restrained by A if B's only reason for not proceeding was that he feared he would consequently lose A's friendship or favour. In this context, it has been observed that "The obstruction must be direct and actual, and not indirect and ideal".[208]

Although a threat, as opposed to an act, is sufficient, the minimum requirement is that unlawful infliction of harm must be threatened. There is no further legal requirement as to the nature of the unlawful harm threatened—it may relate to bodily harm, or damage to property or perhaps even an attack on honour and reputation. Moreover, there is probably no strict requirement that unlawful harm should be threatened necessarily

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203. (1928) 30 N.L.R. 376.
204. At p. 377.
205. ibid.
206. ibid.
207. ibid.
208. *Herath* v. *William Silva* (1928) 30 N.L.R. 376 at p. 377.

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to the person sought to be obstructed. It is arguable that the words of the provision are consistent with the offence being held to have been committed in circumstances where unlawful harm is caused or threatened to some other person, provided that the threat operates on the complainant's[209] mind so as to prevent him from proceeding. While there is flexibility in these respects, it is clear that the accused cannot be liable unless unlawful harm was inflicted or threatened by him.

It is implicit in this analysis of "obstruction" that the complainant should have been dissuaded from proceeding on his way because of fear induced in his mind of impending unlawful harm. The question is thus relevant whether the harm sustained or apprehended should necessarily be a relation to the complainant himself or, where this is not the case, at least in relation to some person other than the accused. The question is whether the accused must be exonerated from liability if the fear induced in the complainant's mind is exclusively a fear for the safety of the person responsible for the obstruction.

This issue is involved in the *ratio decidendi* of *Herath* v. *William Silva*.[210] In this case, the accused was convicted of having wrongfully restrained the complainant from proceeding along the public highway in a lorry. The complainant's version which was believed by the court was that the accused was seated on the middle of the road and that, as the lorry approached, the accused sprang up and walked backwards, so that the driver could not proceed without running over him. The question of law raised in appeal on behalf of the accused was that, to constitute the offence of wrongful restraint, the obstruction offered must be one which raises in the person obstructed a fear other than for the safety of the person obstructing. This contention was uncompromisingly rejected by Lyall Grant J. who observed: "The accused put an actual physical obstruction in the way of the lorry, namely, the obstruction of his own body. The mere fact that, physically, the person obstructed might have been able to overcome the obstruction does not seem to me to alter the nature of the accused's act. The complainant could not have overcome the obstruction except by running the accused down, which would have been a criminal act. An act by one person which prevents another from proceeding in a direction in which he has a right to proceed, unless the latter chooses to commit a criminal act, seems to me to amount to wrongful restraint".[211]

The view adopted on this point by Lyall Grant J. is manifestly the sound view. The vital element postulated by "obstruc-

209. The word 'complainant' is used for convenience of exposition although, of course, the prosecution may be undertaken by the State.
210. See note 203, *supra*.
211. (1928) 30 N.L.R. 376 at p. 378.

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tion" inheres in unlawful harm. The mere fact that unlawful harm would be visited ultimately upon the accused himself is no reason for relieving the accused from liability in all cases. A distinction must be made, it is submitted, between cases where unlawful harm is inflicted, or is threatened to be inflicted, on the accused by the accused himself and cases where unlawful harm is required to be inflicted on the accused by the complainant. Liability for worngful restraint cannot be imposed in the former case, but it can in the latter. Thus, where the accused threatens to shoot himself if the complainant proceeds on his way, the accused threatens harm to himself in the event of the complainant exercising a lawful right, but nothing more is threatened or done. In such a case, if the accused's threat deters the complainant from using the path or way, the requisite lement of directness between the threat and the consequence would not be established and, therefore, liability for wrongful restraint cannot be imposed.

However, the facts of *Herath* v. *William Silva* bear no legitimate comparison with this hypothetical situation. In that case, the accused effectively placed the complainant in a situation in which the latter would have been able to exercise his lawful right only by inflicting unlawful harm on the accused. In this context, the submission that the fear caused in the complainant's mind was only for the safety of the accused is seen to lack substance, since the complainant, as a condition of availing himself of his legal rights, becomes the instrument for the commission of a criminal act. Consequently, no difficulty is encountered in saying, on these facts, that the accused voluntarily obstructed the complainant so as to prevent him from using the path or way.

(ii) Obstruction must be caused *to a person*. Thus, obstruction of a vehicle, *per se*, is not sufficient. The emphasis on obstruction of a person emerges both from the phraseology employed in the statutory provision and from the inclusion of the offence of wrongful restraint in Chapter XVI of the Penal Code which deals, *inter alia*, with offences affecting the human body.

In *Jayasekera* v. *Appu*[212] Moseley S.P.J. quoted with approval the statement in an Indian textbook[213] that "Obstruction of a vehicle alone (when no men are obstructed) cannot amount to wrongful restraint".[214] In this case, the accused was convicted on a charge of "having cut a drain across a cartway...so as to obstruct voluntarily the users of this road from proceeding in a direction in which the public have a right to proceed". The evidence indicated that the drain cut by the accused created an

212. (1941) 43 N.L.R. 260.
213. Ratanlal, *The Law of Crimes* (14th ed.) p. 827.
214. At p. 260.

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obstruction on the cart-road, but Moseley S.P.J. allowed the appeal and set aside the conviction on the ground that the Magistrate "does not appear to have directed his mind to the question of whether or not any person had been obstructed".[215] There was no evidence to suggest that the complainant himself, or any other person, had been obstructed by the accused's activity.

This issue arose again in *Justin Perera* v. *Ratnayake*.[216] The facts of this case, as established by the evidence, were as follows: The accused persons were either employees or sympathizers of employees of a bus company. On the day in question, most of the company's employees had struck work and assembled outside the garage. The management of the company had requested X, an employee who had not joined the strike, to drive one of its buses out of the garage and on to the road in order to commence the normal passenger service. This proved impossible because the thirteen accused persons sat down or reclined in front of the bus and, while lying on the ground, declared that X would not be allowed to reach the road.

The point of law urged in appeal on behalf of the accused persons was that, as the obstruction was to X driving off in the bus and as X was free to proceed by himself without attempting to take the bus with him, the offence of wrongful restraint could not be held to have been committed. It was held that this contention was not entitled to prevail. T. S. Fernando J. posed the question: "Is not a person prevented from proceeding in a direction in which that person *has a right* to proceed when he is not permitted to proceed armed or equipped or even encumbered with anything with which he may lawfully be armed, equipped or encumbered? If it is lawful, for instance, for a person to lead his dog along the road, is he not being wrongfully restrained within the meaning of section 330 when obstruction is offered to his so leading the dog, although it is made clear to him that he would be allowed to proceed if the dog is not brought along with him?"[217]

The suggestion is that X has the right not only to proceed along the road but to do so in the manner or by the mode he lawfully selects. If the accused obstruct the progress of X, in the lawful manner which he has chosen to adopt, they are guilty of wrongful restraint, provided that the other elements of the offence are satisfied. In support of this view, T. S. Fernando J. adopted the following passage from an Indian judgment: "This view of personal obstruction must obviously have some limits. Suppose A wants to proceed in a certain direction with a pair of boots on, and B says: 'I will not allow

215. (1941) 43 N.L.R. 260. 216. (1957) 61 N.L.R. 90.
217. At pages 91-92.

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you to do this. You must take your boots off and go without them if you want to proceed'. If B has no right to say that A cannot wear his boots while proceeding, surely there is wrongful restraint....Similarly, if A is wrongfully prevented from taking a bicycle with him, or riding it, on his way to a place, I can see no adequate reason for the view that there is no wrongful restraint if B is willing to let him proceed without his bicycle. The circumstances of the case must be considered, and if the obstruction to A's taking a thing with him amounts to obstructing A himself from going in a manner he has a right to go, I think there is wrongful restraint".[218]

Accordingly, when a person driving a vehicle is obstructed, the basis of liability is not that the vehicle was obstructed (which, at first glance, would appear to be the case if the person is allowed to proceed without hindrance so long as he leaves the vehicle behind) but that what was obstructed was the progress of a person in a lawful manner whilst exercising a right conferred on him by law. The vehicle merely represents the means he has adopted in using the road or way, and unjustifiable interference with a chosen lawful method of movement suffices as the basis of a conviction of wrongful restraint.

Counsel for the accused persons in *Justin Perera*'s case claimed that his submission derived support from the judgment of Moseley S.P.J. in *Jayasekera* v. *Appu*.[219] However, T. S. Fernando J. reached the conclusion that a proper examination of the facts of that case militates against acceptance of this view. His Lordship, referring to the facts of *Jayasekera* v. *Appu*, observed: "The obstruction complained of consisted merely of the cutting of a drain across a cartway. There was not even any evidence that any person actually attempted to take a cart across or indeed tried to go over the cartway and found that he could not do so by reason of the existence of the drain. In truth, such observations on the law as appear in the judgment of Moseley J. are against the view contended for by (Counsel for the appellant). After stating that the essence of the offence is that the obstruction alleged shall be to a person—which is really no more than a reproduction of part of the definition of the offence—Moseley J. states: 'Obstruction of a vehicle alone (*when no men are obstructed*) cannot amount to wrongful restraint'. It would therefore almost appear that, had it been necessary in that case, the learned judge would have been prepared to say that obstruction of a vehicle, when it is being driven by a man, can amount to wrongful restraint of that man".[220]

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218. *Emperor* v. *Labanu* (1926) A.I.R. (Bombay) 118 quoted with approval by T. S. Fernando J. in *Justin Perera* v. *Ratnayake* (1957) 61 N.L.R. 90 at p. 92.

219. See note 212. *supra.*

220. See note 218, *supra.*

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The essential point of contrast between the cases of *Jayasekera* v. *Appu* and *Justin Perera* v. *Ratnayake* is that, whereas in the former there was no evidence that any person had been obstructed by the behaviour of the accused, such evidence was clearly available in the latter case. In view of this fundamental difference between the two situations, there is no inconsistency between the pronouncements by Moseley S.P.J. and T. S. Fernando J.

(iii) It is a prerequisite of liability for wrongful restraint that the accused should have caused the obstruction *voluntarily*. The gist of this requirement, as applied to the offence in question, is that the accused should have caused the obstruction by means whereby he intended to cause it or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause the obstruction.[221] Where the relevant intention or knowledge is lacking, the obstruction would not be held to have been caused "voluntarily". The absence of volition, in the relevant sense, may be proved by reference to a variety of factors, some of which emerge from the general exceptions contained in Chapter IV of the Penal Code. Examples are provided by the defences of duress,[222] accident[223] and bona fide mistake of fact.[224] But these are not exhaustive, for the accused is entitled to maintain that his conduct was not voluntary for any reason which would not necessarily support one or more of the general exceptions from penal reponsibility.

(iv) The effect of the obstruction must be to prevent some person from proceeding in one direction. For purposes of the offence of wrongful restraint, it is sufficient that a person was prevented from proceeding in one direction *alone*. It may be that the person was left at liberty to proceed in all directions save one, but this is adequate for imposition of liability for wrongful restraint. This feature of the offence enables it to be distinguished readily from the allied offence of wrongful confinement.[225]

(v) The person obstructed must have a *right* to proceed in the direction in which he attempted to proceed. A legal right is envisaged by this requirement. It is not necessary that the person restrained should have endeavoured to use a public road or way. There can exist a legal right to use a private path—for example, where the person exercising the right is the owner of the land, or has acquired a servitude, or is entitled to the right under a contract. The right can exist in respect of a way over land or water.[226] In every case, the vital element is

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221. Penal Code, section 37.
222. Section 87.
223. Section 72.
224. Section 72.
225. Section 331.
226. See Exception to section 330.

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the recognition of a legal right in the complainant or in any other person who has been impeded by the accused 's act.

The cases of *Herath* v. *Silva*,[227] *Knatchbull* v. *Fernando*,[228] *Ossen* v. *Ponniah*[229] and *Justin Perera* v. *Ratnayake*[230] were all concerned with obstruction on a public road. In *Jayasekera* v. *Appu*[231] it appears to have been argued by Counsel for the appellant that the complainant had failed to prove that the path obstructed was a public path. It was seen, however, that this is not an indispensable requirement, for conviction of wrongful restraint.

In circumstances where a legal right to proceed is dependent on fulfilment of a condition, obstruction of the complainant before he satisfies the condition does not amount to wrongful restraint. In *Knatchbull* v. *Fernando*[232] the complainant, a military officer, charged the accused, a toll-keeper, with wrongful restraint. It appeared that the complainant, who was in uniform but was not on duty at the relevant time, rode his bicycle through the toll bar but did not pass the bridge. On being asked by the accused to pay the toll, the complainant refused to do so on the ground that he was in uniform. The accused did not ask the complainant for his name and address, but detained him until the arrival of a constable who noted the material particulars and released the complainant. It was held that the complainant was liable to pay the toll because he was not on duty even though he was clad in uniform.

It follows from this conclusion that the accused's refusal to allow the complainant to pass the toll bar cannot be the basis of a conviction of wrongful restraint, since the complainant had the right to proceed beyond this point, only on payment of the stipulated sum. However, the evidence indicated that, before the constable arrived, the complainant had offered to repass the toll bar and to go back but that the accused had declined to allow this. It was on the footing of this latter act that the conviction of wrongful restraint could have been sustained. While the complainant had no right to traverse the toll bar without payment, he did have the right to turn back and to proceed in the opposite direction. It was the accused's unwillingness to allow this that exposed him to criminal liability. Wood Renton J., in his judgment, also placed some emphasis on the fact that the complainant was at no time asked for his name and address. His Lordship declared: "In any event, the onus of justifying the detention rested with the toll bar keeper, and as he made no attempt to ascertain the complainant's identity before detaining him at the toll, it appears to me that he was guilty of wrongful restraint".[233]

227. See note 203, *supra*.
228. (1906) 9 N.L.R. 222
229. (1932) 1 C.L.W. 246.
230. See note 215, *supra*.
131. See note 218, *supra*.
232. (1906) 9 N.L.R. 222.
233. At p. 224.

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Where the complainant *prima facie* has a legal right to use the road but the accused maintains that there was justification for curtailment or denial of the right in the circumstances of the case, the onus of establishing the facts which give rise to the legal justification for suppression of the right, devolves on the accused. This is illustrated by the decision in *Ossen* v. *Ponniah*.[234] The accused, an Excise inspector, received information that arrack was likely to be transported in a particular car. He made arrangements to watch it and took with him an instrument in the form of a small inverted harrow with spikes which had been designed in accordance with the instructions of the Excise Commissioner for the purpose of puncturing tyres. The complainant's car was damaged by the use of this instrument. The number of the complainant's car did not correspond with that of the vehicle under suspicion. The accused failed entirely to prove that there was any reasonable cause to believe illicit arrack was being transported in the vehicle in question. Dalton J. held, on these facts, that the accused's act in preventing the complainant from proceeding along the road amounted to wrongful restraint. The conclusion reached in this case is defensible in the light of evidence which revealed a complete absence of legitimate grounds for suspecting the complainant or his vehicle.

(vi) The final requirement is that the accused should not have caused the obstruction in good faith. The Exception to section 330 is to the effect that "The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section". The illustration states: "A obstructs a path along which Z has a right to pass, A *not believing in good faith* that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z".

The element of absence of good faith, as a precondition of liability, is to be seen as an aspect of the *animus* required in the accused. In *Ossen* v. *Ponniah* the defence put forward by the accused rested on the plea of good faith. The accused pleaded, in effect, that he obstructed the complainant in good faith—that is to say, believing that he was legally justified in doing so. But the principle applicable is that "Nothing is said to be done or believed in good faith which is done or believed without due care and attention".[235] In keeping with this principle, the accused's plea was rejected in *Ossen* v. *Ponniah*, because his conduct was not characterized by due care and attention.

(B) *Wrongful Confinement*

The offence of wrongful confinement is constituted by section 331 of the Penal Code which provides that "Whoever wrong-

234. (1932) 1 C.L.W. 246. 235. Penal Code, section 51.

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fully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person". The punishment for wrongful confinement is imprisonment of either description for a term which may extend to one year, or a fine which may extend to a thousand rupees, or both.[236]

The offence of wrongful confinement comprises all the elements which inhere in that of wrongful restraint and, in addition, one other element—namely, that some person was prevented from moving not merely in one direction but in all directions. This is the gist of the requirement that any person should have been prevented from proceeding beyond "certain circumscribing limits". A *general* restriction of movement is envisaged by the offence of wrongful confinement.

The interpretation of the phrase "circumscribing limits" really involves a quantitative criterion or a question of degree. Thus, incarceration in a room would clearly satisfy the relevent requirement. Illustration (a) to section 331 which contemplates circumstances in which the complainant[237] is confined within a "walled space", coincides with this situation. Illustration (b) reads as follows: "A places men with firearms at the outlets of a building and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z". This indicates that the offence is committed even when the complainant is confined not in a room but within a building.

The question, however, assumes greater complexity as the space within which the complainant is confined becomes larger. Can this offence be committed if the complainant has been confined within an estate, a village, a district or a country? At the final stage, can the territorial limits of Ceylon be construed as "circumscribing limits" for the purpose of the definition of wrongful confinement? In principle it may be said that, however extensive the limits may be, liability for the offence of wrongful confinement may be imposed, so long as it can be shown that some unlawful limitation was made of a person's freedom of movement. The fact that the limitation is flexible, in itself, is no defence, since it would still be the case that a legal right available to a person is wrongly derogated from. But it is obvious that, as the limits become more and more extensive, increasing difficulty is attendant on proof of the prosecution's case, because interference with freedom of movement then becomes less easy to establish. In any event, it must be noted that wrongful confinement presupposes indication of the limits beyond which the complainant is not allowed to proceed, but movement within these limits is not precluded.

Another question that arises in this connection is whether a conviction of wrongful confinement can be sustained in circum-

236. Section 333. 237. See note 209, *supra*.

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stances where a person is locked up in a room, but, unknown to that person, the room contains an exit through which it was possible for him to escape. This point was considered in *Lourenz* v. *Simon*.[238] In this case the accused was charged with wrongfully confining a police constable who had come to his house for the purpose of serving upon him summons in a criminal case. The constable had marched into the accused's living room while he was taking his lunch, and the accused locked the door of the room in which the constable happened to be and shouted for a gun. In appeal, Abrahams C.J. said: "There was another exit out of the room, even if the constable did not know it was there and made no attempt to look for it, so that he could not be said to be wrongfully confined if he was merely restrained from going in one direction and his movement was not blocked in another way".[239]

The question whether there existed any means whereby the person obstructed could proceed beyond circumscribing limits has to be answered objectively, without considering the knowledge of the particular person who is alleged to have been confined. If any such means of egress were available, even though the complainant[240] was not aware of it, the accused can be convicted only of wrongful restraint.

In all cases where an accused person can be convicted of wrongful confinement, he is necessarily guilty of wrong l restraint. Thus, in the context of a charge of wrongful confinement, the prosecution must initially prove an obstruction by the accused, in the sense relevant to a conviction of wrongful restraint. The obstruction offered, in the case of wrongful confinement as well, must be to a person. Moreover, the person obstructed must have a legal right to proceed beyond the circumscribing limits. Absence of "voluntary" conduct or proof of good faith operates necessarily as a bar to a conviction of wrongful confinement.

All that good faith postulates in this context is belief, accompanied by due care and attention, that the confinement is legally justified.[241] Where the confinement is not merely thought on reasonable grounds to be legally justified, but is actually required or justified by law, *a fortiori* there is release from liability. The confinement is not "wrongful' in these circumstances. In an anonymous Ceylon case[242] where a person trespassing on railway premises was detained on the station master's instructions, the detention was held not to be wrongful because it was acquiesced in by the law. The epithet "wrongful", in the context of the offences of wrongful restraint and

238. (1938) 13 C.L.W. 24.
239. At p. 24.
240. See note 209, *supra*.
241. Penal Code, section 51.
242. (1909) 6 C.L. Rev. Notes 64.

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wrongful confinement, signifies action that is unlawful or is contrary to law.

The basic offence of wrongful confinement is constituted by section 331. The punishment of imprisonment of either description for a maximum period of one year, or a fine which may extend to one thousand rupees, or both, is prescribed[243] for the offence of wrongful confinement, *simpliciter*. The offence is aggravated by certain other circumstances, if they are shown to exist. These factors have reference to (a) the period of confinement, or (b) the category of person whose movements are unlawfully restricted by confinement, or (c) the purpose for which the complainant is wrongfully confined, or (d) the mode of confinement.

(a) *The period of confinement.* For conviction of the basic offence of wrongful confinement, no minimum period of confinement is statutorily required. Thus, even momentary confinement is sufficient. But confinement for a longer period warrants imposition of a heavier penalty. Where confinement is for a period exceeding three days but less than ten days, the punishment is imprisonment of either description for a term which may extend to two years, or a fine, or both.[244] Where the period of confinement is more than ten days, the appropriate penalty is enhanced to imprisonment of either description for a maximum period of three years, and also a fine.[245]

(b) *The category of person confined.* Wrongful confinement of a person for whose liberation a writ has been issued, is treated as an offence of particular gravity. In this case, a sentence of imprisonment of either description for a maximum term of two years, *in addition to* any term of imprisonment to which the offender may be liable under any other section of the Penal Code, may be imposed.[246]

(c) *The purpose underlying confinement.* This may operate as a ground of aggravation. Where the purpose is extortion of property or constraining to an illegal act, the punishment is imprisonment of either description for a term which may extend to three years, and also a fine.[247] The words "illegal act" apply to "everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action".[248] Accordingly, these words are not limited in their scope to criminal offences but apply also to civil wrongs. If the purpose underlying wrongful confinement is extortion of a confession or compelling restoration of property, the penalty applicable is imprisonment of either description for a term which may extend to three years, and also a fine.[249]

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243. Penal Code, section 333.
244. Section 334.
245. Section 335.
246. Section 336.
247. Section 338.
248. Section 41.
249. Section 339.

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(d) *The mode of confinement.* Where wrongful confinement takes place in secret, the added element of stealth has the effect of increasing the punishment to imprisonment of either description for a maximum period of two years, *in addition to* any other punishment to which the offender may be liable for such wrongful confinement.[250] The element of stealth is established where a person is confined "in such a manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as herein before mentioned".[251]

(C) *Wrongful Restraint and Wrongful Confinement Compared*

Wrongful confinement includes wrongful restraint, but not *vice versa.* The fact that wrongful confinement comprises all the elements of wrongful restraint, and postulates an additional element, is reflected in the imposition, upon a conviction of wrongful confinement, of a penalty appreciably greater than that attendant on a conviction of wrongful restraint.

The similarities of the two offences and the differences between them may be considered in turn.

The offences have a common base, in that they both require proof of the following elements:

(i) There must be an obstruction caused by the accused;
(ii) The obstruction offered must be to a person;
(iii) The obstruction must be caused voluntarily;
(iv) The obstruction must cause interference with a legal right in another;
(v) The obstruction should not have been caused in good faith.

The similarity between the two offences consists of the acceptance of these criteria as requisites of liability for both offences.

The difference between wrongful restraint and wrongful confinement is that, in the former case, movement in only one direction is prevented while, in the latter, the impediment is to movement in *all* directions. In *Knatchbull* v. *Fernando*[252] the accused was convicted of wrongful restraint. The evidence led in the case suggested, however, that the complainant had been detained for about forty minutes by the toll-keeper. During this period movement in all directions was prohibited, so that a conviction of the graver offence could have been sustained. It is not clear why the accused was indicated in this case for wrongful restraint rather than for wrongful confinement.

250. Section 337. 251. ibid.
252. See note 232, *supra.*

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(D) *Rationale of These Offences*

The offences of wrongful restraint and wrongful confinement are concerned with the protection of a fundamental right—namely, the right of lawful movement—available to the public. These rights supply the basis of several civil remedies but, in certain limited contexts, they are deemed worthy of entrenchment also by the criminal law. However, considerations which necessarily exclude liability in the criminal action may be irrelevant to liability within the framework of the civil remedies, notably those conferred by the law of delict. These differences are intelligible in the light of the widely divergent objectives and consequences of delictual and criminal liability. Thus, bona fide belief that the defendant was entitled legally to detain the plaintiff is not a bar to imposition of liability for the civil wrong of false imprisonment,[253] although such belief negatives the mental element required by the tort of malicious arrest.[254] In the criminal action, absence of good faith is invariably treated as a prerequisite of a conviction. This may be accounted for by saying that the *animus* of the accused is among the factors which render justifiable the invocation of a criminal sanction in respect of his conduct, although such *animus* has no necessary bearing on the award of monetary compensation under a civil remedy.

IV. CRIMINAL FORCE AND ASSAULT

(A) *Criminal Force*

The Penal Code adopts the expedient of defining "force first and then specifying the circumstances in which the use of force is recognized as an offence—namely, the application of criminal force.

According to section 340 of the Penal Code, a person is said to use "force" on another if (a) he causes motion,[255] change of motion[256] or cessation of motion[257] to that other, or (b) if he causes to any substance motion[258] or change of motion[259] or cessation of motion.[260] In regard to (b), force is held to be used only if the substance is brought into contact with (i) any

253. *Tsose* v. *Minister of Justice* 1951 (3) S.A. 10.
254. ibid.
255. For example, where a person who is standing, is pushed, or a moored boat in which a person is sitting is cast adrift—section 341, illustration (a).
256. For example, where a person who is walking, is pushed or the horses pulling a chariot are lashed—section 341, illustration (b).
257. For example, where a person who is walking, is stopped.
258. For example, by throwing a stone at a person—section 341, illustration (c).
259. For example, by knocking against a moving car.
260. For example, by stopping a palanquin—section 341, illustration (c).

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part of that other's body,[261] or (ii) anything which that other is wearing or carrying,[262] or (iii) anything so situated that such contact affects that other's sense of feeling.[263]

Whether the case falls within the scope of limb (a) or limb (b) of the provision, it is necessary that the person causing the motion, the change of motion or cessation of motion, should have done so in one of three ways: (1) by his own bodily power,[264] or (2) by disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part or on the part of any other person,[265] or (3) by inducing any animal to move, to change its motion or to cease to move.[266]

The proper interpretation of this definition of "force" was considered in *Perera* v. *Karunatilleka*.[267] The question for decision here was whether a person who placed his finger, foot or lips in contact with another's person or clothes, can be said to have used force on that other. The significant consideration in such a case is that there is no motion, change of motion or cessation of motion. H. N. G. Fernando J., having referred to limb (a) of the provision which reads: "A person is said to use force to another if he causes motion, change of motion or cessation of motion to that other", observed: "It would seem that the essence of this part of the definition is that there should be interference with the freedom of movement, by causing either an involuntary movement or a movement different from one which is being performed or an obstruction to free movement. If that view be correct, then the act of molesting a person lying on a bed or sitting on a chair, which is unaccompanied by any force or restraint which impedes the person's ability to continue in the same position or to change it, or which causes the person to move from that position, does not constitute the use of force under the first part of the definition.[268]

It was evident from the facts of *Perera* v. *Karunatilleka* that the girl's freedom of movement had not been interfered with in any way. But this was held not to remove the case from the

261. For example, by aiming a stone at the head of a person in the street—section 341, illustration (d).
262. For example, by aiming a stone at a person's clothes—section 341, illustration (e).
263. For example, by pouring boiling water into a bath in which a person is standing—section 341, illustration (g).
264. For example, by lifting a person bodily and throwing him on the ground.
265. For example, by throwing a stone into the river so that the water would splash up and strike a person's face—section 341, illustration (e).
266. For example, by inciting a ferocious dog to spring upon a person—section 341, illustration (h).
267. (1955) 60 N.L.R. 69.
268. At p. 70.

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ambit of "force", because the principle contained in limb (b) could properly be applied.

Limb (b) requires motion, change of motion or cessation of motion *of a substance* but does not postulate any of these things in respect *of a person.* All that is required is contact of the substance with a person or with another substance in one of the three ways indicated.[269] However, in *Perera* v. *Karunatilleka*, there was the use not of an inanimate substance but of the accused's finger. Consequently, the case could be brought within the purview of limb (b) only if a finger of the accused could be construed as a "substance" for the purpose of the definition of force. The judgment of the court rests on the opinion that this interpretation of "substance" is plausible.

H. N. G. Fernando J. claimed support for his view from the content of illustration (f) to section 341. This illustration reads as follows: "A intentionally pulls up a woman's veil. Here A intentionally uses force to her". Since the act of intentionally pulling up the veil does not necessarily involve motion, change of motion or cessation of motion on the part of the woman, this can amount to the use of force only on the assumption that the finger with which the veil is handled, is a "substance" within the meaning of limb (b). Accordingly, H. N. G. Fernando J. said: "I think on reflection that . . . placing one's finger, foot or lips in contact with another's person or clothes does constitute the placing of a 'substance' in such contact and can therefore constitute the use of force within the meaning of the definition."[270]

Section 341 defines the offence pertaining to the use of criminal force. Section 341 uses, as a base, the elements of the definition of force set out in section 340 but incorporates additional elements which have the effect of transforming force into criminal force. This provision constituting the offence, too, is divisible into two limbs. The alternative forms of the offence may be analyzed as follows: (a) Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, is said to use "criminal force" to that other; and (b) Whoever, intending illegally by the use of such force to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear or annoyance to the person to whom the force is used, is said to use "criminal force" to that person.

Significant differences between the elements envisaged in the two limbs may be noticed. Limb (a) refers to the use of force for a particular purpose—namely, the commission of an offence—while a certain intention or state of knowledge at the time force is used, is the primary requirement contemplated by limb

269. See notes 264-266, *supra.* 270. (1955) 60 N.L.R. 69 at p. 70.

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(b). Moreover, the phrase "without that person's consent" is undoubtedly part of limb (a), but its applicability to limb (b) admits of some ambiguity. If the conclusion is reached that these words are extrinsic to limb (b), a further difference between limbs (a) and (b) would be apparent. In that event, where the accused is alleged to have used force on a person in order to commit an offence the prosecution would be required to establish that force was used without the complainant's consent, since this is an essential ingredient of the statutory definition of the offence. On the other hand, where force is used on a person with intent illegally to cause injury, fear or annoyance to that person, or with knowledge that any of these would be caused to that person, the prosecution would be under no duty to prove that force was used without consent.

In *Costa* v. *Gordon*[271] this construction was adopted on the basis that the words "without that person's consent" had no application to limb (b). In this case, the accused was convicted of the offence of using criminal force on a girl with intent to outrage her modesty.[272] There was no averment by the prosecution that the act had been committed without the girl's consent. The validity of the conviction therefore depended on the question whether outraging a girl's modesty was in itself an offence, for only in that event would force have been used "in order to the committing of any offence,"[273] with the necessary result that absence of consent is treated as a *factum probandum* of the prosecution's case.

On this issue, Dias S.P.J. said: "There is no offence known to our law called 'outraging the modesty of a woman....' Where a man uses 'force' with the intention of insulting or affronting the sense of propriety of a woman, he cannot be said to have done something 'in order to the committing of an offence'."[274] Accordingly, the view was taken that force had been used in this case with the intention or knowledge specified in limb (b) and that absence of consent was not a necessary aspect of the prosecution's case.

The difference between the two limbs of the provision, considered specifically in relation to the issue of consent, is succinctly expressed by Dias S.P.J. as follows: "On which of these two definitions is the present charge based? If the former, then, the burden of proof undoubtedly would be on the prosecution to establish that what was done, was done 'without the consent' of the woman. If the latter, no such burden would rest on the prosecution. In the latter event, the plea that the woman consented would be an exculpatory plea under Chapter

271. (1950) 51 N.L.R. 447. 272. Penal Code, section 345.
273. Section 341.
274. (1950) 51 N.L.R. 447 at pp. 448-449.

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IV of the Penal Code containing the general exceptions to criminal liability. The burden of proof in regard to such a plea would rest on the defence."[275]

This construction of the offence of using criminal force seems to have been taken for granted in the earlier case of *Kalimuttu*.[276] Here, again, the charge was one relating to the use of criminal force on a girl—in this instance of seven or eight years of age—with intent to outrage her modesty.[277] The court held, on these facts, that consent on the girl's part was no defence. Schneider A.J. observed: "There is nothing in the context of section 341 to negative the express provision in section 83 that the consent intended by section 341 is not such a consent as is given by a person who is under twelve years of age". Implicit in this statement is the premise that absence of consent is for the defence to establish whenever the case is governed by limb (b) of section 341. This issue of consent was considered with reference to section 83 of the Penal Code—a general exception requiring proof by the accused[278] on a balance of probability.[279]

The *mens rea* required for the offence of using criminal force is *either* (i) an intention, by the use of force, to commit an offence, *or* (ii) an intention, by the same means, to cause injury, fear or annoyance to any person or knowledge that any of these things would be caused in consequence of the use of force. It is possible that *mens rea*, in either of these forms, may be established in circumstances where the mental element required for an independent offence like mischief, is lacking. *Wilson* v. *Colande Cangany*[280] was a case where the accused threw stones at the complainant with the object of hitting or intimidating him but without a separate intention of causing loss to him or injury to his property. The stones fell on the complainant's house and the roof, tiles, guttering and panes of glass were damaged. The court held that the accused could be convicted of using criminal force. Lawrie A.C.J. said: "None of the stones thrown at Mr Wilson hit him; certainly, the accused did not bring any substance into contact with Mr Wilson's body. Did they cause him to move, to change motion or to cease to move? I suppose they did, for Mr Wilson had to move from one point of vantage to another, especially to place his wife in safety".[281] Moreover, the accused's intention to induce fear in the mind of the complainant satisfied the mental element required for a conviction of using criminal force. However, since the distinct offence of mischief requires proof of intention to cause, or knowledge that the accused is likely to

275. At p. 448.
276. (1919) 6 C.W.R. 142.
277. See note 272, *supra*.
278. Evidence Ordinance, section 105.
279. *Chandrasekera*, *supra*.
280. (1897) 3 N.L.R. 57.
281. At p. 58.

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cause, wrongful loss or damage to the public or to any person[282]—an element not established on the facts of *Wilson* v. *Calande Cangany*—Lawrie A.C.J. held that a conviction of mischief could not be sustained.

It may be noted that both limbs (a) and (b) of section 341 contain reference to an illegal act. There is no difference in this respect between the two parts of the definition of criminal force. Limb (a) adverts to the use of force in order to commit an *offence*, while limb (b) applies to cases where the accused has used force, "intending *illegally* by the use of such force to cause, or knowing it to be likely that by the use of such force he will *illegally* cause injury, fear or annoyance to the person to whom the force is used".[283] It is axiomatic that the use of force for a lawful purpose conclusively negatives liability.

This is made clear by illustration (i) to section 341. "A, a schoolmaster, in the reasonable exercise of his discretion as master, flogs B, one of his scholars. A does not use criminal force to B because, although A intends to cause fear and annoyance to B, he does not use force illegally". The decision in *Mastan Lebbe*[284] turned on legality of the use of force. This case purported to accept a distinction between persons actively attempting to enforce a supposed right, on the one hand, and those acting in defence of a right which they claimed, on the other. It is not illegal, it was held, for persons in possession of property, even though their right to the property may on investigation prove unsound, to prevent other persons from interfering forcibly with the right they set up. It follows, according to this view, that a person who prevents another from entering on property in his possession, to which he genuinely considers himself entitled, cannot be held guilty of the offence of criminal force, even though he resorts to force in resisting interference with the property. However, some qualification of this principle by reference to the criterion of reasonableness of the belief, may be salutary.

Where force is not applied towards the commission of an offence, and the case is considered within the framework of limb (b), it is a question of fact whether intention on the accused's part to cause injury, fear or annoyance to the complainant has been established. In *Goonewardene* v. *Kader*[285] the complainant, a fiscal's officer charged with the execution of a writ, came to the accused's house and was proceeding to seize certain movable property as belonging to the execution-debtor. The accused ran up at this stage and, claiming the property as his own, prevented the seizure by pulling the complainant by

282. Penal Code, section 408.
283. Section 341.
284. (1920) 2 C.L. Rec. 219.
285. (1893) 2 C.L. Rep. 149.

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the hand to the outer verandah. These facts were held not to disclose the requisite intent for purposes of the offence of criminal force.

The punishment for using criminal force in different circumstances is laid down in a series of separate provisions. Use of criminal force otherwise than on grave and sudden provocation is punishable with imprisonment of either description for a term which may extend to three months, or with a fine which may extend to fifty rupees, or with both.[286] Grave and sudden provocation, in this context, is declared subject to the first three among the five provisos attaching to Exception 1 of section 294 which embodies the corresponding plea in cases of homicide. Where grave and sudden provocation has been offered to the person who resorts to criminal force, the punishment is reduced to simple imprisonment for a term which may extend to one month, or a fine which may extend to fifty rupees, or both.[287] Grave and sudden provocation has the same meaning here as in the previous context.[288] Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.[289]

Use of criminal force to a woman with intent to outrage her modesty enhances the gravity of the offence. In this event, the appropriate punishment is imprisonment of either description for a term which may extend to two years, or a fine or both and, in addition, the punishment of whipping.[290] Using criminal force with intent to dishonour a person otherwise than on grave and sudden provocation is punishable with imprisonment of either description for a maximum period of two years, or with a fine, or with both.[291] Where criminal force is applied in an attempt to commit theft of property carried by a person,[292] or in an attempt wrongfully to confine a person,[293] respectively, the penalty of imprisonment of either description for a maximum period of two years, or a fine or both, or the penalty of imprisonment of either description for a maximum period of one year or a fine which may extend to one thousand rupees or both, may be imposed. In all these cases, the elements of criminal force have to be established first, and the *purpose* for which criminal force is used, aggravates the character of the offence.

However, it has been held that, since the offence of using criminal force with intent to dishonour a person otherwise than on grave and sudden provocation[294] is identical in respect of its component elements with the offence of using criminal

286. Penal Code, section 343.
287. Section 349.
288. Explanation to sections 343 and 349.
289. ibid.
290. Section 345.
291. Section 346.
292. Section 347.
293. Section 348.
294. Section 346.

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force otherwise than on grave and sudden provocation,[295] except that an additional element is involved in the former offence, a conviction of both offences is irregular. In circumstances where the requirements of both offences are satisfied, the conviction should be of the former offence and the enhanced penalty may be imposed.

The object of deterring a public servant from discharge of his duty by the use of criminal force[296] increases the gravity of the offence. However, it is necessary for aggravation of the offence on this ground not merely that the person on whom criminal force was used was a public servant, but that the application of force should have had some tangible connection with the functions of the complainant, as a public servant. This connection, according to the terms of section 344, can be established by reference to one of three factors: that criminal force was used on a public servant (a) while he was engaged in execution of his duty, or (b) with intent to prevent or deter that person from discharging his duty as such public servant, or (c) in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant.[297] One of these three elements is as essential to aggravation of the offence by application of section 344, as the accused's identity *qua* public servant.

The term "public servant" is defined elaborately in an explanatory section[298] of the Penal Code which recognizes twelve categories of such officers. The ninth clause of the relevant provision which refers to "every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience", has been held to include an Excise peon,[299] but not a person who holds a license from a Municipality to seize stray cattle.[300] The fifth clause of section 19 of the Penal Code recognizes as a public servant "every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the court, and every person specially authorized by a Court of Justice to perform any of such duties." In *Kapuwala Vel Vidane*[301] the complainant was an Irrigation Sub-Inspector who was acting on the relevant occasion at the request and under the authority of the President of a Village Tribunal

295. Section 343.
296. Section 344.
297. Section 344.
298. Section 19.
299. *de Livera* v. *Baron Singho* (1914) 1 C.A.R. of Cey. 81.
300. *Zilva* v. *Girigoris* (1908) 11 N.L.R. 67.
301. (1917) 4 C.W.R. 351.

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before which, as nominal prosecutor, he had summoned the accused in connection with an alleged offence. Wood Renton C.J. held that the complainant was entitled to the protection conferred on public servants by section 344 of the Penal Code. In *Weerakoon* v. *Mendis*[302] Jayawardene A. J. held that a Muhandiram was not a public servant. In *Meedin* v. *William*[303] it was held that the test to determine whether a Sanitary Inspector was a public servant or not, was whether he was entitled to remuneration from public funds. However, while this may sometimes be an appropriate criterion, it is not universally applicable, since a person who carries out an *ad hoc*, assignment without remuneration may conceivably be treated as a public servant.

In some contexts, the criminal law of Ceylon has drawn a distinction between acts by public servants which are not strictly legal and acts by public servants which are altogether illegal. In these areas, different rules have been applied to these distinct situations.[304] However, no comparable distinction may be recognized in regard to the offence of using criminal force to deter a public servant from discharge of his duty.[305] In this case, it is a requirement that the act by the public servant should be strictly lawful. Moreover, the burden of establishing that the public servant was engaged in *lawful* discharge of his functions is on the prosecution.[306] If there is no evidence that the public servant was carrying out a legal duty, the accused may be convicted under section 343 if the other elements of the offence are established, but never under section 344.

In *Goonesekere* v. *Appuhamy*[307] it was held that where the public servant who was obstructed was not acting with lawful authority, the person responsible for the resistance cannot be convicted under section 344. In *Appusingho* v. *Van Buren*[308] the court reached the conclusion that an Excise officer had no power to arrest a person who committed an offence under the Poisons, Opium and Dangerous Drugs Ordinance unless he either had a warrant or followed the procedure laid down in that statute.[309] It followed that arrest made otherwise was illegal. In this case, since the accused was considered to have exercised his right of private defence legitimately, an exculpatory plea was available to him. Consequently, he could not be convicted even of the basic offence of using criminal force,[310] without the additional element deriving from the object of preventing a

302. (1925) 27 N.L.R. 340. 303. (1934) 13 C.L. Rec. xxx.
304. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (2nd ed. 1980), chapter 8.
305. Penal Code, section 344.
306. *Meedin* v. *William* cited at note 302, *supra*.
307. (1935) 37 N.L.R. 11. 308. (1948) 49 N.L.R. 399.
309. Section 75(2). 310. Penal Code, section 343.

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public servant, by the use of such force, from performing his duty.[311] In this context, Basnayake J. quoted with approval the following passage from the speech of Viscount Simonds, in the House of Lords, in *Christie* v. *Leachinsky*:[312] "It is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful".[313]

It is settled law that forcible obstruction of a public servant who is not acting with lawful authority, does not provide the basis of a conviction under section 344. Similarly, there is a *cursus curiae* to the effect that obstruction of the execution of an invalid warrant, is not an offence under section 344.[314] In *Goonesekere* v. *Appuhamy*[315] Maartensz J. tentatively suggested that it might be necessary, in this context, "to recognize a distinction between an order which a Court has jurisdiction to make . . . but which in the particular case it had no right to make, and an order which the Court has no right to make in any case".[316] But this suggestion has not prevailed, and the consistent practice of our courts has been to regard an act by a public servant which is not legally justifiable in the circumstances of the particular case, as falling outside the area of protection conferred by recognition of the offence of using criminal force to deter a public servant from performance of his duty.

(B) *Assault*

Section 342 of the Penal Code declares that "Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit 'an assault' ".

It is clear that "assault", in its present context, differs significantly from its meaning in ordinary parlance. The *actus reus* of the offence consists of the making of a gesture or the doing of a preparatory act and, by this method, of causing in the mind of any person apprehension that criminal force is about to be used. The question whether words can amount to a "gesture" is answered by the Explanation to section 342: "Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such

311. Section 344. 312. (1947) 1 All E.R. 567 at p. 575.
313. (1948) 49 N.L.R. 399 at p. 401.
314. *Attorney-General* v. *William* (1911) 14 N.L.R. 345; *Goonesekera* v. *Appuhamy* (1935) 37 N.L.R. 11; *Sittamparampillai* v. *Murugan* (1941) 19 C.L.W. 118; *Sumangala* v. *Piyatissa* (1937) 39 N.L.R. 265.
315. (1935) 37 N.L.R. 11. 316. At p. 16.

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a meaning as may make those gestures or preparations amount to an assault". The requisite *mens rea* is the intention to cause apprehension by means of the gesture used or the preparation ostensibly made, or knowledge that apprehension would be induced in this manner.

It is not a requirement of liability for the offence of assault that any blow should be struck or violence in any form resorted to. The gist of the offence is *anticipation* by the complainant of the imminent use of force. The offence falls short of the actual application of force, since a threatening gesture is sufficient.

This is borne out by the illustrations attached to section 342. "A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault".[317] Again, "A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z".[318]

In both these cases, there is a threatening gesture or preparatory act which evokes the requisite response. The element of *immediacy* in regard to apprehension of force operates as a limiting criterion on the scope of liability. The person threatened must fear that force would be used almost instantaneously. If an intervening period before the use of force may be reasonably anticipated, this negatives an integral element of the offence. This is indicated by the words "about to use criminal force"[319] and by the requirement that fear must be caused to a person who is present.[320] In the absence of physical presence of the complainant at the time the threatening gesture was made, the required element of immediacy cannot be established adequately. Thus, evoking of the same response by a different mode—for example, by means of a threatening letter—is not sufficient. In these circumstances, there is no gesture, although there can perhaps be said to be a preparatory act. But want of physical presence precludes liability.

A further restrictive feature derives from the element that the criminal force feared should be in relation to none other than the person entertaining apprehension. Where A makes a threatening gesture in B's presence but B anticipates harm not to himself but to his child, C, who is also present, the requirements of liability are not satisfied.

Moreover, a particular kind of harm must be anticipated—namely, harm consequent upon the use of criminal force. Other types of unlawful harm fall outside the purview of the offence.

317. Penal Code, section 342, illustration (a).
318. Penal Code, section 342, illustration (b).
319. Section 342. 320. ibid.

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It is not necessary, however, that alarm or trepidation should have been caused to the complainant. All that is required is that the impending use of force should be adverted to as an objective fact. The quality of the emotive response to the anticipated contingency is irrelevant.

A further question is whether knowledge that the gesture or preparation is likely to cause any person present to apprehend the relevant kind of harm to himself, should be guaged objectively or whether factors peculiar to the particular complainant may be taken into account in determining the existence of such knowledge. It is submitted that subjective factors may legitimately be treated as relevant. Thus, an old man, a woman or a child may tend more easily to entertain the fear contemplated. Furthermore, a person who resorts to a threatening gesture against such a complainant can readily anticipate this reaction. On the other hand, a body of strong men are less likely to be intimidated by a gesture. Also, the surrounding circumstances are as important in this context as the type of person alleged to have been intimidated. Thus, the attendant circumstances may indicate that the gesture, to the knowledge of the complainant, was made in jest or in a friendly spirit. In this event there is no intention to cause apprehension, and no foresight of the likelihood that fear would be induced in the complainant's mind. Sufficiency of the gesture or act of preparation, then, has to be ascertained in the light of all the circumstances.

Where the gesture is *prima facie* ambiguous, the true effect of the gesture may be revealed by words which accompany it. Thus, where A takes up a stick, saying to Z, "I will give you a beating",[321] the physical gesture is equivocal and does not, in itself, give rise to fear. On the other hand, the words, although clear in their effect, are insufficient to make for liability, in the absence of a simultaneous gesture or preparatory act. However, the combination of the act with the words may be taken, in this instance, to represent the *actus reus* of assault.

In an early anonymous case[322] Bonser C.J., said: "Pointing a gun at a man is a gesture which would cause a person to apprehend that the person making that gesture is about to use criminal force against him. This is punishable by section 343". The relevant section prescribes the punishment for an assault otherwise than on grave and sudden provocation. The hypothetical example given by Bonser C.J. clearly satisfies the requirements of liability for this offence.

What matters in regard to assault is not the actual intention of the accused but the intention which the victim would reasonably believe him to entertain, in view of his gestures or

321. Illustration (c) to section 342. 322. 1899 Koch's Rep. 66.

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preparatory acts. Thus, the accused may raise his hand in such a manner as to suggest that force is about to be used, but he may in fact have no intention of striking the complainant. This would not absolve him from liability, however. Similarly, where A points an unloaded gun at B, the *factum* of assault is established if B is not aware that the gun is unloaded, but not otherwise. The victim should believe that the accused has both the intention and the present ability to use force, but whether either of these elements in fact exists is, as such, irrelevant.

The elements which have been considered so far operate to justify a conviction of assault. However, the purpose for which the assault is made, may have the effect of enhancing the gravity of the offence. Thus, just as in the case of criminal force,[323] assault to deter a public servant from discharge of his duty,[324] assault on a woman with intent to outrage her modesty,[325] assault with intent to dishonour a person otherwise than on grave and sudden provocation,[326] assault in an attempt to commit theft of property carried by a person,[327] and assault in an attempt wrongfully to confine a person[328] all make possible the imposition of heavier penalties prescribed by distinct provisions. On the other hand, the mitigatory plea of grave and sudden provocation is available in cases of assault.[329]

(C) *Criminal Force and Assault Compared*

The point which needs to be brought out in a comparison of the offences of criminal force and assault is that the latter represents a preliminary stage of the former. The former offence requires the actual application of force, while the latter envisages only an incipient act preparatory to the use of force.

This is illustrated by the decision in *Wilson* v. *Colande Cangany*.[330] In this case, the accused, with the object of intimidating the complainant, threw stones at the latter. None of the stones hit the complainant who was not harmed in any way by the accused's behaviour. Lawrie A.C.J. held that "If the acts of the accused did not amount to criminal force under section 340, they did amount to assault under section 341."[331] Anticipation of harm by the complainant was clearly established by the evidence, since the complainant had to move from one point of vantage to another.

However, the word "assault", in this context, was used inaccurately in *Fonseka* v. *Fernando*.[332] A collision occurred on

323. See the discussion at notes 290-315, *supra*.
324. Penal Code, section 344.
325. Section 345.
326. Section 346.
327. Section 347.
328. Section 348.
329. Section 349.
330. (1897) 3 N.L.R. 57.
331. At p. 58.
332. (1885) 7 S.C.C. 65.

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the road between two vehicles. One party seized the other's horse and prevented it for the moment from proceeding. The latter person struck the former with his whip in trying to prevent continued obstruction. Thereupon the party receiving the blow retaliated against the other. This act of retaliation was held to involve liability for committing an assault under grave and sudden provocation. Fleming A.C.J. said: "I am not prepared to say that the amount of violence which the evidence shows was subsequently made use of by the defendants, was justified by a few strokes of the whip given to one of them by the complainant."[333] This is a questionable view but, in any event, if liability was to be imposed on the defendants, it would seem that the appropriate conviction was one of using criminal force and not merely one of assault. The evidence clearly indicated that, once the plea of private defence was rejected, the accused's conduct ought to be held to have passed from the preliminary stage to the actual use of force.

In the generality of cases, the use of criminal force includes the element of assault, but this is not necessarily so. Thus, where criminal force is used unexpectedly and without warning—for example, where the complainant receives a blow from behind—there may be a conviction of using criminal force but not of assault, since there could have been no anticipation of danger. Conversely, where the accused's behaviour is confined to a threatening gesture or act of preparation but does not progress beyond this stage, the accused may be convicted properly of assault but not of using criminal force. The two offences, then, although allied closely, are demonstrably distinct in regard to their constituent elements. It may be concluded from a comparison of the offences of assault and using criminal force that each can be established in circumstances which are insufficient to warrant conviction of the other.

V. KIDNAPPING AND ABDUCTION

(A) *Kidnapping*

Under the law of Ceylon, the offence of kidnapping may take one of two forms[334]—(a) kidnapping from Ceylon,[335] and (b) kidnapping from lawful guardianship.[336] These two species of the offence are differently conceived, and vary in respect of their component elements.

Kidnapping from Ceylon

The requirements of this offence are (i) the conveying of any person (ii) beyond the limits of Ceylon (iii) without the consent of that person or of some person legally authorized to consent on behalf of that person.[337]

333. At p. 66.
334. Penal Code, section 350.
335. Section 351.
336. Section 352.
337. Section 351.

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The essence of the *actus reus* of this offence is the removal of a person outside the confines of the Island. This offence is constituted by the conveying in this sense not of any particular class of persons but of any person at all. There are no special requirements as to the mode by which the conveying is effected. Thus, resort to violence, fraud or guile is not necessarily required for establishment of this offence, so long as want of consent in the victim is proved. Moreover, the purpose of the conveying is not a vital consideration. The mental element of the offence is satisfied by the absence of consent either of the victim or of some other person who is legally entitled to signify consent on his or her behalf. The primary limiting feature of the offence, of course, is that it does not apply to the conveying of a person from one point to another within Ceylon, but governs exclusively cases where a person is taken beyond the territorial boundaries of Ceylon. The determination of the boundaries, for this purpose, may be made by reference to principles of both municipal and international law.

It will appear from a comparison of the elements of "kidnapping from Ceylon" with the ensuing discussion of the distinct offence of "kidnapping from lawful guardianship" that the two offences are distinguishable in the following ways: (i) The latter offence is committed by the taking of specified categories of persons, while the scope of the former is not likewise restricted. (ii) While a taking of the person alleged to have been kidnapped is a feature of both offences, the "taking", for the purpose of the former offence, must be from a point within Ceylon to a point outside Ceylon, but in the latter context a comparable requirement does not apply. (iii) In the former case, the emphasis is on physical asportation of the victim although, in the latter, movements of the victim, in a physical sense, is not necessarily required, so long as there is severance with legal guardianship. Thus, the latter offence may be committed not only where a person is taken from one place to another, whether both places are situated in Ceylon or not, but even where no physical movement of the victim has taken place at all. (iv) It is an essential feature of liability for the latter offence that the victim should have had a lawful guardian at the time of the alleged taking, but this need not be proved if the charge is the former. (v) In the case of the former offence, consent by the victim excludes liability, but in the latter offence, the victim's consent or connivance is irrelevant to liability.

As to the category of persons protected and the absence of a requirement in respect of legal guardianship, the offence of "kidnapping from Ceylon" is of appreciably more extensive scope than the offence of "kidnapping from lawful guardianship". On the other hand, the former offence is more limited

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than the latter, in regard to the nature and degree of the taking required and the relevance of consent by the victim.

Kidnapping from Lawful Guardianship

Section 352 of the Penal Code provides that "Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to 'kidnap such minor or person from lawful guardianship'."

The essential elements of this offence may be formulated as follows: (i) The person taken must belong to a specified category of persons; (ii) The person taken must have been subjected, at the time of taking, to lawful guardianship; (iii) There must have been a "taking" or "enticing" of the person from the "keeping" of the guardian; (iv) The taking or enticing should have taken place without the guardian's consent.

Each of these elements may be investigated in turn.

(i) It is not in respect of every person that the offence of kidnapping from lawful guardianship can be committed. It is a requirement of the law that the person taken should belong to one of three definite classes of persons: (a) a male child under the age of fourteen years, or (b) a female child below the age of sixteen years, or (c) a person of unsound mind. Persons not included in these categories are outside the area of protection conferred by recognition of this offence.[338]

(ii) As to "lawful guardianship" of the person taken, the statutory explanation is given that "The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person".[339]

This explanation represents a departure from concepts frequently employed in the civil law. The civil law may, in appropriate circumstances, distinguish between "guardianship" and "custody". Thus, where a child is sent to boarding school, custody of the child, in one sense,[340] is surrendered temporarily to the principal or warden of the school, but the guardianship of the child remains intact in the parent. However, for the purpose of the offence of kidnapping from lawful guardianship, it would seem that the parent, *qua* guardian, is regarded also as the person entrusted with the custody of the child. No dichotomy, then, emerges in the present context between

338. cf. *de Croos* (1911) 14 N.L.R. 249 at p. 250, *per* Wood Renton J.
339. Explanation to section 352.
340. But, of course, the term "custody:" is used in the civil law in a broad sense, to connote the legal right to guardianship or to the physical keeping of the child.

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"guardianship" and "custody". In the example suggested, custody is not deemed to have been delegated to the head of the school but remains with the parent or other person *in loco parentis* who is considered to be the guardian.

This point is brought out clearly in the case of *de Croos*.[341] The third accused who was appointed guardian by a District Court over two minor girls under sixteen years of age, placed the girls at Mount Leo Convent, Kandy, for their education, on an order of Court. For some time the girls had been in the habit of spending their holidays with the accused in Negombo. Subsequently, however, the Mother Superior declined to allow the girls to leave Kandy without an express order of Court. The accused moved the District Court of Negombo to direct the Mother Superior to send the girls to Negombo for the Chirstmas holidays. The Court refused this aplication. The accused nevertheless removed the girls by strategem from the keeping of the Mother Superior and took them to Negombo.

Wood Renton J., holding that the accused was not guilty of kidnapping from lawful guardianship, said: "The girls were primarily under the lawful guardianship of the third accused. Their father and mother are dead, and he was the guardian who had been appointed by the Court".[342] Again, it was observed: "The Mother Superior fairly admitted that she was not entitled to the legal custody of the girls as against him and that she had no dealings with anyone in regard to their custody or their education except with the third accused. It is clear from these facts that her guardianship, if guardianship it could be called, was only a derivative one, and it could not have been set up . . . as against the lawful guardianship of the third accused."[343] Wood Renton J. quoted with approval the following statement by the High Court of Madras in an Indian case:[344] "Such temporary guardianship does not exclude the higher legal guardianship of the father. That remains in full force".[345] This principle was applied, *mutatis mutandis*, to the facts of *de Croos*.

However, the prosecution argued that the District Court's refusal to grant the application by the accused, enabled conviction of the accused. The contention was that this order by the court was inconsistent with continued recognition of the accused as the legal guardian of the girls. But Wood Renton J. disposed of this contention in the following way: "I am unable to see that the order made by the District Judge . . . in any sense took away from the guardian his legal right to the custody

341. (1911) 14 N.L.R. 249.
342. At p. 250.
343. ibid.
344. *Jagannatha Rao* v. *Kamaraju* (1900) I.L.R. 24. Mad. 284.
345. At p. 251.

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of these children. It prohibited him from exercising that right by the removal of the children from Kandy to Negombo. But if he had come to the Mother Superior and had said to her, 'I intend to take these children for their holidays from Kandy to Jaffna', I do not think that she would have had, in law, any answer to his demand. If that view is correct, it follows that he cannot be convicted of the offence of taking the children out of the keeping of their lawful guardian".[346]

The principle deducible from this decision is that a person who is accepted for the time being as the lawful guardian of the child or other person, cannot be convicted of kidnapping from lawful guardianship, since it is of the essence of this offence that there should be a removal of the child or other person from the keeping of the guardian himself. The legal right of the guardian is paramount over, and prevails against, the lesser right available to a person on whom custody for a temporary period or for a specified purpose is conferred. The offence is one directed against the lawful guardian and not against a person entitled to a more qualified right. *Ex hypothesi*, the guardian cannot himself be guilty of kidnapping from lawful guardianship.

The definition of this offence contains a statutory exception in the following terms: "This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose".[347] Although it appears to have been suggested at the argument in *de Croos*' case that acquittal of the accused may be based on this exception, the court considered it unnecessary to deal with the applicability of the exception to the facts of the case. The reason was that the accused not merely considered himself the guardian in good faith, but was guardian in contemplation of law.

There is required to be a taking or enticing out of the "keeping" of the lawful guardian. There is no elucidation of what is meant by "keeping". The substance of "keeping", it is submitted, is custody in respect of the child or other person enjoyed by the guardian.

However, the concept of "keeping", in this context is not limited in scope by any requirement of physical custody. A notional custody is sufficient for this purpose. The decision in *de Croos* may be explained on the basis that, while immediate physical custody of the children was in the Mother Superior, the notional custody inherent in the lawfully appointed guardian represented the essential interest which is contravened by the

346. At p. 252.
347. Exception to section 352 of the Penal Code.

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act of kidnapping. Similarly, in several cases where the custody held by the guardian lacked any element of immediacy, the courts of Ceylon have not hesitated to hold that the child was in the "keeping" of the guardian at the time the offence was committed. Thus, in *Shaik Adam*,[348] the accused met the girl some distance away from her parent's house but this was not held to affect the parent's custody of the girl. In *Nalliah* v. *Herat*[349] the child was leaving a church when the accused took her away. In *Murugesu*[350] the girl was walking home from school when the accused accosted her. *Brampy Singho*[351] was a case where the girl was bathing at a well some distance from her home at the time of her meeting with the accused. In all these cases, the victims were considered to have been in the "keeping" of their guardians at the relevant time.

The relationship between legal guardian and child is generally independent of volition or agreement. It emanates compulsorily from operation of law. Thus, the relationship between parent and child is established at birth. Neither party may repudiate the relationship at their option. In other cases, the court, as upper guardian of minors, has power to appoint a guardian on whatever terms it thinks fit. Similarly, the guardian of a person of unsound mind derives his authority from his appointment as guardian, duly made.

The concept of "keeping", in its present signification, contains a *de iure* quality. In *Nicholas Appu* v. *Serasin Appu*[352] the complainant found a little girl on the road and took charge of her. After she had been with him for two years, the accused was alleged to have kidnapped her. In appeal, Bertram C.J. said: "The child who is said to have been kidnapped was picked up by the complainant on the road, and was taken into his service. In point of fact, in his evidence, he explains that the complaint is that the accused has kidnapped his servant girl. The child, whose services are thus appropriated, cannot be said to be within the lawful guardianship of the person who so takes possession of her".[353] The relationship between the complainant and the child was of an entirely *de facto* character and failed to satisfy the requirement that the complainant should have lawful guardianship of the child. The conviction was set aside on this ground.

To the question whether the complainant himself may be indicted for kidnapping the child, the answer is likely to be in the negative, since the complainant who had found the child on the street, cannot be said to have taken her out of the keeping of the lawful guardian.

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348. (1888) 8 S.C.C. 161.
349. (1951) 44 C.L.W. 81.
350. (1961) 65 N.L.R. 11.
351. (1965) 69 N.L.R. 61.
351. (1922) 1 Times of Cey. 31.
353. At p. 31.

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(iii) It is a further requirement that the accused should have "taken" or "enticed" the child or person of unsound mind out of the keeping of the lawful guardian. In the interpretation of "taking" or "enticing", the primary consideration to be borne in mind is that the use of force or violence by the accused in order to effect the "taking" is not an essential ingredient. The child or other person may have come on his or her own at the behest of the accused. The word "enticing", in particular, covers a situation where the accused uses persuasion as a method of inducing the victim to accede to his wishes.

While force or violence on the accused's part is not necessary, some element of active responsibility for the child's leaving the keeping of its guardian must be attributable to the accused. This represents the minimum requirement of the law in this regard. There must be some kind of encouragement or prearrangement.

In *Shaik Adam*[354] the girl sent a message to the accused, inviting him to elope with her. He agreed and, the following morning, met her by appointment not far from her father's house. She left her home with her sisters on the pretext of going to school but presently left her sisters and joined the accused on a neighbouring road. On the basis of this evidence it was argued by Counsel for the accused that, since the girl was neither compelled nor threatened by the accused but went with him voluntarily—indeed, took the initiative herself in suggesting that he should elope with her—there was no "enticing", and also no "taking" on the part of the accused. While the court conceded that the girl left the house independently of the accused, there was still held to be a sufficient "taking" for this purpose. Clarence J. declared: "It is true that, in the present case, the girl had left her father's house with the intention of not returning, when the accused joined her and escorted her away, but her so leaving her father's house appears to have been the result of prearrangement with the accused, which makes all the difference".[355]

In *Don Stephen*[356] the second accused was the mother of the first accused. The second accused escorted the girl from her parents' house to a spot about one hundred yards away where the first accused met them. The first accused then invited the girl to come with him and to marry him. She accepted and accompanied him to his house where she remained until she was removed by the headman. The girl had left her home voluntarily with her clothes and jewellery. The District Judge stated, as one reason for acquitting the accused, that the girl

354. (1888) 8 S.C.C. 161.
355. At p. 162.
356. (1928) 6 Times of Cey. 34.

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went to the accused's house of her own accord without any inducement or threat being offered. In appeal, Schneider J., rejecting this view and remitting the case for trial, said: "The evidence in this case clearly proves that the girl was taken away from her parents' guardianship by both the accused. She left the house of her parents in the company of the second accused. One hundred yards away from that spot the first accused joined the two women and accompanied them to his house. Those facts constitute a 'taking' within the meaning of section 352 of the Penal Code".[357]

Kiri Banda[358] was a case where the accused and the girl had known each other all their lives. At the relevant time the girl was living with her father and stepmother. The accused, a distant relative of the girl's visited her home frequently and an intimacy grew between them. On one occasion they were surprised in the act of sexual intercourse, and thereafter the accused's visits ceased for some time. About a month later, the girl who did not get on with her stepmother, left the house one night, walked to the accused's home and asked him to take her away. As the accused's mother was unwilling to receive the girl, they set out together at dawn and hid in the jungle. The next evening, the accused hired a car and took the girl to his uncle's house.

On these facts the submission was pressed in appeal that the accused had not "taken" or "enticed" the girl, in the relevant sense. Maartensz J., refusing to accept this contention said: "Here is a case where a girl under sixteen years of age, whatever her appearance might be, leaves her house at eleven o'clock at night with all her clothes and jewellery to go to her lover. Is it conceivable that she would have taken that step without preconcerted arrangement with the accused? I do not think so. If the accused was embarrassed with the visit of the girl, all he had to do was to report the arrival of the girl to her parent, which he did not do. On the contrary, he concealed himself with her in the jungle and carried her away late the next evening. The only possible inference from these facts is, I think, that the accused persuaded the girl to elope with him and that she met him that night by arrangement".[359]

In English law the accused is not considered to have "taken" or "enticed" the child if the accused remained a passive party throughout the transaction.[360] It is probable that the law of Ceylon is to the same effect. Thus, in *Shaik Adam*'s case, Clarence J. referred to the English case of *Handley*[361] which

357. At p. 34.
358. (1925) 3 Times of Cey. 129.
359. At p. 130.
350. *Colville Hyde* 1950 Cr. L. Rev. 117.
361. 1 F. & F. 648.

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turned on the question whether the girl had not already left her guardian's keeping at the time the accused joined her. The acquittal of the accused in that case depended on evidence that the girl had left her guardian's house independently of the accused, so that she could not be said to have been taken by the accused out of her guardian's keeping. However, in Clarence J.'s view, the facts of *Shaik Adam*'s case were distinguishable from those of *Handley*[362]. Whereas, in the English case, the girl's decision to leave her home was in no way influenced by the accused, her resolve to do so in *Shaik Adam*'s case was due at least in part to the previous arrangement which had been arrived at between the girl and the accused. While the decision to leave her home was that of the girl in both cases, in the latter case unlike in the former, the accused was in some measure directly responsible for that decision.

Similarly, in *Don Stephen*, the accused's participation in the girl's decision was revealed by the fact that the accused's mother walked with the girl from her house and that the accused was waiting for them one hundred yards away. These circumstances clearly suggested the existence of a plan or design, in the conception and implementation of which the accused played a part. The girl's decision, consequently, had not been reached independently of the accused. The accused's involvement or complicity in the decision may be oblique or subtle, but this does not negative the element of a "taking" or "enticing". Thus, where the girl derives courage for the making of her decision from any promise or assurance held out by the accused, the necessary nexus between the accused and the girl's departure from her home would be established. In *Kiri Banda*[363] Maartensz J. said: "No doubt if a man finds a girl wandering about the streets—if she is old enough to look after herself—and induces her to remain with him, he cannot be guilty of the offence of kidnapping."[364] This is substantially similar to the effect of the ruling by the English court in *Colville Hyde*.[365]

The essential distinction in this regard is between cases where the accused has been instrumental in some form in bringing about the girl's decision and those where the girl herself has come to an entirely independent decision. It is submitted that, before there can be held to be no "taking" or "enticing", the accused must be presented with a *fait accompli*. The severance of the child from its guardian's custody must be an objective fact at the time the accused arrives on the scene. Where the child communicates her independent decision to the accused in these circumstances and calls on him to look after her the accused cannot be considered to have "taken" or "enticed"

362. ibid.
363. (1925) 3 Times of Cey. 129.
364. At p. 130.
365. See note 359, *supra*.

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the child merely because he does not remonstrate with her or try to persuade her to return home. The accused is not required to do this. However, the tenor of the judgments in the Ceylon cases suggests that any support or pressure from the accused before the girl takes a final decision, would expose him to liability. The Ceylon cases go far, in that they appear to suggest by implication that even sympathy or moral solicitude emanating from a subsisting relationship is a factor to be taken into account in deciding whether there has been a "taking" or "enticing", for the present purpose. This attitude would undoubtedly include in the notion of "taking" or "enticing", suggestions or advice offered by the accused. Moreover, the mere fact that the child has taken the initiative does not necessarily absolve the accused from responsibility if the accused has taken advantage of the child's lack of judgment or infirmity of judgment, or exploited his moral ascendancy to further his interest. The approach emerging from the Ceylon cases may on occasion be exceedingly stringent, although the broad rationale underlying this approach is clear.

As a practical matter, our courts have asserted that, in cases of kidnapping from lawful guardianship, where the girl alleged to have been kidnapped is called as a witness, her evidence as to the circumstances in which she left her home, should be received with caution. In *Kiri Banda*'s case Maartensz J. stated: "The girl, as a rule, shapes her evidence to protect her lover, and I think the court is justified in looking at the surrounding circumstances of the case to ascertain whether the version of the girl that she went of her own accord is true or whether, in the circumstances, that statement is inconsistent with the truth".[366] In this case, so Maartensz J. held, evidence to the effect that intimate relations had prevailed between the girl and the accused over a sustained period and that the accused had promised to marry the girl, supplied sufficient ground for concluding that he had enticed her away.

The courts of Ceylon have insisted repeatedly that the offence of kidnapping from lawful guardianship is not "a continuing offence". What is meant by this is that "the offence of kidnapping from lawful guardianship is completed when the minor is actually taken from lawful guardianship and it is not an offence continuing so long as he is kept out of such guardianship".[367]

The distinction entails consequences of practical importance, as is indicated by the decision in *Heppenstall* v. *Simon Singho*.[368] The court acted on the principle that there can be no abetment of this offence by conduct which commences only after the minor

366. At p. 130.
367. (1911) 14 N.L.R. 249 at p. 252, *per* Wood Renton J.
368. (1938) 2 C.L.J. 273.

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has been completely taken out of the guardian's keeping. A third party who intervenes at this late stage to offer material assistance to the person responsible for the kidnapping, incurs no liability since the offence is no longer in the process of being committed. However, completion of the taking or enticing may sometimes be a matter of degree.

In *Fernando* v. *de Silva*[369] the basis of the charge against the first and the second accused was that they acted in furtherance of a common intention in kidnapping a boy, aged eleven years. According to the evidence, the second accused, at Maradana, took the boy away from lawful guardianship. The first accused was not present in the vicinity when the boy was taken by the second accused who later handed over the boy to the first accused at Negombo. Manicavasagar J. observed: "The offence was complete when the second accused took the boy away; the handing over of the boy to the first accused at Negombo does not make him liable to a charge of kidnapping".[370]

With this ruling may be contrasted the decision in *Don Stephen*'s case.[371] There the leading of the child by the second accused from the parent's house and the handing over of the child by the second to the first accused at a spot one hundred yards away were construed as distinct stages of the same transaction of taking or enticing. The two acts, taken together constituted the taking or enticing of the child. Unlike in *Fernando* v. *de Silva*, the two events in *Don Stephen*'s case were not so clearly severable in regard to place, time and the relationship between the parties as to enable the court to say that the "taking" had already been completed by the first act before the subsequent act was committed.

(iv) Kidnapping from lawful guardianship requires that the taking or enticing of the child should have taken place without the lawful guardian's consent. The relevant consent, then, is not that of the child or other person but that of the guardian himself. In *Nalliah* v. *Herat*[372] Gratiaen J. said: "I agree that (the child's) so-called 'consent' to her alleged kidnapping would be immaterial. A child cannot validly consent to the substitution of some other person's control for the control which is exercised over her by her lawful guardian."[373]

The victim's consent does not preclude liability because the purpose of the law in recognizing the offence of kidnapping from lawful guardianship is to protect certain categories of exceptionally vulnerable persons against infirmities arising from their immaturity or lack of judgment. The rationale of the requirement in regard to want of consent by the guardian was

369. (1964) 68 N.L.R. 166.
370. At p. 167.
371. (1928) 6 Times of Cey. 34
372. (1951) 44 C.L.W. 81
373. At p. 83.

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KOHA JPL

cogently expressed by Clarence J. in *Shaik Adam*'s case: "As long as the girl is under the statutory age, no amount of forwardness on her part will prevent the person taking her away from being guilty of the offence created by the statute . . . . This is, to my thinking, an eminently sensible reading of the enactments, and to adopt any other would be to render such enactments powerless in some of the very cases most of all requiring their operation . . . . To rule otherwise would be to deprive the enactment of a large part of the effect it was designed to exercise in protecting females of tender age, not merely from force or fraud, but from results of their own immature judgment and unreasoning impulses".[374]

Similarly, in *Don Stephen*'s case, the fact that the girl went to the accused's house of her own accord was held not to affect his liability. Since the element relating to absence of the guardian's consent is part of the definition of kidnapping from lawful guardianship, this element has to be established by the prosecution beyond a reasonable doubt.

The four elements which have so far been considered are referred to *ex facie* the statutory definition of kidnapping from lawful guardianship. However, the judgment of Gratiaen J. in *Nalliah* v. *Herat* seems to have the effect of adding a further element to the requisites of liability for this offence. In this case, the accused was charged with kidnapping a girl aged thirteen and a half years. The facts were as follows: The girl was leaving the precincts of a church one afternoon when the accused met her. He invited her to go with him to a cinema as his guest. She joined him in a bus, having parted company with her sister who went home alone. On the way to the entertainment they had some refreshments at the accused's expense at a "buriyani" shop. There was a conflict of testimony as to what took place after they had taken their seats at the cinema. The girl complained that, after the lights went out, the accused put his arms around her and acted improperly towards her. She was considerably upset, she maintained, and wished to leave the cinema immediately. According to her version, the accused then took her away but instead of accompanying her home direct, he took her by force to the Galle Face green and, taking advantage of the darkness, sexually molested her. This part of the girl's story was vigorously denied on oath by the accused. He insisted that the whole transaction was perfectly innocent, that he was kindly disposed towards the child and that his only motive was to give her a pleasant "outing" until it was time for her to return to her mother and for him to return to his wife.

In appeal, Gratiaen J. held that since the girl's evidence in

374. (1888) 8 S.C.C. 161 at p. 163.

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regard to the use of criminal force on her person by the accused had been disbelieved by the Magistrate, this evidence could not be taken into account for any purpose whatever in connection with the kidnapping charge. In the picturesque phrase of the learned judge, the alleged acts in the cinema and at Galle Face green could not be considered "because one's vision is blurred, so to speak, by the impenetrable 'smoke screen' set up by the order of acquittal on the second count".[375]

The vital part of the judgment of Gratiaen J. consists of the following passage: "Can it be said that a person necessarily 'kidnaps' a young girl by merely taking her to a cinema show without her guardian's express consent but without the proved intention of depriving the girl of her unrestricted freedom to return to her guardian's protection whenever she chose to do so? I do not think so. It seems to me that in such a case the girl has not, even temporarily, left her mother's 'keeping'. Where a minor leaves the immediate custody of his lawful guardian for a temporary purpose, he must be deemed to be still in the guardian's keeping, and the correct view is that the relationship between guardian and child suffers no break in its continuity *so long as there is no interference with the child's opportunity of returning to the guardian.* The offence of kidnapping would have been complete if she had been forced or enticed away for an improper purpose."[376]

The effect of this approach is that a distinction is made between a "proper purpose" and an "improper purpose" for which the child is enticed away. According to this view, if the purpose is "improper", the taking or enticing is established at the time when the child joins, or goes away with, the accused. But where the purpose is a "proper" one, the child's act in accompanying the accused does not amount to a "taking" of the child by the accused. This element, in the opinion of Gratiaen J., is satisfied only when the child is prevented from returning to her guardian. In the absence of such prevention or interference, there is no severance of parental custody. On this view of the law, Gratiaen J., said: "I am logically compelled to hold that the offence of kidnapping has not been made out because the person of the minor has not been proved to have been transferred from the custody of her guardian into the custody of some person not entitled to her custody".[377] The reason was that the child was at liberty to return to her parent whenever she wished to do so. Accordingly, the conviction of kidnapping was quashed and the accused acquitted.

If, then, the approach favoured by Gratiaen J. is adopted, the crucial issue in all cases other than those in which a demonstrably

375. (1951) 44 C.L.W. 81. 376. At p. 83
377. ibid.

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improper motive may be attributed to the accused, is whether there was any restraint or confinement of the child in such a manner as to prevent her return to the guardian.

However, the difficulties inherent in this approach are convincingly exposed in the later case of *Brampy Singho*.[378] On the day of the incident the girl had left home with her little brother to bathe at a well some distance away. After the girl had bathed and worn her frock, the accused who was quite well known to the girl, came to the well and asked the little boy to go home. He thereafter invited the girl to come with him and pick firewood. The girl accompanied the accused to some land near a stream, and there both picked up firewood. After some little time, the accused placed a gunny sack on a rock and, having made the girl lie on the sack, he used criminal force on her.

An examination of the charge to the jury by the Commissioner of Assize indicates clearly that the dicta by Gratiaen J. were uppermost in his mind. The direction by the Commissioner was as follows: "If, at any time, (the girl) could have returned to her guardian, then there was no restraint of her freedom and there was no interference with the custody of the guardian, but if she was taken and if she did not have the opportunity of returning to her guardian at any moment she wanted, then there was an interference and there was a taking away from the keeping of her guardian, but it is not a matter of how long or short a time her freedom was restricted. The time may be ever so short, still if she was taken away even for a brief period of time, if her freedom to return to her guardian was interrupted or restricted, then there was a taking away from the keeping of her guardian."[379]

This approach involves some confusion between the elements of criminal force and of kidnapping. In any situation where criminal force is used on a child with intent to outrage her modesty, some degree of restraint is necessarily involved. But this degree of restraint does not invariably support a charge of kidnapping. The objective, towards the attainment of which the restraint was used, judged in the light of the surrounding circumstances, constitutes the governing consideration. There are cases in which the restraint employed is integral to the offence of using criminal force but is entirely extrinsic to the province of kidnapping. In *Brampy Singho*'s case H. N. G. Fernando S.P.J. cited, as an illustration, the case of a child who is held by the hand or shoulder with the object that she may be slapped or reprimanded.[380] In this case, there is momentary interference with the child's freedom of movement and,

378. (1966) 69 N.L.R. 60 379. At pages 61-62. 380. At. p. 62

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consequently, with her freedom to return to her guardian. However, while the circumstances may be sufficient for a conviction of wrongful restraint, using criminal force or assault, the suggestion that the accused may be indicted for kidnapping, is clearly without foundation.

The contrary view leads to absurdity. In almost every case where a child is sexually molested, there is such a degree of restraint as is incidental to the use of criminal force. If restraint in these circumstances is held to amount to a denial of the child's freedom to return to her guardian at will, it would follow that the use of criminal force on a child with intent to outrage her modesty, entails of necessity a conviction of kidnapping from lawful guardianship.

However, the two offences are entirely distinct in regard to their scope and essential elements. Thus, there can be situations where criminal force is resorted to for the purpose of a sexual assault, with accompanying restraint, but where it is impossible to say that there has been any severance of parental custody or control. In *Brampy Singho*'s case, Counsel for the accused suggested, as an example, the case where a child is molested in her own home and is momentarily restrained in the course of the molestation.[381] Here restraint and the use of criminal force are proved, but not in circumstances which warrant imposition of liability for the separate offence of kidnapping.

The offence of kidnapping from lawful guardianship may be committed without any use or show of force or any intention to take advantage of the victim sexually. These elements do not inhere in the indispensable requisites of kidnapping. They only have the effect of enhancing the penalty for kidnapping, provided that the requirements of kidnapping have already been proved *independently* of these elements. Where kidnapping is already proved to have taken place, the *extraneous* element of an intention to outrage the victim's modesty heightens the gravity of the offence. But where the offence of kidnapping has not been established independently, by reference to the elements emerging from the definition of that offence, the existence of an intention to outrage a young girl's modesty and the use of force in furtherance of this intent, entailing inevitably the momentary imposition of restraint, do not in themselves supply the basis of a conviction of kidnapping. The use of criminal force and kidnapping from lawful guardianship are both offences which usually involve, as part of their *facta probanda*, the use of some measure of restraint. But the restraint envisaged by kidnapping amounts to a great deal more than the restraint which

381. At p. 62.

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is ordinarily attendant on the application of criminal force during a sexual assault.

In *Brampy Singho*'s case, both the trial judge and the Court of Criminal Appeal expressed the view that the girl could not be considered to have been enticed away from the custody of her parents at the commencement of the incident when the accused invited her to come and pick firewood with him.[382] The question, then, was whether the restraint used by the accused at a later stage for the purpose of committing the sexual offence was tantamount to interference with the girl's freedom to return to the protection of her guardian and so represented a "taking", in the context of kidnapping. Answering this question in the negative, H. N. G. Fernando S.P.J. observed: "Such restraint as the accused did impose on the girl in this case was only incidental to the offence of using criminal force."[383] Moreover, it was said that, where the charge is one of kidnapping a young girl from lawful guardianship in order that she may be subjected to unnatural lust,[384] "The kidnapping has to be 'in order to' or 'with intent to' the commission of some other act, so that the act of kidnapping must be completed before the other act is committed, and can be completed even if the other intended act is not actually committed".[385]

The essential objection to a conviction of kidnapping from lawful guardianship, on the facts of *Brampy Singho*'s case, is that the elements of kidnapping had not all been established at the time the other act was committed, and the latter act was sought to be availed of to make good some of the deficiencies in regard to proof of kidnapping. The Court of Criminal Appeal correctly held that this was not a permissible course.

The source of the confusion is the attempt by Gratiaen J. in *Nalliah* v. *Herat* to superimpose the element of impropriety of purpose or motive on the statutory requisites incorporated in the definition of kidnapping. It is submitted, however, that the reprehensible character or otherwise of the accused's motive in escorting or enticing the child is altogether irrelevant to the question whether there has or has not been a "taking" of the child out of the guardian's keeping. It is difficult to support logically the dichotomy between the rules which Gratiaen J. thought applicable to situations where the accused's purpose was or was not innocuous. The distinction which Gratiaen J. purported to accept does not really emerge from interpretation of the element of "taking out of the guardian's keeping" but assumes the character of an additional element which, as was seen in *Brampy Singho*'s case, could readily give rise to anomalous results.

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382. At p. 61 383. At p. 62. 384. Penal Code, section 357.
385. (1966) 69 N.L.R. 60 at p. 62.

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In *Nalliah* v. *Herat*, the basis of the accused's acquittal on the charge of kidnapping was that the girl's evidence as to what transpired at the cinema and subsequently on Galle Face Green could not be drawn upon directly or indirectly to sustain the charge of kidnapping. The tenor of the judgment suggests that Gratiaen J. would have been persuaded to adopt the contrary view of the girl's evidence as to these matters was capable of legitimate use in regard to the charge of kidnapping.

This view of the law is open to cogent criticism, however. Taking for granted that the accused restrained the girl at the cinema and thereafter for the purpose alleged, this does not justify a conviction of kidnapping if the restraint was only incidental to the use of force for the purpose of the sexual assault and was nothing more. Even if it were assumed that the girl's testimony was true, it does not follow that a conviction of kidnapping could have been sustained on the facts of *Nalliah* v. *Herat*. It may be submitted that, although Gratiaen J. based his order of acquittal on a narrower ground which had to do with reliability of evidence, the acquittal could probably have been supported on a broader ground which involved the fundamental requisites of liability. The Court of Criminal Appeal, in *Brampy Singho*'s case, made no reference to *Nalliah* v. *Herat*, but some aspects of the approach by Gratiaen J. would seem to be vitiated effectively by the judgment in the later case.

At the same time, the distinction drawn by Gratiaen J. between a proper and an improper motive on the part of the accused and the learned judge's insistence on interference, albeit momentary, with the child's freedom to return to her guardian in the former case derive from an intelligible attitude. If the same approach were to be adopted to the case of a man who takes a child out to a film show without her guardian's consent entirely from generous and kindly motives, and to that of one who does so for sinister reasons, the result would naturally offend one's sense of justice. These cases certainly require to be distinguished, and indeed are capable of being readily distinguished, under the provisions of the Penal Code. But the distinction has to be established in the light of provisions other than those governing the offence of kidnapping.

Whatever may be the accused's motive for enticing or taking the child—whether it is benign or depraved—liability for kidnapping from lawful guardianship is compulsorily imposed no sooner than the four elements of the statutory definition are proved. There is no warrant for expansion of these requisites by introducing an element based on the quality of the accused's motive. In the circumstances of *Nalliah* v. *Herat*, if the girl's version of the events at the cinema and at Galle Face green had

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been accepted by the court, the accused would have been held guilty of the offences of rape, wrongful restraint, use of criminal force on a girl with intent to outrage her modesty and, possibly, assault. Thus, exacting penalties are necessarily visited upon the turpitude characterizing the accused's conduct. But the offences he has committed, although punishable under other provisions, have no connection with the distinct requirements of kidnapping. In ordinary circumstances, there would be no need to resort to the penal provisions which deal with kidnapping, since penalties for other offences are available in a situation of this kind. *Nalliah* v. *Herat*, however, was a case where all but the comparatively trivial among the offences enumerated above were excluded by the evidence and by the trial judge's inferences from the evidence. This probably accounts for the attempt by the prosecution to support the conviction of kidnapping before the appellate tribunal.

In *Nalliah* v. *Herat* the charge of rape was abandoned at a preliminary stage because of the medical evidence which was conclusive on this point, and the accused was acquitted on the charge of using criminal force. In these circumstances, there was clearly no justification for falling back on the offence of kidnapping from lawful guardianship as a last resort.

As to the essentials of kidnapping, the final question to be considered is whether genuine belief by the accused that the person alleged to have been kidnapped did not belong to one of the three categories specified in the section, would operate as a bar to the recognition of liability. For example, where the person taken away by the accused is a girl of sound mind, she has necessarily to be below sixteen years of age if the accused is to be convicted of kidnapping.

What if the accused believed in good faith that the girl was eighteen? Our law and English law are both quite clear in their effect that the liability of the accused is left intact. In Ceylon the question is whether the accused, in these circumstances, is entitled to the benefit of a general exception from criminal responsibility—namely, section 72 of the Penal Code which provides that "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it." In *Shaik Adam*'s case it was held that this provision is inapplicable to the case in hand, because even where the mistake of fact was made in good faith, the accused cannot be said, in consequence of his mistake, to have believed himself *justified* by law in taking the girl. The applicable principle, then, is that the accused acts at his peril and that a mistake on his part, even though based on reasonable grounds, does not provide a means of exculpation.

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This approach is defensible. Construction of the definition of kidnapping indicates that no particular motive is essential, the relevant constituent being that the taking of the child should have occurred without the guardian's consent. The general exception from criminal liability embodied in section 72 of the Penal Code would appear inapplicable in this context. A rationale for rejecting a defence based on a mistake as to the child's age was formulated by Clarence J. in *Shaik Adam*'s case: "Suppose the defendant to have really believed this girl to have been about eighteen, is that what the Code contemplates is a belief that he was by law justified in taking her out of her father's guardianship? I think not. So long as she was a minor, the father had a right to her guardianship, and although if she was so old as eighteen the taking of her away therefrom would not be an offence under section 354, no man could be said to be justified by law in taking her away against the guardian's will." In *Shaik Adam*'s case Clarence J. held that the reasoning in the English case of *Prince* was applicable in Ceylon.

However, a bona fide error entertained by the accused may relate not to the victim's age but to some other element of the offence—for example, that the child should be in the keeping of a lawful guardian. What if the accused believed that the child was not subject to anyone's guardianship? The effect of *Prince*'s case was to exclude a particular kind of error from the ambit of a valid defence, but nothing was said about other kinds of mistake. The Ceylon cases, too, deal only with a mistake as to the child's age and hold that a mistake of this nature is irrelevant to liability. Thus, there is no binding authority which requires exclusion of a mistake in regard to the existence of lawful guardianship.

Two views are possible as to this matter. Principle and analogy, however, would probably suggest that such a mistake is more relevant to exemption from liability than a mistake as to the child's age, which may not be treated as *in pari materia*. The question whether the accused considered himself legally *justified* in taking the child away would arise. In exceptional cases where this question is capable of being answered in the affirmative, a ground of exoneration may be established.

The difference between wrongful restraint and criminal force, on the one hand, and kidnapping from lawful guardianship, on the other, may be indicated briefly at this stage:

(i) Wrongful restraint and, *a fortiori*, wrongful confinement are not necessary elements of kidnapping from lawful guardianship. Wrongful restraint presupposes that a person attempted to proceed in a particular direction in which he had a right to

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proceed and that he was obstructed by the accused. However, the child in respect of whom the offence of kidnapping is alleged to have been committed, may have shown no inclination to leave the *de facto* custody of the kidnapper, and indeed may have taken the initiative in suggesting that the accused should take him or her away. Once this is done, the child may be willing or even anxious to stay away from the custody or control of the lawful guardian.

It is quite possible that the offence of kidnapping from lawful guardianship is committed in these circumstances, although wrongful restraint and wrongful confinement are ruled out. This represents one of the difficulties about the proposition laid down by Gratiaen J. that, where the initial purpose of the accused in taking away the child is not necessarily improper, interference with the child's freedom to return to its guardian must be proved before liability can be imposed for kidnapping from lawful guardianship. It would appear consistent with this view that the success of the charge of kidnapping should depend on the question whether the child wished, at any time, to return to her guardian or not. But the presence or lack of this disposition in the child is altogether irrelevant, since the basic object underlying recognition of the offence of kidnapping from lawful guardianship involves protection of the child from the consequences of its own immaturity and want of discretion.

(ii) Similarly, the use of criminal force cannot be identified as a necessary feature of kidnapping from lawful guardianship, since the latter offence may or may not entail the use of criminal force. Where the child is willing to accompany the accused of its own accord, the need to resort to criminal force would not arise, but this consideration does not exclude a conviction of kidnapping from lawful guardianship.

While the usual punishment for kidnapping is imprisonment of either description for a term which may extend to seven years, and also a fine,[386] this punishment may be enhanced on account of the purpose for which the kidnapping is effected. Thus, the offence is aggravated where the kidnapping has been done in order to murder the victim,[387] with intent secretly and wrongfully to confine him,[388] in order to compel a female victim to marry,[289] or in order to subject a person to grievous hurt or slavery.[390] Wrongfully concealing or keeping in confinement a person known to have been kidnapped,[391] kidnapping a child under ten years of age with intent to steal movable property from the person of such child,[392] procuration,[393] buying or disposing

386. Penal Code, section 354.
387. Section 355.
388. Section 356.
389. Section 357.
390. Section 358.
391. Section 359.
392. Section 360.
393. Section 360A

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of any person as a slave,[394] and habitual dealing in slaves[395] are distinct offences which are made punishable by separate provisions.

A principle which needs to be stressed in this connection is that, where the gravity of the offence is sought to be heightened by reference to the purpose of the kidnapping, *all* the constituents of kidnapping from lawful guardianship must *first* be established and the particular object which the accused hoped to attain by carrying out the kidnapping must *next* be proved. Both aspects are essential prerequisites of liability for the aggravated offence. However, the actual accomplishment of the object which the accused had in mind is not necessary. All that is required is that the intention to achieve this purpose should be entertained at the time the constituents of kidnapping are satisfied *in toto* and that the kidnapping should have been done with a view to, or as a means of, attaining the desired objective.

(B) *Abduction*

The essence of abduction lies in inducing or compelling any person to go from one place to another, in one of the following ways: (i) by force; (ii) by abuse of authority or any other means of compulsion; (iii) by means involving the use of deceit.[396]

The offence of abduction is aggravated in circumstances where the compelling or inducing of the victim has been done for any one of the following purposes: (i) to murder the victim;[397] (ii) to confine him secretly and wrongfully;[398] (iii) to compel the marriage of a young girl;[399] (iv) to subject the victim to grievous hurt or slavery.[400] Wrongfully concealing or keeping in confinement a person known to have been abducted,[401] abduction of a child below ten years of age with intent to steal movable property from the person of such child[402] and procuration[403] are recognized as separate offences.

Here, again, where the offence is sought to be aggravated because of a special purpose or objective, it must be proved that the purpose was entertained *at the time* inducement or compulsion of the victim took place. Thus, the fact that the purpose was not in fact accomplished does not negative liability for the aggravated offence, so long as the abduction is proved to have been committed with this end in view. Conversely, the fact that the purpose was actually accomplished does not suffice for a conviction of the more serious offence if the purpose was not entertained at the time of the abduction.

394. Section 361.
395. Section 362.
396. Section 353.
397. Section 355.
398. Section 356.
399. Section 357.
400. Section 358.
401. Section 359.
402. Section 360.
403. Section 360A.

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This principle is reflected in the case law. In *Wegodapola*[404] the accused was convicted of abducting a woman in order that she may be forced to illicit intercourse under section 357 of the Penal Code. On the question whether the accused intended to use force for the purpose of illicit intercourse, at the time the abduction took place, the trial judge directed the jury as follows: "(The accused) goes further in his statement and says that he had intercourse. So you would not have much difficulty once you find that he abducted her, to say that he did so in order that she may be forced to illicit intercourse."[405] In another part of his charge to the jury, the trial judge said: "According to (the accused's) own statement, he not only made the attempt but he succeeded in the attempt."[406] The Court of Criminal Appeal held that this direction was erroneous. Howard C.J. observed: "Once again from the admission by the accused that intercourse took place, the jury are invited to find that there was an intention to force to illicit intercourse. I do not consider that such an intention can be inferred.... The majority of the Court are of opinion that, in spite of the matter being left to the jury, the invitation by the learned judge to draw the inference I have mentioned amounted to misdirection."[407]

In *Murugesu*[408] one of the charges was the same as that in *Wegodapola*. Delivering the judgment of the Court of Criminal Appeal, Sansoni J. said: "One complaint made against the summing up was that the learned Commissioner, in dealing with the question of intention which the accused should have had before they could be found guilty of the offence, told the jury that there was a common sense principle that a man intends the natural consequences of his acts. It would have been better if he had told them that the actual intention of the abductors could be inferred from the circumstances such as the time and manner of removal, the number of persons engaged in the enterprise, whether the girl protested or not, whether force was used or not."[409] The mere fact that intercourse did not actually take place, Sansoni J. held, is no reason to conclude that the abduction was not effected in order to compel illicit intercourse. The court declared: "The offence of abduction with the necessary intention was complete, whether or not the rape was committed. Whether intercourse took place or not subsequent to the abduction, or even if the girl had intercourse willingly with the accused the proved circumstances under which her removal took place, were sufficient."[410]

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404. (1941) 42 N.L.R. 459.
405. At p. 466.
406. At p. 465.
407. At p. 466.
408. (1961) 65 N.L.R. 11.
409. At p. 16.
410. ibid.

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(C) *Kidnapping and Abduction Compared*

The offence of "kidnapping from Ceylon" has already been distinguished from that of "kidnapping from lawful guardianship".

The following differences between "kidnapping from lawful guardianship" and "abduction" may be noticed:

(i) Only three specified categories of persons—namely, males under the age of fourteen years, females under the age of sixteen years and insane persons—may be victims of the former offence, while any person at all may be abducted.

(ii) The former is essentially an offence against guardianship while, in the latter case, there need be no guardian.

(iii) The relevant consent is that of the lawful guardian in the former case and that of the victim in the latter.

(iv) The latter offence, unlike the former, involves as a constituent the use of compulsion, deception or force, in some form.

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CHAPTER 7

SEXUAL AND MARITAL OFFENCES

1. BIGAMY

The definition of bigamy in Ceylon is contained in section 362B of the Penal Code which declares that "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

Three requisites are incorporated in this definition: (i) The accused, at the time of his second marriage, should already have a spouse living; (ii) The accused should have purported to marry a second time during the subsistence of the previous marriage; and (iii) The second or later marriage should be void on the ground that it had taken place while a previous valid marriage remained undissolved.

(i) A previous marriage recognized by law should exist. All that is required is that the earlier marriage should be a legally valid marriage. No special form of marriage is essential. Thus, there is no doubt that a customary marriage is sufficient for this purpose. Even a marriage by repute should be adequate, provided that the existence of the marriage is established by reliable evidence.

In *Perumal*[1] the accused was a Hindu who was alleged to have contracted a polygamous marriage. The first marriage was a customary marriage, and there was some doubt whether the *Kurai* ceremony—which was said to be an essential part of the marriage ceremony—had been performed at the relevant time. However, the court acted on the testimony of a witness who deposed that everything that was necessary to constitute a valid marriage had been done. In appeal, Lascelles C.J. observed: "The fact of a marriage ceremony having been proved, it was, in my opinion, incumbent on counsel for the accused, if he relied upon the omission of any essential detail in the ceremony, to make good his point, and to show that the omission had in fact taken place."[2] Middleton J., following an Indian case,[3] laid down the principle that "When the fact of the celebration of the marriage is established, it will be presumed in the

1. (1911) 14 N.L.R. 496.
2. At p. 503.
3. At p. 507.

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absence of evidence to the contrary that all the necessary ceremonies have been complied with."[4] The applicable principle, then, would appear to be not merely that the first marriage can be a customary marriage but that, when celebration of the marriage is proved, its validity is presumed until the contrary is established by any party who seeks to impugn the initial marriage.

A subsidiary question relates to the mode of proof of the first marriage. The General Marriage Registration Ordinance[5] contains provision that "The entry made by the Registrar in his marriage register book...shall constitute the registration of the marriage, and shall be the best evidence thereof before all Courts and in all proceedings in which it may be necessary to give evidence of the marriage."[6]

Where the first marriage is registered and the Registrar's entry in the marriage register is available as evidence of the marriage, no difficulty arises. However, where there is no evidence of registration of the marriage, and the prosecution seeks to prove the existence of the marriage by other means, the question is whether oral evidence may be received for this purpose.

This question arose for decision in *Nonis*.[7] The accused was charged with bigamy. The prosecution did not produce the entry in the register as proof of the accused's first marriage but the first wife and the officiating priest testified that the marriage had taken place. It was contended on behalf of the accused that the reception of such evidence was inconsistent with the terms of section 38(1) of the General Marriage Registration Ordinance.[8]

It may be noted that the legal requirement, so far as the offence of bigamy is concerned, is that the first marriage should have been contracted, and not necessarily that it should also have been registered. Thus, since registration is not always a condition precedent of validity of a marriage in Ceylon, registration, as such, cannot be treated as a *factum probandum* in this context.

The law of Ceylon recognizes a distinction in this regard between marriages registered under the General Marriage Registration Ordinance[9] and those registered under the Kandyan Marriage Ordinance.[10] In the latter case, there is explicit statutory provision which renders a marriage void unless it is registered in the manner prescribed by the Kandyan Marriage

4. ibid. 5. Chapter 112, Legislative Enactments (1956 ed.)
6. Section 41 (1), earlier section 38(1).
7. (1947) 35 C.L.W. 84. 8. See note 6 *supra*.
9. ibid.
10. Chapter 113, Legislative Enactments (1956 ed.).

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Ordinance.[11] Significantly, no comparable provision is contained in the Marriage Registration Ordinance. The Muslim Marriage and Divorce Act,[12] too, provides that "Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage...which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage belong."[13]

Where the marriage has not taken place under the aegis of the Kandyan Marriage Ordinance,[14] the view has prevailed conclusively in Ceylon that the validity of the marriage is not affected by want of registration. In *de Silva* v. *Shaik Ali*[15] Withers J. observed: "A marriage duly solemnized...must be taken to be good and valid in law."[16] In this case a marriage was proved to have been solemnized but not registered under the General Marriage Registration Ordinance. The court stated: "The attempt to prove later marriages...did not destroy the *prima facie* case of a legal marriage. If they were contracted, they were bigamous."[17] Bonser C.J. endorsed this conclusion.[18]

Taking for granted, then, that registration of the first marriage is not an essential requisite of validity except in the case of marriages governed by the Kandyan Marriage Ordinance, the question remains whether evidence derived from matters other than registration may be availed of to establish the existence of the first marriage. The meaning of the words "best evidence" in section 38(1) of the General Marriage Registration Ordinance has been elucidated in a series of cases.

In *Mampitiya* v. *Wegodapola*[19] Bertram C.J. and Ennis J. were concerned with the interpretation of the words "best evidence" in the Kandyan Marriage Ordinance, No. 3 of 1870, which provides that the entry in the register shall be the best evidence of the marriage and of the other facts stated therein.[20] Their Lordships held that the words, in this context, were used in the English law sense and excluded all evidence of an inferior character.

However, in *Seneviratne* v. *Halangoda*[21] de Sampayo J. made the following comment on *Mampitiya* v. *Wegodapola*: "I certainly accept this ruling with regard to the Kandyan Marriage Ordinance, because under section 11 of the Ordinance registra-

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11. Section 27(1), earlier section 8.
12. Chapter 115.
13. Section 16.
14. Note 10 *supra*.
15. (1895) 1 N.L.R. 228.
16. At p. 236.
17. At p. 237.
18. At p. 232.
19. D. C. Kandy 27, 829 (S. C. minutes, June 20, 1921).
20. Section 39, now section 28(1).
21. (1921) 22 N.L.R. 472.

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tion is the only valid form of marriage for Kandyans[22] and, further, because section 39 itself indicates the exceptional case in which oral evidence may be admitted.[23] But I do not think that this interpretation can be extended to other enactments, such as the General Marriage Registration Ordinance, No. 19 of 1907, in section 39(1) of which[24] the same expression 'best evidence' occurs."[25]

In view of the compulsory requirement of registration imposed by the Kandyan Marriage Ordinance but not by the General Marriage Registration Ordinance, this distinction as to the meaning of "best evidence" in these distinct contexts, is inherently sound.

This phrase, as used in the General Marriage Ordinance, was construed by Windham J. in the following manner in *Nonis*:[26] "The registrar's entry of the marriage in the register shall prevail over any other evidence as to the marriage in case of conflict, i.e. conflict as to whether the marriage was celebrated at all or as to its character or any particulars regarding it. It would thus prevail as a matter of law over the evidence of an accused in a bigamy charge who denied the marriage. But if the registrar's entry is not produced, whether or not the marriage was in fact registered...the marriage may be proved by any other evidence affording strict proof and this would include the evidence of an eye-witness."[27] Accordingly, Howard C.J. and Windham J. held that, in the absence of registration, oral evidence of the first wife and of the officiating priest had been properly admitted and accepted in proof of the first marriage. This view, it is submitted, needs to be departed from only in the case of marriages to which the provisions of the Kandyan Marriage Ordinance apply.

In regard to the first element—that there should be a subsisting marriage—the following conclusions may be submitted: The validity of the previous marriage depends on the personal or other law to which the accused is subject. The tenets of different personal laws have to be resorted to in this connection. The resulting position is that (a) in the case of all marriages other than those governed by the Kandyan Marriage Ordinance, registration is not a prerequisite of validity, and (b) again subject to an exception in regard to marriages contracted under the Kandyan Marriage Ordinance, the solemnization of a marriage may be established by oral or other informal evidence.

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22. Now section 27(1). 23. Now section 30.
24. Now section 28(1).
25. (1921) 22 N.L.R. 472 at pages 473-474.
26. (1947) 35 C.L.W. 84.
27. At p. 85.

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(ii) The second component of bigamy is that the accused should purport to marry, notwithstanding that his or her spouse is living. This requirement is satisfied by the accused's going through the motions of a marriage—for example, participating in a ceremony where the purported marriage is a customary marriage or observing the procedure for solemnization of a marriage specified in the General Marriages Ordinance.[28] The substance of the legal requirement in this regard is that the accused should perform the *facta* which would result in a marriage, but for his lack of capacity in view of the subsisting marriage. Only in the event of establishment of these *facta* can the accused be said to "marry" a second time within the meaning of section 362 B of the Penal Code.

(iii) The final element is that the subsequent marriage should be void by reason of its taking place during the subsistence of an earlier valid marriage. In determining whether the subsequent marriage is "void", difficulties arise in Ceylon from the circumstance that there are in operation in the Island a multiplicity of legal systems by which different sections of its people are governed. It may thus become necessary to consider the content of personal laws as a means of deciding whether the later marriage, during the lifetime of the previous husband or wife, is void or not. The answer may turn on the personal law applying to the individual indicated for bigamy.

A relevant provision of law in this regard is that contained in section 18 of the General Marriage Registration Ordinance: "No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void". "Marriage" is defined in the Ordinance as "any marriage save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act[29] and except marriage contracted between persons professing Islam".[30]

Where the accused was not subject, at the time of the first marriage or the subsequent marriage, to a personal law which permits bigamy or polygamy,[31] no difficulty is encountered. The simple proposition may be supported in these circumstances that a later marriage contracted while the previous marriage remains valid, is ineffective. However, exceptions are statutorily recognized in the case of (a) Kandyan marriages, and (b) Muslim marriages. In regard to exception (a), it must be noted that although Kandyan marriages are specifically excluded

28. Sections 34 and 35 of the General Marriages Ordinance (Cap. 112).
29. Cap. 113, Legislative Enactments (1956 ed.).
30. General Marriage Registration Ordinance, section 64.
31. These are not distinguished for the present purpose by the criminal law.

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from the ambit of section 18 of the General Marriage Registration Ordinance, a Kandyan is not free to marry a second time while the first marriage is subsisting, since the Kandyan Marriage and Divorce Act[32] declares invalid a second marriage under the Act where the spouse of the previous marriage is alive and the *vinculum matrimonii* remains intact.[33] By contrast, a comparable restriction does not apply to exception (b), in that Muslims are excepted from the scope of section 18 of the General Marriage Registration Ordinance but, in their case, a subsequent marriage[34] during subsistence of the previous marriage is not precluded by a separate provision of law. The real exception, then, under our law, is confined exclusively to Muslims.

In the result, the question whether the later marriage is void on account of the existence of a previous valid marriage may admit of some complexity in circumstances where the accused was a Muslim[35] either at the time of the initial marriage or when the later marriage was contracted. Two situations warrant separate treatment in this regard: (A) The accused contracts a marriage under the general law in accordance with rites other than those pertaining to the Muslim faith and later marries under the provisions of the Muslim Marriage and Divorce Act[36] which applies compulsorily to marriages between Muslims—notwithstanding that the previous marriage is subsisting and had not been dissolved in a manner recognized by the general law; and (B) The accused is an adherent of the Muslim faith at the time of his first marriage but subsequently renounces Islam and marries a second time under the general law while his previous marriage is subsisting. These situations will be discussed in turn.

(A) The first situation is exemplified by the facts of *Attorney-General* v. *Reid*.[37] The accused was convicted of bigamy by a District Court but his conviction was set aside in appeal by three judges of the Supreme Court. The acquittal was duly confirmed by the Privy Council.

At the argument before the Judicial Committee, the main obstacle confronting the Crown was that the statute law of Ceylon expressly removed a marriage contracted under the Muslim Marriage and Divorce Act from the scope of the definition of "marriage" embodied in the General Marriage Registration Ordinance,[38] with the consequence that a pre-existing Muslim marriage could not be held "void" under section 18 of

32. See note 29, *supra*.
33. *Attorney-General* v. *Reid* (1963) 65 N.L.R. 97 at p. 99.
34. Four wives are allowed by customary Muslim law.
35. This denotes a religious community—i.e. adherents of Islam—irrespective of race.
36. Cap. 115, Legislative Enactments (1956 ed.).
37. (1964) 67 N.L.R. 25.
38. Section 64.

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the General Marriage Registration Ordinance. In the Supreme Court, Basnayake C.J. (with whom Abeysundere and G. P. A. Silva, JJ. agreed) held: "Persons professing Islam can now marry only under the Muslim Marriage and Divorce Act, so that marriages under that Act are not marriages within the definition of the expression 'marriage' in the Marriage Registration Ordinance."[39]

Assailing the acquittal of the accused by the Supreme Court, Counsel representing the Attorney-General, in his argument addressed to the Privy Council, sought to circumvent this difficulty by contending that, although there are three statutory enactments dealing with marriage in Ceylon—the General Marriage Registration Ordinance, the Kandyan Marriage and Divorce Act and the Muslim Marriage and Divorce Act—general principles independent of these statutory provisions must be applied to ascertain whether the parties, as a consequence of their first marriage, acquired a status which rendered them incapable of validly marrying again until the first marriage was lawfully terminated.[40] In the submission of Counsel for the Crown, this question had to be answered in the affirmative. The substance of his argument was that a person who enters into a monogamous marriage not only makes a contract but acquires, as an invariable incident of that contract, a definite status.[41] This status, according to the argument presented by the prosecution, was immune from change as the result of a new marriage contracted by either spouse before the subsisting matrimonial bond had been severed by a mode which admittedly applies to monogamous marriages. This position, it was strenuously urged by Counsel representing the Attorney-General, held good even though both parties are subsequently converted to the Muslim religion and, *a fortiori*, if the change of faith is unilateral on the part of the husband only.[42]

The Privy Council observed that the argument of Counsel for the prosecution was summarized in the following passage of the District Court's judgment: "Monogamy is an unalterable part of the status of every person who marries under the General Marriage Registration Ordinance, and a change of religion cannot affect that status. Conversion to the Muslim faith, even if genuine, cannot enable one who has married under the General Marriage Ordinance to contract a polygamous marriage; such a marriage is void in the lifetime of a former wife."[43]

On the other hand, the argument adduced by Counsel for the accused was that the status emanating from a contract of

39. (1963) 65 N.L.R. 97 at p. 99.
40. (1964) 67 N.L.R. 25 at p. 29.
41. At p. 28.
42 ibid.
43. At p. 29.

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marriage was one to which each country was entitled to attach its own conditions, as to its creation and duration. In this view, the relevant question was: What status does the law confer on parties to a marriage under the Marriage Registration Ordinance? That question, he contended, had to be answered solely by reference to the statute law of the relevant jurisdiction. Counsel for the accused submitted that the acknowledged violation of the first wife's marital rights enabled invocation of the remedy conferred by a different section[44] of the General Marriage Registration Ordinance—namely, the right available to the first wife, at her option, to treat the second marriage as an adulterous association by her husband on which she was entitled to base a petition for divorce. However the crux of his argument lay in insistence that there was nothing in the content of any statute which rendered the second marriage void and nothing in the general law of Ceylon which precluded the husband from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognized polygamy. An essential aspect of this argument was that the subsisting monogamous marriage presented no bar to solemnization of the later polygamous marriage countenanced by the newly assumed personal law.[45]

The concept of an *a priori* accrued status emerging from a monogamous marriage—which formed the basis of the prosecution's argument before the Privy Council—was unequivocally rejected by their Lordships. The view which prevailed finds expression in the following passage of the opinion by Lord Upjohn: "Whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon, a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there....In their Lordships' view, in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognized by the laws of the country, notwithstanding an earlier marriage. If such inherent right is to be abrogated, it must be done by statute. Admittedly there is none."[46]

In favour of the view contended for by the Attorney-General, it was pointed out that section 35(2) of the General Marriage Registration Ordinance requires the Registrar to address the parties to a marriage contracted under that Ordinance, in the

44. Section 19.
45. (1964) 67 N.L.R. 25 at p. 29.
46. At p. 32.

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following terms: "...know ye that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you, before the death of the other, shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy...." This provision it was argued, lent support to the view that the first marriage entered into under the general law militated against the validity of the subsequent polygamous[47] marriage, so long as the earlier marriage subsisted, even though the later marriage was contracted under the provisions of the Muslim Marriage and Divorce Act. Lord Upjohn repelled this contention: "The exhortation contained in the Registrar's address is no more than a warning and, though it may be apt to mislead the ordinary man or woman ignorant of the definition of marriage contained in section 64 (of the General Marriage Registration Ordinance), it cannot successfully be prayed in aid when considering whether the offence of bigamy has been committed in terms of section 362 B of the Penal Code."[48]

The basis of the Privy Council's conclusion that the offence of bigamy was not made out on the facts of *Attorney-General* v. *Reid* was that the second marriage entered into by the accused was not tainted by voidness but was entirely valid.

Where the accused claims to have been a Muslim at the time of the second marriage, it is a question whether validity of a polygamous marriage would be upheld only where the conversion is not "colourable", in the sense that its only object is to make possible the subsequent marriage. In *Reid*'s case the evidence indicated that the accused and his second wife had been converted to Islam on the same day in the presence of each other by the same priest and that the interval between the conversion and the second marriage was a mere month and three days. Basnayake C. J. declared: "The proximity of the date of the second marriage to the date of conversion gives room for the suspicion that the change of faith was with a view to overcoming the provisions of section 18 of the Marriage Registration Ordinance."[49] But this was explicitly held not to affect the validity of the second marriage.[50]

The Privy Council prefaced their opinion with the observation: "This appeal has been argued before their Lordships upon the express admission of Counsel for the appellant on the footing that the conversion of (the accused) to the Muslim faith... was sincere and genuine notwithstanding doubts expressed in the Courts below on this point."[51] Accordingly, the Privy

47. "Polygamous" is here used in a sense which includes a bigamous marriage.
48. (1964) 67 N.L.R. 25 at p. 32.
49. (1963) 65 N.L.R. 97 at p. 99.
50. ibid.
51. (1964) 67 N.L.R. 25 at p. 27.

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Council found it possible to refrain from asserting that their view would have remained the same, even if the *mala fides* of the accused had been proved. However, the Supreme Court would appear to have favoured the view that, once the conversion is proved, the motive underlying the conversion was irrelevant.

This view is not necessarily at variance with the conclusion reached in *Obeyesekere*.[52] The argument which prevailed in this case was not that the conversion was made in bad faith but that there was no conversion to the Muslim faith at all. This is made explicit by the remarks of Dias J.: "I think there was sufficient *prima facie* evidence to go to the jury that the accused was not a Mohammedan. He was brought before the jury and they could see him; he bears a Sinhalese name, and on both occasions on going through the ceremony of marriage he followed the procedure prescribed by law for the marriage of persons other than Mohammedans. There is nothing to prevent a Sinhalese man adopting the Mohammedan faith, but there is no suggestion that the accused, though Sinhalese by birth, is a professed Mohammedan, and if he is, the onus is on him to prove it."[53]

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It is clear that the subsequent marriage would be treated as valid only if the parties were Muslims at the time the subsequent marriage was contracted. Where the parties are not proved to have been Muslims at the relevant time, the fact that the second marriage was recognized as valid by the law of the country in which the husband has his domicile, does not prevent its being treated as void for the present purpose under the Penal Code of Ceylon. This principle was effectively asserted in *Perumal*'s case.[54] There the accused was a Hindu who described himself as a native of Tinnevelly in South India but had settled in the Central Province of Ceylon. A Full Bench of the Supreme Court held that a polygamous marriage celebrated between persons other than Muslims, was void in Ceylon. Lascelles C.J. declared: "That polygamy has been prohibited and has been an offence under the municipal law of Ceylon for more than half a century, except in the case of Mohammedans, is beyond all question."[55]

(*B*) In *Katchi Mohamed* v. *Benedict*[56] the question for decision was whether an adherent of the Muslim faith at the time of his first marriage who subsequently renounces Islam and marries a second time under the general law while his previous marriage has not been dissolved, commits the offence of bigamy. Basnayake C.J. observed: "There is no evidence, nor was it contended,

52. (1889) 9 S.C.C. 11.
53. At p. 13.
54. (1911) 14 N.L.R. 496.
55. At p. 505.
56. (1961) 63 N.L.R. 505

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that a Muslim cannot change his religion and become a Roman Catholic. When a Muslim becomes a Roman Catholic, he is no more a follower of the Prophet and does not thereafter enjoy the rights and privileges of a Muslim. The moment (the accused) became a Roman Catholic, he ceased to be a person who was in law entitled to have more than one wife and, when he married a second time as a Roman Catholic, he committed the offence of bigamy."[57]

This is clearly a justifiable conclusion, since the second marriage, not being one contracted by a Muslim, falls within the purview of the definition of marriage in the General Marriage Registration Ordinance and, consequently, the second marriage is tainted by voidness under section 18 of that statute. As Basnayake C.J. held, "The marriage of a person other than one who belongs to Islam is void by operation of section 18 of the Marriage Registration Ordinance under which law (the accused's) second marriage was solemnized and which became applicable to him the moment he became a Roman Catholic."[58]

Two further points may be noted in this connection:

(i) In *Katchi Mohamed* v. *Benedict*[59] Counsel for the accused based his argument on section 18 of the Marriage Registration Ordinance which provides that "No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void." Counsel's contention was that, in each of the expressions "no marriage" and "a prior marriage" used in this provision, the term "marriage" must be understood to exclude marriages contracted between persons professing Islam and that, therefore, the second marriage was not rendered invalid by reason of the fact that it was contracted while the first marriage was subsisting.[60]

This contention was rejected by the court. Gunasekara J. declared: "It is manifest that, when the Ordinance provides that 'no marriage shall be valid' where it is contracted in certain circumstances, the term 'marriage' must be understood to exclude Muslim marriages. The reference to 'a prior marriage', however, does not occur in a provision relating to the requisites of such prior marriage or its registration and cannot be understood to contemplate only marriages contracted under (the General Marriage Registration) Ordinance. In my opinion, the context requires that, in this expression, the term 'marriage' must be understood to mean any marriage and not any marriage except a Kandyan or Muslim marriage."[61]

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57. At p. 506.
58. ibid.
59. See note 56, *subra.*
60. (1961) 63 N.L.R. 505 at p. 507.
61. ibid.

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In a separate judgment T. S. Fernando J. suggested a cogent reason for rejecting the interpretation contended for by Counsel for the accused. "An acceptance of (Counsel's) argument would mean that whereas section 6 of the Kandyan Marriage and Divorce Act, No. 44 of 1952, renders invalid a marriage between two persons subject to the Kandyan law where one of the parties has contracted a prior marriage which has not been lawfully dissolved or declared void, this consequence of the invalidity of the second marriage may be avoided by a Kandyan who has married another Kandyan under the Kandyan Marriage Ordinance or the Kandyan Marriage and Divorce Act by the simple expedient of resorting to a registration of his or her second marriage under the General Marriage Registration Ordinance."[62]

(ii) In *Katchi Mohamed*'s case, the Attorney-General invited the court to consider the effect of a possible view that, under the relevant Muslim law, a marriage is automatically dissolved by apostasy.[63] On the facts of the case, the court held that it was unnecessary to consider the question, as a change of faith had not been established adequately. The only evidence adduced by the prosecution on the question of apostasy, it appeared, was that of the second wife's father who deposed that the accused was baptized about two or three weeks before the marriage.[64] However, the accused testified that the ceremony, as he understood it, had merely the object of changing his name and that he did not abandon the Muslim faith at any time. This evidence was accepted by the court. It may be pointed out, however, that an inconsistency is manifest in the judgments of the court. Thus, while the accused is treated at one point as having embraced Roman Catholicism, there seems to be insistence in other parts of the judgments that he was a Muslim always and remained so at the time of the trial, notwithstanding the change of name.

Nevertheless, quite apart from the special facts of the case, the question of law tentatively raised in regard to apostasy is of some interest. The contention that a marriage contracted by a Muslim is automatically dissolved on apostasy, derives no support from the Muslim Marriage and Divorce Act. This statute is described as "an Act to make provision with respect to the marriages and divorces of Muslims in Ceylon and, in particular, with respect to the registration of such marriages and divorces."[65] The Act is concerned primarily with provision of machinery for the registration of marriages and divorces among Muslims and with the setting up of bodies like the Muslim Marriage and Divorce Advisory Board[66] and the Board

62. At p. 509.
63. At p. 507.
64. At p. 508.
65. Cap. 115, Legislative Enactments (1956 ed.).
66. Section 4.

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of Quazis[67] which have important functions to perform in regard to such matters as the giving of notice, the numbering of marriages and other ancillary matters. As to the dissolution of marriages, no new principles are introduced by the statute. Accordingly, recourse must be had to the customary Muslim law on the point.

In any event, the submission may be made that there is cogent reason for declining to accept apostasy as an automatic mode of termination of a marriage, since the other spouse would be left substantially unprotected in this situation. Even where the change of a personal law confers on the parties capacity to alter their status in relation to marriage, the correct position is that a change of status is legally permissible and not that it is compulsorily effected by apostasy, so far as the validity of a marriage is concerned. Since the matter is *res integra* in Ceylon, considerations of policy may be taken into account legitimately in resolving this issue.

The following conclusions may be submitted on the basis of this analysis of the relevant law:

(*A*) Where the accused contracts a marriage under the general law in accordance with rites other than those pertaining to the Muslim faith and later marries as a Muslim while the previous marriages remains intact, the offence of bigamy is not committed;

(*B*) Where the accused is an adherent of the Muslim faith at the time of his first marriage but subsequently renounces Islam and marries under the general law while his previous marriage is subsisting, he may be convicted of bigamy.

The definition of bigamy in our law includes the Exception that "This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time: provided the person contracting such subsequent marriage, shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge."[68]

In circumstances where there is no decree by a competent court, the three essential elements of the Exception are that (i) the spouse should have been absent continually for at least seven years; (ii) he or she should not have been heard of by

67. Section 15.
68. Penal Code, section 362B.

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the other spouse as being alive during this period; and (iii) a bona fide disclosure should have been made to the subsequent spouse before the second marriage takes place.

This Exception to section 362B of the Penal Code was judicially construed in *Pattison* v. *Kalutara Special Criminal Investigation Bureau*.[69] The accused was convicted of bigamy on the basis of a marriage he had contracted in 1960. His first wife was alive at this time. She had lived with the accused in her home until 1952, when she left the accused and lived thereafter with another man in a village thirty-five miles away. The people of her village did not know where she resided, and letters addressed to her at her mother's house were not delivered to her. She herself had never seen the accused during the eight years since their separation. The accused testified at the trial that he had made inquiries about his first wife from her mother and others acquainted with her, but that none of these people had any knowledge of her whereabouts. The Magistrate had convicted the accused on the ground that the first and the second elements of the Exception were not satisfied by the facts of the case. This finding was vitiated in appeal.

As to element (i), H. N. G. Fernando C.J. observed: "If, as (the first wife) and the accused both stated, the two had never been together or even seen each other between 1952 and 1960, then she had obviously been 'absent from the accused' for eight years. The Magistrate misdirected himself when he thought that there was no evidence of this simple fact of 'absence' for seven years; what had to be proved was *absence from the accused* and not absolute non-existence."[70]

In regard to element (ii), it was stated: "The Magistrate's opinion is that the accused has 'placed no evidence that the first wife was not heard of as being alive' after 1952. Involved in this opinion is a misdirection in law, for here also the matter to be established is only that she had not been heard of as being alive *by the accused*. The Exception does not require proof that the former wife had not been heard of as being alive even by other people."[71]

A relevant question in regard to element (ii) is whether it is for the accused to prove that he was unaware his first wife was alive, as a ground of exoneration from liability, or whether the prosecution must establish the existence of such knowledge on his part, as a constituent element of liability. The words of the Exception would seem to suggest that the burden is on the accused to prove absence of knowledge. However, in *Pattison*'s case H. N. G. Fernando C.J. construed the Exception as

69. (1970) 73 N.L.R. 399.
70. At p. 400.
71. At pages 400-401.

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involving a transfer of the burden to the prosecution to show that the accused did have the requisite knowledge. The Evidence Ordinance provides that, when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to those who affirm that he is alive.[72] This provision was considered by the court to govern the case in hand. Moreover, placing of the burden in this regard on the prosecution was thought to be logical and reasonable. "The harshness, and even the absurdity, of any other view is demonstrable. If, as in the instant case, it turns out that a man's first wife was in fact alive when he contracted a second marriage, proof that no one knew of that fact would be impossible unless the wife had led a hermit's existence."[73]

Clearly, element (iii) of the exception was satisfied in this case, since the evidence indicated that the accused proved his good faith by disclosing the fact of his former marriage both to his second wife and to the registrar and indeed entered into the later marriage only when the registrar advised him to do so.[74]

Since the Exception to section 362 B of the Ceylon Penal Code is based on the Proviso to section 57 of the English Offences Against the Person Act of 1861, a brief reference to the English case law is useful.

In *Tolson*[75] the accused was deserted by her husband, and afterwards heard that he had been lost at sea. Five years after last seeing her husband, the accused went through a ceremony of marriage with another man. Her husband was still alive. She was convicted of bigamy but, on appeal to the Court for Crown Cases Reserved, the conviction was quashed by a majority of nine judges to five.

The relevant Proviso of the English Act reads as follows: "...provided that nothing in this section contained shall extend...to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time..."[76] The Proviso founded on absence for seven years could not be invoked by the accused, because the period of absence in this case was less than the minimum postulated by statute. However, the majority of the court held that bona fide mistake of fact constitutes a general defence under the common law and that the operation of this defence was left unaffected by the Offences Against the Person Act of England.

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72. Section 108.
73. (1970) 73 N.L.R. 399 at p. 401.
74. ibid.
75. (1889) 23 Q.B.D. 168.
76. Section 57.

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Cave J. who subscribed to the view of the majority, stated: "If the proviso covers more ground than the general exception, surely it is no argument to say that the legislature must have intended that the more limited defence shall not operate within the seven years, because it has provided that a less limited defence shall only come into operation at the expiration of those years." On this view of the law, it was held to be a sufficient basis of exoneration that the accused honestly and on reasonable grounds believed her first husband dead before she married again.

A different conclusion was reached for English law in *Wheat and Stocks*.[77] W went through a form of marriage with S at a time when W's wife was still alive. However, W genuinely and on reasonable grounds thought that he had divorced her. He was convicted of bigamy and, on appeal, his conviction was sustained.

The mistake made by the accused in this case was held to belong to a different category from the mistake in *Tolson*. The mistake in *Tolson*'s case, it was held, involved a persumption of death which, unless rebutted by the prosecution, entitles the accused to an acquittal. In other words, the person accused is presumed to believe under such circumstances that the former spouse is dead at the time of the second marriage and, therefore, has no intention of doing the act forbidden by the statute—namely, marrying during the life of the former husband or wife.[78] However, in *Wheat and Stocks*, the misconception in the accused's mind related not to the question whether the spouse was living or dead but to the distinct issue as to validity of a supervening divorce. In this latter context, Avory J. held: "There is no indication in the statute that any presumption or belief is to afford any defence; the words do not admit of any such qualification, and the only defence under this head appears to be that the accused has in fact been divorced from the bond of the first marriage. If he has not, then at the time of his second marriage he is a person who, being married, intends to do the act forbidden by the statute—namely, to marry during the life of the former wife." On this ground the decision in *Tolson*'s case was thought by Avory J. to be distinguishable.

While there is this point of contrast between the two cases, it may be felt that the broad policy approach adopted in the two cases is inconsistent. In both *Tolson* and *Wheat and Stocks*, the accused's mistake concerned the fundamental question whether the accused was competent to contract a second marriage at the time he or she did. Whether the accused believes his wife to be dead or whether he labours under an error as to the dissolu-

77. (1921) 2 K.B. 119.
78. *per* Avory J.

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tion of the marriage by a court, the significance of the error is that it induces in his mind the belief that no legal bar exists to his contracting a second marriage. If a genuine mistake is sufficient in the one case to relieve the accused of liability, it may perhaps be asked why the same reasoning should not be adopted in the other case.[79]

A criticism on these lines emerges from the judgment of Latham J. in *Thomas*.[80] On the decisions in *Tolson* and *Wheat and Stocks*, His Lordship commented as follows: "In *Tolson*'s case the belief of the accused can be described with equal accuracy either as (1) a belief in the existence of a fact which removed the prisoner from the category of married persons, or (2) a belief that her former husband was no longer alive.... In *Wheat*'s case emphasis is placed upon the latter method of describing the belief, but there is no reason why the former method of describing the belief should not be adopted.... Mistaken belief as to any relevant element of the offence is sufficient to bring the case within the rule in *Tolson*'s case."[81]

It is submitted, however, that a convincing distinction between these two cases may be established by reference to practical considerations. Generally, it may be much more difficult in the relevant factual contexts to ascertain whether a spouse who has been continually absent for a sustained period, is living or dead, than it is to learn whether a marriage has been terminated by divorce or not. A mistake in the latter category of case is much more likely to involve moral culpability or even dishonesty than a mistake as to the former issue. Consequently, the considerations of policy which would support a legally valid defence in the former context, are rendered much less cogent when sought to be applied to the latter situation. Moreover, it could probably be contended that the latter kind of error is an error of law, while the former is an error of fact.

In view of the strikingly similar terms in which the Exception is couched in England and in Ceylon, it may be suggested that

79. An error as to voidness of a marriage should logically be treated as *in pari materia* with an error as to termination of a marriage by divorce. However, a different view appears to have been taken by an English court in *Dolman* (1949) 1 All E.R. 813. D was charged with bigamously marrying Miss J. during the lifetime of his wife F. D's defence was that he thought his marriage to F was void, because he had been told by F that she was already married to G when she married D. Streatfied J. directed the jury in the following terms: "The question you have to answer is whether, when the accused went through that form of marriage with J, he honestly believed on reasonable grounds that his first marriage to D was void because she was already married to G. If you think he did believe that on reasonable grounds, then you will find him Not Guilty." But this direction is probably inconsistent with the decision by the English Court of Criminal Appeal in *Wheat and Stocks, supra*.

80. (1937) 59 C.L.R. 279. 81. At p. 292.

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the distinction between *Tolson* and *Wheat and Stocks* is valid for the law of Ceylon as well. The judgment of H. N. G. Fernando C.J. in *Pattison* may be supported on the basis that the facts of this case warrant comparison with *Tolson* rather than with *Wheat and Stocks*.

Nevertheless, one significant difference may be noticed between the phraseology of the Exception in England and in Ceylon. The Exception under English law is that liability for the offence shall not extend to "any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been *known* by such person to be living within that time."[82] In this connection Cave J. observed, in relation to the facts of *Tolson*'s case: "Unless the prosecution can prove that she *knew* her husband to be living within the seven years, she must be acquitted. The honesty or reasonableness of her belief is no longer in issue. Even if it could be proved that she believed him to be alive all the time, as distinct from *knowing* him to be so, the prosecution must fail."[83] So wide an interpretation of the Exception cannot be adopted plausibly in Ceylon, because the phrase employed in the Ceylon Penal Code is "heard of" and not "known". Thus, information reaching the wife in regard to the whereabouts of the husband, or *vice versa*, would have the effect of excluding the proviso, even though receipt of information may not amount to definite knowledge. In this marginal sense, the Exception covers a narrower area in Ceylon than it does in England.

An interesting jurisprudential problem in this area concerns the question why bigamy should be an offence in Ceylon when adultery is not. The Indian Penal Code recognizes adultery as an offence, but the position is different in Ceylon. This is probably accounted for by the divergent *mores* which prevail in this regard in the two countries. Generally, an act is characterized as an offence by the criminal law not only when it contravenes the moral code but when the nature and the extent of the transgression are such as to arouse great abhorrence in the vast mass of the people. Subject to this consideration, the spheres of immorality and criminality are not coextensive. This matter was investigated in another work, and readers are referred to that work for the conclusions reached there.[84] It may perhaps be said that, while adultery offends so strongly against the conventional morality subscribed to by the majority of the people in India as to justify its characterization as an offence, different attitudes which prevail in Ceylon lead to the

82. Offences against the Person Act, 1861, section 57.
83. (1889) 23 Q.B.D. 168.
84. G. L. Peiris, *General Principles of Criminal Liability in Ceylon*, pages 70-73 and 447-454.

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result that the delictual remedy in damages against the third party paramour and the action for divorce against the offending spouse are considered sufficiently to protect the innocent spouse, without the application of penal sanctions. As to the treatment of bigamy as an offence although adultery is not so regarded in Ceylon, a possible explanation may be suggested by reference to the fact that bigamy involves going through the motions of a marriage, while adultery does not. Consequently, the purported legalization of the illicit relationship in the former case entails some element of affront to the institution of marriage. This special feature of bigamy may provide the rationale of a relatively stringent approach, in the interest of preserving public confidence in an institution which is part and parcel of their lives.

Fraud is not an essential constituent of bigamy. Thus, the accused may genuinely believe that his first marriage is void or has been terminated by divorce, but this is not sufficient to relieve him of liability. Knowledge on the accused's part that he is not legally competent to marry a second time is not an indispensable requisite for conviction of bigamy. However, the presence of this element heightens the gravity of the offence and makes applicable a heavier penalty. Thus, cohabitation caused by a man deceitfully inducing a belief of lawful marriage,[85] marrying during the lifetime of a husband or wife with concealment of the former marriage from the person with whom the subsequent marriage is contracted[86] and the act of going through a marriage ceremony with fraudulent intent[87] are all distinct offences constituted by the Penal Code of Ceylon. These offences are ordinarily punished with greater severity than bigamy not involving fraud or deception.

II. RAPE

The definition of rape is contained in section 363 of the Penal Code. According to this provision, a man is said to commit "rape" who, except in the case hereinafter excepted,[88] has sexual intercourse with a woman in circumstances falling under any of the five following descriptions:

Firstly, against her will;
Secondly, without her consent;
Thirdly, with her consent when her consent has been obtained by putting her in fear of death or of hurt;
Fourthly, with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

85. Penal Code, section 362A.
86. Section 362C.
87. Section 362D.
88. Exception to section 363.

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Fifthly, with or without her consent when she is under twelve years of age.

Consent is referred to in clauses (ii), (iii), (iv) and (v). Clause (ii) postulates absence of consent in any form. Clauses (iii) and (iv) contemplate apparent consent which is not genuine consent because of the presence of duress and deception respectively. In clause (v) the presence or absence of consent is not an issue at all.

Even where absence of consent by the victim is not part of the statutory definition of an offence, the presence of consent ordinarily furnishes the basis of a general exception from criminal liability, subject to closely defined limitations.[89] In these cases, the presence of consent by the victim, like all other pleas giving rise to a general or special exception, has to be averred and proved by the accused on a preponderance of probability.[90] However, clause (ii) of the definition of rape envisages a materially different situation, since the *absence* of consent is a feature of the definition and, like all essential elements of the offence, is required to be proved by the prosecution beyond a reasonable doubt. In this situation, then, it is for the prosecution to establish absence of consent, and not for the defence to show the presence of consent.

This requirement which is manifest *ex facie* the definition of rape in our law, has received emphasis in the cases. In *Balakiriya*[91] the vital issue was whether intercourse had taken place with or without the complainant's consent. The trial judge had directed the jury in the following terms: "You must be satisfied by the balance of evidence with (the accused's) story that he had intercourse with the consent of the complainant."[92] The conviction of the accused was set aside by the Court of Criminal Appeal. Howard C.J. observed: "This passage places the burden of proving that he had intercourse with the consent of the complainant on the accused. That is clearly a misdirection."[93]

In *Ariyaratna*[94] the trial judge had stated in his summing-up: "The burden of proof is on the Crown. The Crown must prove that this accused committed this offence and that it was done against the will of the woman, or if it was with her consent, that her consent was obtained by fear of death or of hurt."[95] However, having laid down this principle, the trial judge emphasized that the accused's defence was not that he had intercourse with the woman's consent but that he had no connec-

89. Sections 80-85.
90. Evidence Ordinance, section 105.
91. (1945) 46 N.L.R. 83.
92. At p. 84.
93. ibid.
94. (1946) 47 N.L.R. 236.
95. At p. 237.

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tion at all with her. In the light of this consideration, the trial judge insisted that the governing factor in the case was identity and not consent. The Court of Criminal Appeal strongly disapproved of this approach and refused to sustain the conviction. Cannon J. declared: "It may be that the judge meant the jury to understand that, if they did not accept that view of the defence, it being that the accused had had no connection with the girl, then if they believed the girl's story that he had, they would have no reasonable anxiety as to the truth of her statement that it was against her will; but the passage seems to direct the jury that the question of consent is not a matter for their consideration. It does not follow necessarily that, because the accused's defence was that he had had no connection with the girl, therefore the question of consent was irrelevant."[96] The Court of Criminal Appeal refused to support the conviction primarily because of the likelihood that the jury would have considered the issue of consent of minor importance.

It is a fundamental principle that, where the woman's consent is an issue, a conviction of rape will be upheld only in circumstances where the prosecution has succeeded in establishing absence of consent beyond a reasonable doubt. If proof of this element is lacking, the cause of the prosecution is necessarily incomplete. Consequently, no burden devolves on the defence in these circumstances. Any departure from this position culminates in a miscarriage of justice. This principle was explicitly asserted by the Court of Criminal Appeal in *Heen Banda*.[97] In this case, the trial judge had directed the jury as follows: "If you accept the evidence of the accused and his wife as the truth, then he must be acquitted. The onus of proving his case is not as heavy on the accused as it is on the prosecution. If you think that the accused has established by a preponderance of probability that he is not guilty of any offence at all, then he is entitled to be acquitted. If, on the other hand, you discredit the accused's defence altogether and you feel that the prosecution has beyond reasonable doubt established his guilt, then it will be your duty to find him guilty of the offence with which he is charged."[98] The Court of Criminal Appeal held that this amounted to a misdirection and quashed the conviction. Howard C. J. said: "Although it is obvious from the whole of the charge that the learned judge did not in any way intend to throw the burden of proof on the accused, this passage is open to this interpretation.... These words seem to indicate that the onus of proving his innocence in some manner rested on the accused. This is not the law."[99]

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96. At p. 238.
97. (1941) 42 N.L.R. 538.
98. At p. 539.
99. ibid.

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Marthelis[100] was a case where the victim was a girl below twelve years of age. The case therefore fell within the purview of clause (v) of the definition of rape and the question of consent on the girl's part was treated as irrelevant. Sexual intercourse with the girl in these circumstances by any person other than her husband involves liability for rape, notwithstanding that the girl had consented to the act.

The nature of the evidence which a court would receive as to the girl's age, was adverted to by the Court of Criminal Appeal in *Mendis*.[101] A valid birth certificate, of course, would be the best evidence in this regard, but no birth certificate was introduced in evidence in *Mendis*' case. Instead, the prosecution called the Judicial Medical Officer to prove that the girl was under twelve years of age. The Judicial Medical Officer, in turn, relied for his opinion on an X-ray photograph which he had arranged to be taken. There was no evidence to suggest, however, whether the Judicial Medical Officer was present when the X-ray photograph was taken and whether the X-ray photograph was in fact that of the girl. Jayatilleke S.P.J., on behalf of the Court of Criminal Appeal, quashed the conviction on the ground that the X-ray photograph should not have been admitted in evidence.

The position under the law of Ceylon is that, in all cases other than those involving as victims girls below the age of twelve years, the woman's consent has a decisive bearing on liability for rape. The meaning of "consent" was explained by the Supreme Court in *Kalimuttu*'s case where Schneider A.J. observed: "Consent is not mere submission. It involves something more than mere submission. There can be no consent where there is no proper knowledge of the nature of the act. Consent cannot be implied unless the conscious mind had considered the nature and consequences of the act and had then submitted to it. Immaturity of understanding due to youth may render a person incapable of consenting."[102] Thus, while express consent is not invariably insisted on by the law, consent will be implied only with reluctance and not at all in circumstances where doubt envelopes the issue. Any factor which destroys reality or spontaneity of consent deprives the consent of its legal effect.

The Ceylon cases have consistently insisted, as a matter of prudence, that in cases of rape a conviction can be sustained only if the evidence of the prosecutrix is corroborated in some material particular by independent testimony. The following points may be made in correspondence with the case law:

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100. (1942) 43 N.L.R. 560.
101. (1950) 52 N.L.R. 486.
102. (1919) 6 C.W.R. 142.

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(a) The principle requiring corroboration in this context may be identified as a rule of practice almost equivalent to a rule of law. Where there is no corroboration of the woman's evidence, the jury should be clearly warned of the dangers of convicting. In the absence of an explicit warning, the conviction will generally be quashed in appeal.[103]

(b) No warning is required if there is corroboration of a substantial character.[104]

(c) The rationale underlying the requirement of corroboration of the prosecutrix's evidence in cases of rape is not identical with that enjoining rejection of the unsupported testimony of an accomplice. In the former case, it is a matter of one oath against another oath, so that a conviction is generally proper only when the scale is weighted in favour of the prosecution by some item of independent evidence. By contrast, the latter case involves the question of complicity and the natural inclination of an accomplice to exonerate himself by incriminating another participant in the crime.[105]

(d) Notwithstanding this difference in the rationale applicable to the two cases, the principles governing the question as to the nature of the requisite corroboration have been formulated in similar terms in both contexts.[106]

(e) The character of the corroboration needed naturally varies according to the particular circumstances surrounding the offence alleged. An attempt at formulation of general criteria is unnecessary and is fraught with danger. All that may be stated in the abstract is that corroborative evidence is evidence which shows or tends to show that the version given by the prosecutrix is true, not only in regard to commission of the crime by some person but as to actual complicity on the part of the accused himself.[107]

The application of this principle is exemplified by the approach of the Court of Criminal Appeal in *Marthelis*.[108] Soertsz J. observed: "We are of opinion that there is independent evidence here which, although it may not positively show, yet *tends* to show, that the appellant committed the crime. The evidence of (an independent witness) that he saw the girl enter the house of the accused, of which, during this period, he was the sole occupant, about the time this offence was committed, taken with the unexplained fact that there was blood on the

103. *Tate* (1908) 2 K.B. 680, adopted in *Ana Sheriff* (1941) 42 N.L.R. 169. at p. 171.
104. ibid.
105. *Baskerville* (1916) 2 K.B. 658, adopted in *Ana Sheriff* (1941) 42 N.L.R. 169 at p. 171.
106. ibid.
107. ibid.
108. (1942) 43 N.L.R. 560.

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sarong the accused admittedly wore on this day and with what, according to the view of the jury, was a false denial by him that the house was not his house, and a false statement by him that he was away from his village at the time alleged, corroborate the girl's story by *tending* to show that he must have been the culprit."[109]

(f) The evidence in corroboration must be *independent* testimony. In *Atukorale*[110] the Court of Criminal Appeal held that a complaint made by the prosecutrix to the police, in which she implicated the accused, cannot be regarded as corroboration of her evidence. The reason is that this evidence "lacks the essential quality of coming from an independent quarter".[111] Gratiaen J. accepted as applicable to the law of Ceylon the principle that "Although the particulars of a complaint made by a prosecutrix shortly after the alleged offence may be given in evidence against the accused as evidence of the consistency of her conduct with her evidence given at the trial, such a complaint cannot be regarded as corroboration in the proper sense in which that word is understood in cases of this kind, and it is a misdirection to refer to it as such."[112] In *Rajaratnam* v. *The Republic of Sri Lanka*[113] it was held that the corroboration required in a rape case was some independent testimony which affected the accused by connecting or tending to connect him with the crime and that a statement made by the prosecutrix to her grandmother after the event cannot constitute the kind of corroboration required.

(g) The corroborative evidence must affect the accused by connecting or tending to connect him with the crime.[114] The confirmation must relate to some fact which goes to fix the guilt on the particular person charged.[115] The corroboration must consist of some circumstance which involves the identity of the accused.[116]

(h) There need not be confirmation of all the circumstances of the crime. All that is required is confirmation *in some material particular*.[117]

(i) Once the trial judge has explained to the jury the meaning of corroboration, there is no further duty to point out to them the items of evidence which are capable in law of being treated as corroboration. In *Jarlis*[118] Dias S.P.J., speaking for the

109. At p. 563.
110. (1948) 50 N.L.R. 256.
111. At p. 257. cf. *Karunaratne* (1966) 68 N.L.R. 257, *per* T. S. Fernando, J.
112. (1948) 50 N.L.R. 256 at p. 257.
113. (1975) 79 N.L.R. 73
114. *Ana Sheriff* (1941) 42 N.L.R. 169 at p. 171.
115. *Wilkes* 173 E.R. 20, quoted in *Ana Sheriff, supra*, at p. 172.
116. *Farler* 173 E.R. 418, quoted in *Ana Sheriff, supra*, at p. 172.
117. *Baskerville* (1916) 2 K.B. 658, quoted in *Ana Sheriff, supra*, at p. 171.
118. (1951) 52 N.L.R. 457. 119. At p. 462.

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Court of Criminal Appeal, quoted with approval the following statement: "If a judge points to a piece of evidence as being capable in law of amounting to corroboration, and it turns out that it is not capable of amounting to corroboration, the conviction may be quashed; but there is no duty upon the judge to point out every piece of evidence which is capable of amounting to corroboration, provided he has sufficiently told the jury what in law is meant by corroboration."[119]

(j) The requirement of corroboration of the prosecutrix's story in sexual offences including rape has not crystallized into an absolute rule of law. Thus, the position in Ceylon is not that corroboration in these cases is strictly required by law but that it is unsafe to convict on the uncorroborated testimony of the prosecutrix. In at least four Ceylon cases[120] the Court of Criminal Appeal has stated that the jury are not precluded from returning a verdict against the accused if they are convinced of the truth of the prosecutrix's story even though it is uncorroborated.

(k) However, where there is absence of corroboration and a reasonable doubt as to the accused's guilt, the courts of Ceylon have echoed the words of an English judge, "On the whole we think it safer that the conviction should not be allowed to stand"[121] and allowed the appeal by the accused.[122]

(l) Although the question of the presence or absence of corroboration is conceived of as one of law to be decided by the judge, in reality it becomes one of fact as to whether certain evidence, if believed, shows or tends to show that the complainant's allegation is true.[123]

(m) Evidence which indicates only that the accused had the opportunity of committing rape, is not acceptable as corroboration; nor is it sufficient that such evidence renders the story of the complainant more plausible than that of the accused.[124]

(n) The Court of Criminal Appeal has expressed strongly its disinclination to assail the verdict of a jury given on questions of fact.[125] Specially, in cases concerning rape, the Court has stated that it is not entitled to conduct a re-trial on questions which had been left to the jury properly.[126] Nevertheless, the Court may intervene exceptionally even in these circumstances.

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119. At p. 462.
120. *Themis Singho* (1944) 45 N.L.R. 378; *Dharmasena* (1956) 58 N.L.R. 15. *Premasiri* v. *The Queen* (1971) 77 N.L.R. 86; *Karunasena* v. *The Republic of Sri Lanka* (1975) 78 N.L.R. 63.
121. *Bradley* 4 Cr. App. Rep. 228, *per* Alverstone L.C.J.
122. *Mustapha Lebbe* (1943) 26 C.L.W. 41. *per* Moseley J.; *Themis Singho* (1944) 45 N.L.R. 378, *per* Howard C.J.
123. *Ana Sheriff* (1941) 42 N.L.R. 169 at p. 173. *per* Howard C.J.
124. ibid.
125. *Andiris Silva* 4 C.L.J. 237.
126. *Themis Singho* (1944) 45 N.L.R. 378.

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Thus, in *Arthur Fernando*[127] Moseley J. said, allowing the accused's appeal on issues of fact: "In view of the contradictory statements which occur in the evidence of the prosecutrix and the generally unsatisfactory nature thereof, the absence of corroboration, the circumstances in which the girl made her first complaint (i.e. in consequence, of a threat by her father), and her failure to complain primarily when the opportunities arose, and the inconclusive nature of the medical evidence, the majority of the Court feels that it may properly be said that the verdict cannot be supported, having regard to the evidence."[128]

The Explanation attached to the definition of rape in our law declares that "Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."[129] It is clear, in the light of this explicit provision, that ejaculation is not a requisite of this offence in Ceylon.

The definition of rape in our Penal Code includes the Exception that "Sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape."[130] It may be questioned, however, whether this absolute proposition is defensible. English law would seem to admit qualifications. In *Miller*[131] the complainant was the wife of the accused. She had left her husband and had filed a petition for divorce on the ground of adultery. The hearing of this petition had commenced, the wife had given her evidence, and the hearing was adjourned for the husband to attend. Later the husband met his wife and had intercourse with her against her will. The indictment charged him, among other offences, with rape. In his judgment Lynskey J. made the important concession that, if there had been an agreement to separate—and particularly if it had contained a non-molestation clause—the charge of rape may have been supported, since the consent to intercourse with the husband signified by the contract of marriage could be treated as subsequently revoked in this event.

However, a qualification on these lines does not appear to be recognized by the law of Ceylon. The Exception seems to require recognition of the marital status as necessarily precluding a charge of rape brought against the husband. The attitude reflected in the law of Ceylon finds support in some institutional texts on the English law. Thus, Hale observes that "A husband cannot be guilty of rape upon his wife for, by their mutual matrimonial consent and contract, the wife has given herself in this kind to her husband, which she cannot retract." On this passage, Lynskey J. in *Miller*'s case made the following

127. (1940) 42 N.L.R. 76. 128. At p. 80.
129. Penal Code, Explanation to section 363.
130. Penal Code, Exception to section 363.
131. (1954) 2 Q.B. 282.

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comment: "At that time it was no doubt considered that consent, once given, could never be retracted...As far as the law was concerned, there was no power to avoid a marriage. Since then there have been numerous departures from that view of marriage."[132] These departures are a feature of the law of Ceylon no less than of the law of England. It would seem, then, that the absolute form in which the Exception is formulated in our law, is anomalous.

Also relevant in this connection is section 113 of the Ceylon Evidence Ordinance which declares that "It shall be an irrebuttable presumption of the law that a boy under the age of twelve years is incapable of committing rape." In English law, a similar irrebuttable presumption applies to boys below the age of fourteen years.[133] However, on facts which would support the conviction of an older person for rape, a boy below the age specified by the law may be found guilty of indecent assault in England[134] and of common assault in some other Commonwealth jurisdictions.[135] It may be noted that the exclusion contemplated by the Evidence Ordinance[136] in Ceylon, too, applies solely to the offence of rape.

The punishment prescribed for rape in Ceylon is imprisonment of either description for a term which may extend to twenty years and also a fine.[137]

III. DEFILEMENT OF GIRLS BETWEEN THE AGES OF TWELVE AND FOURTEEN

The Penal Code of Ceylon provides that "Whoever has carnal intercourse or attempts to have carnal intercourse with any girl of or above the age of twelve years and under the age of fourteen years shall be guilty of an offence, and shall be punished with imprisonment of either description for a term not exceeding two years, and may in addition be punished with whipping."[138]

"Intercourse", in this context, probably has the same meaning as in the Explanation to the definition of rape.[139]

This offence may be distinguished from rape in the following ways:

(a) This offence, unlike rape, may be committed only in respect of girls within a specified age group;

(b) Rape involves sexual intercourse with a woman against

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132. cf. *Clarke* (1949) 33 Cr. App. Rep. 216, *per* Byrne J.
133. *Groombridge* (1836) 7 C. & P. 582.
134. *Williams* (1893) 1 Q.B. 320.
135. *Angus* (1907) N.Z.L.R. 948 (New Zealand).
136. Section 113.
137. Penal Code, section 364.
138. Section 364A.
139. Section 363.

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her will or without her genuine and legally valid consent, but the question of consent by the girl is altogether irrelevant in the case of a charge under section 364A of the Penal Code;

(c) A reasonable misconception in the mind of the accused as to the girl's age is an exonerating circumstance under section 364A,[140] while this is not a relevant consideration in regard to rape;

(d) Section 364A, unlike section 363, prescribes the same maximum penalty for an attempt at defilement and for the completed offence of defilement;

(e) Section 364 A, but not section 363, is subject to a procedural limitation in the form of a rule that no prosecution shall be commenced for an offence under the former section more than three months after the commission of the offence.[141]

The exclusion of consent as a relevant factor from the ambit of the offence embodied in section 364 A of the Penal Code, is to be explained by reference to the paternalistic attitude of the law in this regard. This offence envisages a context in which the victims deserve protection from the consequences of their own immaturity and lack of judgment.

IV. UNNATURAL OFFENCES

Two provisions of the Penal Code deal with unnatural offences.

(a) Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, is declared punishable with imprisonment of either description for a term which may extend to ten years and also with fine.[142]

(b) Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, is declared to be guilty of an offence and punishable with imprisonment of either description for a term which may extend to two years or with fine, or with both, and also with whipping.[143]

The changes which were made for English law in consequence of the recommendations by the Wolfenden Committee have not yet been adopted in Ceylon. The basis and implications of these changes have been discussed in another work.[144]

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140. Section 364A (2). 141. Section 364 (4).
142. Penal Code, section 365. 143. Section 365A.
144. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pages 339-342, 447-455.

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CHAPTER 8

OFFENCES INVOLVING VIOLATION OF FEELINGS

I. CRIMINAL INTIMIDATION

(A) *Constituent Elements of the Offence*

"Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat"[1] is said to commit the offence of criminal intimidation.

The different features of the offence warrant separate examination:

(a) The *actus reus* of the offence consists of the making of a threat. The nature of the required threat may be investigated in detail, in the light of decided cases.

(i) The threat may be conditional. In *Samaranayake* v. *Jayasinghe*[2] the accused's threat was that he would harm the complainant *if* the latter attempted to obtain possession of a piece of land. In appeal Basnayake J., confirming a conviction of criminal intimidation, said: "A conditional threat of injury or a threat of future injury is not excluded from the description of the offence. A threat is a declaration of an intention to punish or hurt and to threaten is to give warning of the infliction of injury or to announce one's intention to inflict an injury as punishment or in revenge."[3] A conditional threat satisfies this definition.

(ii) In *Samaranayake* v. *Jayasinghe* the threat was expressed in the words: "If you come to enjoy the land, I will draw your entrails out and hang them round your neck."[4] Counsel for the accused contended in appeal that, in view of the extravagant language employed, the court, could properly conclude that the threat was not intended to be taken seriously. Basnayake J. rejected this argument. His Lordship observed: "For a threat to constitute the offence of criminal intimidation, it is not necessary that the threatened injury should be capable of execution in all its details. Each case must be decided on its own merits. No abstract rule of general application can be

1. Penal Code, section 483.
2. (1948) 50 N.L.R. 330.
3. At p. 331.
4. ibid.

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laid down. In certain circumstances a threat may seem so unreal that it may not amount to the offence of criminal intimidation. But one cannot for that reason lay down a rule that, where a threat is couched in highly extravagant language, it is not an offence."[5]

(iii) It is a question whether the accused can be convicted of criminal intimidation only if, at the time of uttering the threat, he had the ability to carry it out instantaneously. In this connection, the decision in *Guneratne* v. *Allis Sinno*[6] is of assistance. In this case the accused threatened to shoot the complainant, but he had no gun or any other weapon with him at the time. Upholding the conviction, de Sampayo J. said: "(The accused's) attitude would seem to have caused alarm to the complainant and made him believe that the accused, was determined to do some sort of bodily injury to him, but not necessarily kill him or cause grievous hurt; and, after all, the gist of the offence is threatening another with injury to his person with intent to cause alarm. The element necessary in this connection was supplied by the evidence, and there is no necessity to emphasize the fact that the words used by the accused were that he would shoot."[7] It would seem, then, that present ability in the accused to achieve the object threatened is not an indispensable ingredient of liability.

(iv) Is it necessary that the person threatened with harm should have been present when the threat was made? It would appear not. In *Balawandaram* v. *Heenkende*[8] the threat was made, in the absence of the complainant, to two of his servants, one of whom conveyed the threat to their employer. Soertsz J., holding the accused liable, pointed out that the threat had been made with the intention that it should be brought to the complainant's knowledge.[9] Moreover, the evidence indicated that the threat had in fact been conveyed to the complainant, so that the offence was completed.

Would the position be different if the accused intended that the complainant should be informed of the threat, but he was actually told nothing about it? Although the court was not bound in *Balawandaram*'s case to consider this issue, Soertsz J. expressed his opinion on the point. "If the fact that the threat was uttered came to the knowledge of the (complainant) in some way, and he was able to prove it, the charge would be established. If, however, the (complainant) remained in ignorance of the threats, *cadit quaestio*, in that event, there could be no charge."[10]

5. At p. 332.
6. 1 Crim. App. Rep. 16.
7. At p. 17.
8. (1942) 43 N. L. R. 401.
9. At p. 403.
10. At p. 403, *ad fin.*

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It may be noted that the view which was accepted by the court in *Balawandaram* v. *Heenkende* is in conformity with the statement by de Sampayo J. in the previous case of *Sinnappu* v. *Vallipuram*[11] that "The essence of intimidation is the holding out of some threat directly to the person concerned, or with the intention of its being communicated to him."

(b) The *means* by which the threat is uttered must be considered next. The statutory definition itself[12] envisages a "threat" but contains no *indicia* as to the medium whereby the threat is required to be made. In *Murukesu* v. *Karunakara*[13] the court held that the threat, in this context, must be either verbal or contained in writing. But this is probably too narrow a view. There seems no reason, in principle, why a threatening gesture should be excluded from the ambit of the offence. Although Basnayake J. in *Samaranayake* v. *Jayasinghe*[14] thought that a "threat" involved a "declaration of intention",[15] it is submitted that the accused's intention to inflict harm on the complainant or on another may well be manifested by gestures no less than by spoken or written words.

(c) What must have been the accused's *intention* in making the threat? "There can be liability for criminal intimidation only if the accused intended one of two things: (i) to cause alarm to the person to whom the threat was made, or (ii) to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do."[16] The accused should have intended to bring about either of these effects by means of his threat. Where this intention is not present, but the accused made his threat in a spirit of braggartry, liability will not be imposed.[17]

(d) Proof that the accused entertained this intention is not sufficient. The prosecution must establish that the threat, considered in the light of its surrounding circumstances, was of such a nature as to cause "a person of ordinary cautiousness and prudence"[18] to feel alarmed or to desist from the exercise of a lawful right. To this extent, the objective quality of the threat is relevant. However, it is not an essential element of the offence that the complainant actually felt alarmed or that he refrained from availing himself of his lawful right to perform an act or to forbear from an act. Whether the complainant actually felt alarmed or not would depend on subjective considerations such as his strength of will. The accused's inten-

11. 4 C.W.R. 231.
12. Penal Code, section 483.
13. (1923) 2 Times of Cey. 64.
14. (1948) 50 N.L.R. 330.
15. At p. 331.
16. Penal Code, section 483.
17. *Samaranayake* v. *Jayasinghe* (1948) 50 N.L.R. at p. 332.
18. *Borham* v. *Menon* (1937) 17 C.L. Rec. 80.

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tion to cause alarm, coupled with the circumstance that the threat was such as to cause alarm in the mind of the average man, furnishes a sufficient basis of liability, without reference to the actual response of the complainant.

(e) What should be the *content* of the threat? The definition of the offence is of extensive scope in this regard. Harm may be threatened not only to the complainant but to any other person in whom the complainant is interested. The area of liability is only marginally wider in cases where the complainant himself is threatened with harm. Where the threat is to the complainant himself, it encompasses injury to person, reputation or property, but where the threat is to another, only injury to person or reputation falls within the scope of the offence.

The following further principles as to the scope of the threat are deducible from the case law:

(i) Is the concept of "injury", in the relevant sense, restricted to harm done by one person to another, or does it extend to harm which, it is feared, may be inflicted by supernatural agencies?

This question arose for decision in *Banda Korala* v. *Pinhamy*.[19] Here the accused persons had performed a kind of sorcery, known as a *huniam* ceremony, with the intention of putting the complainants in fear of their personal safety and so preventing them from entering their field and reaping the crop. In appeal Lawrie A.C.J. held that the accused persons were properly convicted of criminal intimidation. His Lordship stated: "In my opinion the accused in this case threatened the complainant. True, they did not say that they themselves would do an injury, but they said that injury would certainly follow if an act (namely, the reaping of the harvest) was done. They tried to prevent the complainant doing that act by intimidating him, and that was criminal, because the act was one which the complainant was legally entitled to do."[20]

The physical element of the offence resides in a threat of injury. "Injury" is defined in the Penal Code as denoting "any harm whatever illegally caused to any person in body, mind, reputation or property".[21] This definition is wide enough to cover the kind of harm with which the complainant was threatened in *Banda Korala* v. *Pinhamy*. It must be appreciated, however, that the social context is a relevant factor in this connection. While the threat involves criminal liability only if it would have caused the reasonable man alarm or led him to refrain from exercising a lawful right, the test of the "reasonable

19. (1901) 5 N.L.R. 223.
20. At p. 225.
21. Penal Code, section 43.

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man" does not represent a complete abstraction but has to be applied in the light of prevailing customs and beliefs. Thus, the superstitions peculiar to the class of society to which the parties belong, are relevant in this regard. As the Magistrate rightly observed in *Banda Korala*'s case. "It no doubt seems ridiculous to an Englishman that a bona fide owner should be kept out of his property (by sorcery), but I have no doubt that the superstitious villagers believed that their lives would be forfeited if they entered the field".[22]

(ii) It is clear from the definition of "injury" in the Penal Code that the concept is limited to harm *illegally* caused.[23] Consequently, it has been held that a threat of procuring a person's imprisonment by the sentence of a competent court is not a threat of injury, for purposes of the definition of criminal intimidation.[24] This principle holds good even where the threat is to procure imprisonment by making out a false case before a court having power to pass a sentence of imprisonment.[25]

(iii) Where harm to property is threatened, the property should belong to the person to whom the threat is addressed. Property of which the complainant has temporary use on the leave and license of the owner would not ordinarily be encompassed by the definition of the offence. In *Raman* v. *Superintendent of Police, Hatton*[26] the accused, a member of a trade union was charged with having criminally intimidated M, a worker on an estate who was not a member of the union. According to the evidence, the accused had threatened to set fire to the shed where M and his fellow labourers worked. Wijewardene J. quashed the accused's conviction on the ground that the shed could not be treated as the property of the party threatened, within the meaning of section 483 of the Penal Code.[27]

(iv) Where the alleged threat is to reputation, the reputation assailed may be that of the complainant himself or of someone else in whom the complainant is interested . However, in either case, liability can be imposed only if the reasonable man would have believed that the threat to injure his reputation would be carried out. A situation in which this requirement was held not to have been satisfied, is exemplified by the facts of *Sub-Inspector of Police, Beliatte* v. *Wijesuriya*.[28] The threat was alleged to have been made to a Medical Officer who was engaged in inspecting a building which belonged to the accused's mother. The accused came up to the Medical Officer and spoke rudely to the latter. On being ordered by the Medical Officer to "shut up", the accused retorted: "I will lower you in the

22. (1901) 5 N.L.R. 223 at p. 223, *ad fin.*
23. Penal Code, section 43.
24. *Cassim* v. *Muhamadu* (1892) 1 S.C.R. 254.
25. ibid.
26. (1946) 47 N.L.R. 474.
27. At p. 475.
28. (1935) 3 C.L.W. 78.

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estimation of others." Maartensz J., setting aside the conviction, declared: "It is clear from the evidence that the Medical Officer himself was not as courteous as he might have been and that the accused merely replied to what he considered a piece of rudeness on the part of the Medical Officer. I do not think it can possibly be said that this was a threat to the reputation of the Medical Officer made with intent to cause him alarm."[29]

The threat was construed as an idle boast or an exaggerated statement which was not accompanied by the requisite *mens rea.* Where the alleged threat is made in the course of an exchange of words, it would seem that the whole conversation must be considered with a view to deciding whether the accused intended to cause alarm or whether he was merely responding to provocation offered by the complainant.

A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within the scope of the offence.[30]

(f) A consideration relevant to jurisdiction in regard to this offence is that, where the threat is to cause death or grievous hurt, the offence is not triable summarily by a Magistrate but must be tried by a District Court.[31] This rule, established by statute,[32] has been given effect in a series of cases.[33]

In *Fernando* v. *de Vas*[34] it was contended on behalf of the accused that, in all cases other than those triable by a District Court, the offence of criminal intimidation could not be made out at all. The argument was that if the threat to kill was serious, the Magistrate's Court had no jurisdiction; on the other hand, if the threat could not be expected to be taken seriously, the offence of criminal intimidation would not be committed. Lyall-Grant J. disposed of this argument in the following terms: "I think that there is a *via media* by which a threat of the kind used in this case can be dealt with under section 483. Although the accused admittedly was proved to have used the words 'I will kill you', he was not armed and it was a reasonable inference from the evidence that the complainant was not under the apprehension of death or of grievous hurt. At the same time, the fact that the man so obviously lost his temper, that he came in front of the shop and abused the complainant for some minutes and uttered threats, was sufficient to cause alarm; the act must be construed as having been done with intent to cause alarm, and that being so, it is an act within the definition of criminal intimidation under section 483 of the Penal Code."[35]

29. At p. 79.
30. Explanation to section 483 of the Penal Code.
31. But, see schedule I to the Code of Criminal Procedure.
32. ibid.
33. *Simeon Appuhamy* v. *Velun Singho* (1911) 5 S.C.R. 56; *Sabonaida* v. *Baba* (1915) 6 Bal. N. of C. 47; *Wright* v. *Siriwardena* (1947) 34 C.L.W. 78.
34. (1928) 9 C.L. Rec. 67.
35. At p. 68.

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This approach was approved and adopted by Swan J. in *Caldera v. Imbuldeniya.*[36] His Lordship said: "In the present case the threat complained of by Carline Perera was to kill not her but her husband. The facts reveal that the husband was not there when the threat was uttered, nor is there any evidence to show that the accused was armed or, to put it in other words, that he was in a position to cause death or grievous hurt either to Carline Perera or to her husband. In the circumstances, the threat could not have been uttered with any other intent than to cause alarm to Carline Perera. In my opinion, the charge was properly laid in the Magistrate's Court."[37]

In the light of these cases it would seem that, even though the accused has threatened to cause death or grievous hurt, a Magistrate's Court would still have jurisdiction to try the accused, so long as the threat is not of such a nature as to induce in the mind of the person threatened apprehension that instant death or instant grievous hurt would be caused to him or to some other person in whom he is interested.

(g) A charge of criminal intimidation cannot be combined with a charge of another distinct offence. The governing provision in this regard is the section of the Code of Criminal Procedure which requires a separate charge for every distinct offence of which a person is accused.[38] In *Mohamed Levve* v. *Careem*[39] the offences of criminal intimidation and insult were referred to in the same charge. Basnayake J. set aside the conviction on the ground of this irregularity.

(h) The competency of one spouse to testify against the other is relevant in this connection. The general rule of evidence is that, in criminal proceedings, one spouse may give evidence for the other but may not be called by the prosecution to testify against the other.[40] However, one of several exceptions to this rule is that "In criminal proceedings against a husband or wife for any attempt to cause any bodily injury or violence on his or her wife or husband, such wife or husband shall be a competent witness for the prosecution."[41]

In *Seethevi* v. *Arumugam*[42] K. D. de Silva J. held that this exception enabled a wife to give evidence against her husband in a case where the wife charged the husband with criminal intimidation. His Lordship observed: "Strictly construed, it is true that the offence of intimidation is not an attempt to cause bodily injury or violence, but it has been held in England that 'a threat of personal violence' comes within the exceptions.

36. (1952) 54 N.L.R. 229. 37. At p 231.
38. Code of Criminal Procedure, section 173.
39. (1948) 36 C.L.W. 96.
40. Evidence Ordinance, section 120(2).
41. Section 120(4). 42. (1953) 50 C.L.W. 21.

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When one of the married parties used or threatened personal violence to the other, the law would not allow the supposed unity of person in husband and wife to supersede the more important principle that the State is bound to protect the lives and limbs of its citizens."[43]

According to this construction, the rule precluding testimony by one spouse against the other has no relevance to a prosecution for criminal intimidation.

(j) Where a complaint relating to the commission of a crime is declared vexatious by a Magistrate's Court, the Magistrate has power to order the complainant to pay Crown costs and, if necessary, to compensate the accused who had been acquitted or discharged.[44] The question has arisen whether this provision can be invoked in all circumstances where a charge of criminal intimidation has failed. The word "vexatious", in this context, was construed in *de Silva* v. *Mammadu*[45] where Withers J. observed: "I understand a vexatious complaint to mean one that is brought without cause or for a matter so trivial that no person of ordinary sense or temper would complain of it, with intent to harass the personcomplained of." In *Haronis Appu* v. *Singho Appu*[46] Lawrie J. said that a vexatious charge means "a charge instituted to vex, and not a series of charges, the object of which is to have the accused severely punished."

In *Ranasinghe* v. *Jayasekera*[47] the appellant instituted proceedings against the respondent for criminal intimidation. At the conclusion of the case for the prosecution, the Magistrate discharged the respondent and called on the appellant to show cause why he should not be dealt with for making a "vexatious complaint". On the appellant's failure to show cause, the Magistrate ordered him to pay Crown costs and to compensate the respondent. In appeal, Basnayake J. observed: "A complaint is vexatious within the meaning of section 253 B (of the Criminal Procedure Code) when a case is instituted without sufficient grounds for the purpose of harassing, troubling or annoying the person against whom the complaint is made... In the instant case, there is nothing to show that the appellant instituted proceedings against the respondent for the purpose of harassing him."[48] The Magistrate's order was therefore set aside.

The principle applicable is that an abortive charge is not necessarily vexatious but that the decisive factor lies in the motive with which proceedings were instituted.

43. At p. 22.
44. Code of Criminal Procedure, section 17(1)
45. (1897) 3 N.L.R. 3.
46. (1899) 1 Tamb. 58.
47. (1951) 46 C.L.W. 52.
48. At p. 52.

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(B) *Punishment for Criminal Intimidation*

Severity of the punishment for criminal intimidation depends on the nature of the threat made by the accused. If the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause the commission of an offence punishable with death or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, the appropriate penalty is imprisonment of either description for a term which may extend to seven years, or a fine, or both.[49] In all other cases of criminal intimidation, the maximum punishment enjoined by law is imprisonment of either description for a period of two years, or a fine, or both.[50]

A person who is convicted of the offence of criminal intimidation by an anonymous communication, or a person who takes the precaution of concealing the name or abode of the person responsible for the threat, may be sentenced to imprisonment of either description for a term which may extend to two years, *in addition to* the punishment ordinarily provided for criminal intimidation.[51]

(C) *Criminal Intimidation Distinguished from Other Offences*

(a) *Criminal Intimidation and Causing Hurt*

The offence of criminal intimidation may be complete in circumstances which involve no infliction of hurt, whether grievous or simple. Liability cannot be imposed under section 312 or 313 of the Penal Code unless the accused, by a voluntary act, actually causes hurt to any person with the intention or knowledge specified by these provisions. Criminal intimidation, on the other hand, requires only a threat by the accused. What the victim complains of, in this case, is not that he has suffered physical injury at the hands of the accused, but that the accused's unlawful threat was intended to cause him alarm or to impede the exercise of a lawful right available to him.

(b) *Criminal Intimidation and Wrongful Restraint*

The essence of wrongful restraint is interference with the complainant's freedom of movement.[52] This element, however, is not a necessary feature of criminal intimidation. The epitome of the latter offence is the holding out of a threat. Restriction of the complainant's freedom of movement may sometimes accompany the making of the threat, but this is an extraneous feature which is not part of the definition of criminal intimidation. Where the charge is one of criminal intimidation, the fact that the complainant had a ready means of escaping from the accused, does not necessarily provide a ground of exoneration.

49. Penal Code, section 486.
50. ibid.
51. Section 487.
52. Section 330.

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(c) *Criminal Intimidation and Criminal Force*

The offence of criminal force postulates some form of contact either with the complainant's body or with something he is wearing or carrying.[53] By contrast, no physical contact with the person threatened is required for recognition of liability for criminal intimidation. A mental reaction to an oral statement suffices as the basis of liability in the latter context, unlike in the former.

(d) *Criminal Intimidation and Assault*

These offences have in common the characteristic that some kind of apprehension engendered in the complainant's mind is the foundation of responsibility. But the two offences are distinguishable in the following respects: (i) A threat conveyed by words constitutes the *actus reus* of criminal intimidation, but so far as the offence of assault is concerned, mere words are not sufficient, and the words must be accompanied by some gesture or act of preparation.[54] (ii) If the charge is assault, the apprehension caused in the victim's mind must be of a particular kind, in that a specific development ought to be anticipated. This development is the contingency that the person making the gesture is about to resort to criminal force. By contrast, the nature of the apprehension created in the complainant's mind is not limited in this manner, in the context of the offence of criminal intimidation. In that area, the intention to cause alarm, in any manner, as a result of the threat warrants liability. Alarm may be caused to the complainant otherwise than by anticipation that criminal force would be used. For instance, the complainant may apprehend injury to his reputation in consequence of a statement which the accused threatens to make. The offence of criminal intimidation is of wider scope, in that it includes this kind of situation. (iii) The causing of apprehension to the complainant is an indispensable prerequisite of liability for assault. This is not true of criminal intimidation, however. The causing of alarm is one of two alternative effects envisaged by the latter offence. Where the complainant, although not alarmed in any way, is compelled by the accused's threat to perform an act which he is not bound to perform or to desist from an act which he is lawfully entitled to do, the offence of criminal intimidation is complete. (iv) Assault envisages threatened harm only to the complainant's person, while criminal intimidation extends to threatened harm to the person, reputation or property of the person threatened, and also to the person or reputation of any other party in whom the person threatened is interested. In this respect, again, criminal intimidation is of relatively extensive scope. (v) It is possible that

53. Sections 340 and 351.
54. Explanation to section 342.

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the concept of "apprehension" embodied in the definition of assault, is of a milder quality than the notion of "alarm" which represents a characteristic of criminal intimidation. If this is so, the former idea would encompass situations which are excluded by the latter. (vi) Assault can be committed only if the parties are in the presence of each other, while criminal intimidation can take place by means of a threat conveyed by letter or by a third party.

II. INSULT

"Whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence"[55] incurs liability for the offence of insult. The punishment for this offence is imprisonment of either description for a term which may extend to two years, or a fine, or both.[56]

The *actus reus* of the offence consists of the giving of provocation by means of an insult. The *mens rea* comprises two distinct elements: (i) resorting to an insult intentionally; and (ii) having either the intention or the knowledge that the person insulted would probably disturb the public peace or commit some other offence.

The following characteristics of the offence may be noted:

(a) An insult, *per se*, does not justify imposition of criminal liability. What gives it the character of a crime is the likelihood of a breach of the peace. It is not sufficient that the person insulted had every reason to resent the insult deeply or that he was likely to feel great pain of mind. The vital element of the offence resides in the probability that the person insulted would be led by the provocation offered to behave in such a manner as to cause a breach of the public peace.

In *Senanayake* v. *Don John*[57] Lawrie J. said; "Section 484... does not declare that all insults are an offence. The section limits the character of an offence to such insults as are provocations, and only to such provocations as are intended to cause the person provoked to break the public peace or to commit an offence....It is, I think, intended to prevent breaches of the peace by preventing what is likely to cause them."[58] In *Cader Batcha* v. *Dunn*[59] it was emphasized that mere abuse, however reprehensible it may be, does not constitute the offence of insult, in the absence of an intended or contemplated threat to the public peace.

55. Penal Code, section 484.
56. ibid.
57. (1901) 5 N.L.R. 22.
58. At p. 22.
59. (1910) 3 Weer. Rep. 80.

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(b) The prosecution must establish that the accused intended that a breach of the peace should be brought about or was aware that this consequence would probably ensue.

In *Subasinghe* v. *Muttiah*[60] Howard C.J. observed: "It has been held by this and the Indian courts that a charge of insult cannot be sustained if the language used amounted to mere verbal abuse. It must also appear from the circumstances, from the terms of the abuse itself, and having regard to the person to whom it was addressed, that the accused intended or knew it would be likely to cause him to break the peace or commit some other offence."[61] In *U. J. Perera* v. *Fernando*[62] Abrahams C.J. held that, in the absence of proof relating to such intention or knowledge on the part of the accused, a conviction of insult cannot be sustained. This principle has received emphasis in a series of decisions.[63]

(c) Extravagance of the language employed by the accused is not conclusive. In *Cader Batcha* v. *Dunn*[64] Hutchinson C.J. said: "I do not think that I can say that the mere foulness of the language used is by itself sufficient to prove such intention or knowledge." The nature of the words used may provide some indication of the accused's intent or knowledge, but generally there must be some further evidence *aliunde*.

(d) It has been held that no liability can be imposed for this offence unless the insult is offered to a person's face or at least in his presence or hearing.[65] This limitation on the scope of liability may perhaps be supported on the ground that, where the person insulted has the opportunity of independent thought or reflection, his response cannot be treated as stemming directly from the provocation initially offered by the accused.

(e) The provocative nature of the insult, objectively assessed, gives rise to a strong presumption that the accused had awareness that the insult would have the effect of leading the persons to whom it was addressed, to commit a breach of the peace.[66] In these circumstances, the burden devolving on the prosecution in regard to proof of intent or knowledge is held to be discharged.

(f) Words indicating an intention on the part of the accused himself to break the peace, do not establish liability for insult.[67]

60. (1945) 46 N.L.R. 208. 61. At p. 209. 62. 1 C.L.J. 49.
63. *Fernando* v. *Van Rooyen* (1922) 1 Times of Ceylon. 47; *Rahaman* v. Perera (1929) 10 C.L. Rec. 160; *Mataragawera* v. *Yaratanepi Unnanse* (1914) 2 C.A.R. of Cey. 49; *Marimuttu* v. *Dissanayake* (1939) 41 N.L.R. 31; *S. I. Police* v. *Wijesekera* (1935) 38 N.L.R. 30; *Balasuriya* v. *Dharmasiri* (1932) 1 C.L.W. 343; *Jayasuriya* v. *Ratnayake* (1949) 40 C.L.W. 47; *Gunaratnam* v. *Meeralevvai* (1951) 53 N.L.R. 453.
64. See note 59, *supra*.
65. *Corea Mudaliar* v. *Anthonipillai* (1906) S.C.L. Rev.88; *S. I. Police, Kalutara* v. *Silva* (1928) 6 Times of Cey. 74.
66. *Mageroll* v. *Silva* (1915) 5 Bal. N. of C. 90.
67. *Seneviratne* v. *Arumothan* (1890) 6 C.L. Rev. 26.

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The essence of the offence is the giving of provocation to another, with the result that the latter is induced to break the peace or to commit any other offence.

(g) An open and avowed insult has been held to be necessary.[68] In *Sri Mudali* v. *Sabastian*[69] the accused had scribbled indecent and insulting pictures and words in charcoal on the walls of a mosque abutting a public street. The court expressed the view that these acts did not make for liability for the offence of insult.

(h) Some Ceylon decisions[70] turn on the principle that no offence is committed where the person insulted has not been actually provoked or has shown restraint. This attitude has been adopted particularly in cases where the insult was directed against police officers.[71]

Nevertheless, this approach is now discredited. In *Haniffa* v. *Packeer*[72] Basnayake J. declared: "It is not necessary that the person whom the offender intends to provoke or knows to be likely to be provoked, should in fact be provoked or should actually commit a breach of the peace or an offence. The section requires that the person insulting should intend to provoke a person to commit a breach of the peace. It is immaterial whether the person insulted takes the insult in the manner intended. The mere forbearance of the person insulted and provoked from committing a breach of the peace is insufficient to protect the offender."[73]

In similar vein Wood Renton J. observed in *Frazer* v. *Sinnaiya*[74]: "I think it is not necessary that the complainant should say in so many words: 'I was provoked by the conduct of which I complain'. It is sufficient, I think, if the insult is clearly of a provocative character, of a character likely to produce a breach of the public peace on the part of the respondent towards whom it is directed, and if the court is satisfied from all the circumstances of the case that the accused must have intended to produce, or must have known that he would produce, that result."[75]

The approach emerging from *Frazer* v. *Sinnaiya* and from *Haniffa* v. *Packeer* is clearly preferable. Whether the person insulted allows himself to be provoked or not depends on the strength of will and the degree of self-control he possesses. There is no cogent reason why the issue of liability should hinge

68. See note 69, *infra*, 69. (1898) 4 Bal. Rep. 133.
70. *Corea Mudaliar* v. *Anthonipillai* (1906) 5 C.L. Rev. 88; *S. I. Police, Kalutara* v. *Silva* (1928) 6 Times of Ceylon. 74; *Rahaman* v. *Perera* (1929) 7 Times of Cey. 66.
71. *Herath* v. *Rajapakse* (1932) 1 C.L.W. 326; *S. I. Police* v. *Wijesekera* (1935) 38 N.L.R. 30; *Police Vidane* v. *H. J. Fernando* (1936) 1 C.L.J. 49.
72. (1949) 51 N.L.R. 330. 73. At p. 332.
74. (1910) 14 N.L.R. 3. 75. At p. 4.

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on this subjective and variable criterion. The rationale underlying this approach was convincingly expressed by Basnayake J. in *Haniffa* v. *Packeer*: "It is not necessary that the insulting words should result in an actual breach of the peace nor, indeed, is it necessary that the person insulted should in fact be provoked or yield to his resentment, because if it were so it would not be an offence to insult a person who, by virtue of his position in life, exercises restraint or is too weak to retaliate. The law is not designed to enable those who do not respect law and order to oppress those who do."[76] The position is therefore quite clear under our law that the provocative nature of the insult has to be determined by application of objective criteria and that "The offence depends on the provocation given and not on the provocation felt."[77]

(j) The courts have insisted that, when a charge of insult is brought, the insulting words complained of should always be stated in the indictment.[78] This is a necessary means of enabling the court to assess the provocative character of the words used.

(k) The words "or to commit any other offence" which occur in the definition of insult refer to any offence recognized by the Penal Code but do not extend to offences created by other statutes.[79]

III. MISCONDUCT IN PUBLIC BY A DRUNKEN PERSON

"Whoever, in a state of intoxication, appears in any public place or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person"[80] commits an offence and is liable to be punished with simple imprisonment for a term which may extend to one month, or with a fine which may extend to one hundred rupees or with both.[81]

The components of the offence are the following elements; (a) The accused should be in a state of intoxication; (b) He should have entered either a public place or a place where his presence may be considered that of a trespasser; (c) His behaviour at such place should have been of a kind likely to cause annoyance to any person.

(a) Whether the accused was in an inebriated condition or not, is a question of fact. Proof that the accused was "in a state of intoxication" is an indispensable element of this offence. In *Joseph* v. *Mariam Pillai*[82] Herat J. observed: "The accused

76. (1949) 51 N.L.R. 330 at p. 332.
77. ibid.
78. *Sabaratnam* v. *Perera* (1916) 3 C.W.R. 120; *Batuwantudawa* v. *Karunaratne* (1922) 4 C.L. Rec. 64; *Pakeer* v. *Warnakulasooriya* (1930) 3C.A.R. of Cey. 69; *Ismail* v. *Thangaiah* (1949) 40 C.L.W. 63.
79. Penal Code, section 38(1).
80. Penal Code, section 488.
81. ibid.
82. (1963) 65 N.L.R.406.

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was not examined by any medical officer who could have reported as to whether the accused was in an intoxicated state. Because a man is smelling of liquor and behaving in a disorderly manner, it does not necessarily follow that he is in a state of intoxication. I therefore hold that one vital element of the offence charged is not borne out by the evidence."[83] The conviction was quashed on this ground.

(b) The phrase "public place" has received a narrow interpretation in the Ceylon cases. In *Pietersz* v. *Wiggin*[84] the phrase was defined as meaning "a place to which and from which the public have ingress, egress and regress as of right, and without reference to any particular purpose". According to this definition, a right of entry qualified by reference to some such consideration as the purpose for which the right is exercised, would not confer on the public an adequate interest, the contravention of which exposes the accused to criminal liability. Even more important is the requirement that the public must be entitled to entry as of right. A right of entry deriving from the permission or acquiescence of the owner of the premises is apparently insufficient for this purpose. Thus, in *Wijesuriya* v. *Abeyesekera*[85] Shaw J. held that the venue of a circus was not a public place, on the ground that "It is within the power of the proprietor (of a circus) to prevent anyone entering without payment, and indeed to prevent anyone entering whom he deems undesirable as a member of the audience". This was a case where the right of entry available to the public was conditional on payment of a fee for admission and, in any event, was subject to the discretion of the proprietor. The court probably went too far in insisting that the offence was restricted in scope to cases where the public had an absolute right of entry. This criticism may be made justifiably of the ruling in *Wijesuriya* v. *Abeyesekera* that an accused person who pays for his ticket, becomes intoxicated and causes annoyance to the other spectators at the circus, cannot be convicted of this offence.

In keeping with the criteria emerging from the case law, it has been held that a rest-house[86] and a post office[87] are public places within the meaning of section 488 of the Penal Code, while a police station[88] is not.

Where the accused is not in a "public place", it is sufficient if he is found in a place which he had entered without a lawful right, whether express or implied. This would satisfy the criterion embodied in the phrase "any place which it is a tres-

83. At p. 407.
84. (1892) 1 S.C.R. 320.
85. (1919) 21 N.L.R. 159.
86. *Perkins* v. *Don Samel* (1926) 28 N.L.R. 173.
87. *Inspector of Police, Batticaloa* v. *Ponniah* (1938) 40 N.L.R. 255.
88. *Van Cuylenberg* v. *Weerasekera* (1948) 39 C.L.W. 26.

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pass in him to enter." A person visiting a place as a licensee or on sufferance by the owner does not incur liability on this ground, since he is not a trespasser at that place.

It is a requirement that the accused should voluntarily enter either of the categories of places envisaged by the definition of the offence. Thus, if the accused is brought in a drunken condition to the place in question without his knowledge or against his will, one of the essential elements of liability would not be established.

(c) The effect of this requirement is that the accused's conduct should have been such as to cause annoyance to an average member of the public. It is not necessary that one of the persons present should be proved to have been actually annoyed. The test in this regard, then, is basically hypothetical and objective.

IV. CRIMINAL DEFAMATION

This offence is defined by section 479 of the Penal Code which declares that "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person".

The interest protected by this offence is the interest which all persons have in their reputation. Subject to the exceptions recognized by the law, wilfully lowering a person in the esteem of others is treated as an offence. Such an act entails contravention of an inherent right in a manner which justifies imposition of criminal responsibility.

The following features of the offence of criminal defamation emerge from the statutory definition:

(a) Deceased persons are capable of being defamed;[89]

(b) The reputation of corporate persons no less than that of natural persons is protected in this respect by the law;[90]

(c) An innuendo may be relied upon to establish defamation;[91]

(d) Defamation includes disparaging references to a person's caste or calling.[92]

The defences to a charge of criminal defamation coincide, in the main, with the defences to a civil action for defamation.

89. Penal Code, section 479, Explanation 1.
90. Penal Code, section 479, Explanation 2.
91. Penal Code, section 479, Explanation 3 and illustration (a).
92. Penal Code, section 479, Explanation 4.

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The defences admitted by the Penal Code are: (a) justification;[93] (b) fair comment,[94] (c) privilege;[95] (d) lawful authority.[96] These defences are incorporated in the Exceptions which are appended to the definition of criminal defamation.

The punishment for criminal defamation is simple imprisonment for a term which may extend to two years, or a fine, or both.[97] Printing or engraving matter known to be defamatory[98] and the sale of printed or engraved matter known to be defamatory in content[99] are distinct offences. The penalty applicable to these offences is the same as that for criminal defamation.

V. RATIONALE OF THE OFFENCES

These offences all involve violation of feelings. In the field of civil law, the *actio iniuriarum* provides a remedy for wrongful transgression of personality or feelings. In regard to the basic interests protected, there is a partial overlap between the *actio iniuriarum* and the requisites of liability for offences constituted by Chapters XIX and XX of the Penal Code.

Nevertheless, there are significant differences between the scope of delictual liability and of criminal liability in this area. The *actio iniuriarum* is a general remedy protecting three broad categories of interests—*corpus*, *dignitas* and *fama*. But only a very small part of the area provided for by the *actio iniuriarum* falls within the purview of the relevant offences created by the Penal Code. The elements contained in the offences of criminal intimidation, intentional insult and criminal defamation would generally establish delictual liability, but the latter extends to a variety of circumstances which are extrinsic to the scope of the offences.

Apart from the fact that criminal liability is confined to far fewer contexts than civil liability, the essential requirements of criminal liability are more stringently conceived within the area of each specific offence than the corresponding elements of liability under the *actio iniuriarum*. This may be illustrated by examining the offence of intentional insult. In the field of delict, the governing criterion in this regard is that an average person should have felt humiliated or that his dignity should have been unjustifiably impaired, in consequence of the act done or the words used by the defendant. By contrast, so far as criminal liability is concerned, the mental ingredient of *contumelia* and the objective effect of violation of feelings are not sufficient. The essence of criminal liability derives from a

93. Section 479, Exception 1.
94. Section 479, Exceptions 2, 3, 5 and 6.
95. Section 479, Exceptions 4 and 9.
96. Section 479, Exceptions 7 and 8.
97. Penal Code, section 480.
98. Section 481.
99. Section 482.

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threat to the public peace or the likelihood that an offence would be committed. In the absence of this added element, although a case can be made out for imposition of responsibility in delict, criminal liability is rigidly excluded.

This is accounted for by the materially different objectives of delictual and of criminal liability. The former is concerned with the reparation of a wrong by payment of monetary compensation, while the latter involves not merely the adjudication of a claim by one citizen against another but the punishment of persons at the instance of the State. An *iniuria* giving rise to a grievance in an individual is adequately redressed by payment of compensation, but the invocation of penal sanctions has to be justified by reference to some element of jeopardy to the public interest rather than to the feelings of individuals. Accordingly, it is the element of foresight that the person insulted may be provoked into retaliating by the commission of an offence or by disturbing the public peace, that exposes the accused to liability for the offence of intentional insult. It is thus seen that an element which is altogether irrelevant to delictual liability is identifiable as an indispensable prerequisite of criminal liability.

The divergent scope of civil liability for defamation and criminal liability for defamation is also explicable on the basis of the different rationale underlying civil and criminal liability. Although *dolus malus*, understood in the sense of intent, was a necessary element of liability in the classical Roman-Dutch law relating to defamation, the modern case law tends to follow a different approach by extending liability to cases where negligence rather than intention is properly imputable to the defendant. So far as the modern civil action for defamation is concerned, it would appear indisputable that a defendant who has no intention of injuring the plaintiff's reputation, may still be liable, so long as he ought to have foreseen, even if in fact he did not foresee, that the plaintiff would be defamed by the imputation he makes.[100] The concept of *animus iniuriandi* in the modern civil law of defamation, then, envelopes negligence no less than intention. It would seem that the case law[101] cannot be explained satisfactorily on any other hypothesis.

Moreover, some cases[102] lend support to the view that proprietors and editors of newspapers and other mass media of communication may be properly burdened with strict liability

100. See, for example, *Hulton* v. *Jones* (1910) A.C. 20; *Vengtas* v. *Nydoo* 1963 (4) S.A. 358.
101. See note 100, *supra*.
102. *Wilson* v. *Halle* 1903 T.H. 178; *Hartley* v. *Palmer* (1907) 17 C.T.R. 278; *Naylor* v. *Central News Agency* 1910 T.H. 189. See also *Hill* v. *Curlewis* (1844) 3 M. 520; *Dunning* v. *Thomson* 1905 T.H. 313; *Robinson* v. *Kingswell* 1913 A.D. 513; *Toerien* v. *Duncan* 1932 O.P.D. 180.

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for defamatory material published by them. These cases are consistent with the view that the mere publication of a defamatory statement is sufficient in these circumstances to justify liability, whatever the defendant's state of mind may have been and whether some element of culpability was attributable to him or not. In this sense, there is no doubt that the civil law of defamation in recent times has placed increasing emphasis on the objective fact of publication, while considerations pertaining to the defendant's state of mind have been relegated.

The position in regard to criminal defamation is significantly different. In this area, the defendant's state of mind continues to be treated as a vital factor. In any event, the statutory definition of criminal defamation in the law of Ceylon leaves no room for acceptance of negligence as a sufficient basis of liability. In our law, an accused person should have the intention of causing harm to another's reputation, or he should know or have reason to believe that such harm would be caused, before criminal liability for defamation can be imposed. This requirement has the effect of restricting criminal liability to a much narrow compass than liability in the civil action for defamation.

The relatively limited ambit of criminal liability for defamation is indicated by the decision reached in the trial at bar in *Thejawathie Gunawardene*.[103] The accused was charged with criminal defamation in respect of a statement published in a newspaper. The statement concerned a person who had held high office, in Government for many years in various capacities and who, on the day before the publication of the statement, had ceased to hold office as Minister of Finance and became Governor-General designate. The statement was to the effect that the Governor-General designate had been engaged in swindles on an international scale and that a public trial of the gang—of which he was presumably a member—was imperative. The Court which consisted of three judges, acquitted the defendant on the ground that the prosecution had failed to establish that the defendant published the relevant issue of the newspaper with the necessary knowledge of its contents.[104]

The decision turned on the state of mind of the defendant. While it is possible that civil liability would have been imposed in these circumstances, the application of penal sanctions was manifestly indefensible. There is something to be said for the view that the owner or editor of a newspaper which carries a defamatory article about X, should be liable in damages to X, even if the owner or editor had no knowledge of the contents of the article. The plaintiff, a blameless party, has suffered

103. (1954) 56 N.L.R. 193. 104. See Editor s note at p. 214.

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damage to his reputation, while the defendant has been at least negligent and to that extent culpable. A preponderant equity in favour of the plaintiff may be recognized reasonably in these circumstances. But this is only because the defendant's obligation is limited to satisfaction of a monetary claim. The position in regard to the civil action has no bearing on the principle that absence of intent in the defendant militates conclusively against recognition of criminal liability.

It may be noted in passing that a charge of criminal defamation is not necessarily restricted to circumstances such as those envisaged in *Thejawathie Gunawardene*'s case. The *factum* and the *animus* of criminal defamation are capable of being established in situations where the person defamed is not a high dignitary of Government but an ordinary member of the public.

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CHAPTER 9

OFFENCES AGAINST PUBLIC JUSTICE

The Penal Code of Ceylon contains a separate chapter[1] dealing with false evidence and offences against public justice. The interest which the community at large has in the proper administration of justice is such as to justify the deliberate subversion of justice being characterized in some circumstances as a crime.

Broadly, the Penal Code recognizes six categories of offences in respect of public justice;

I. The giving or fabricating of false evidence;
II. Improper suppression of existing evidence;
III. Improper use of the process of a court;
IV. Other methods of participating in the subversion of justice;
V. Complicity of public officials in offences in respect of justice;
VI. Resistance or obstruction of lawful arrest or detention.

The offences against public justice, constituted by the Penal Code of Ceylon, are seen on analysis to fall into one of these categories which warrant separate treatment.

I. THE GIVING OR FABRICATING OF FALSE EVIDENCE

The structure of the law may be indicated at the outset. The offences of giving[2] and fabricating[3] false evidence, respectively, are constituted by separate sections of the Penal Code which incorporate comprehensive definitions. Three sections deal with the quantum of punishment for giving or fabricating false evidence.[4] The gravity of the punishment depends on three factors: (a) whether the false evidence was given in, or fabricated for use in, a judicial proceeding or not;[5] (b) whether the false evidence was given or fabricated with intent to procure conviction of a capital offence or not, and if the answer is in the affirmative, whether an innocent person was thereby convicted and executed or not;[6] and (c) whether the false evidence was given or fabricated with the intention of procuring conviction of an offence punishable with imprisonment for a term exceeding seven years or not.[7]

1. Penal Code, Chapter XI.
2. Penal Code, section 188.
3. Section 189.
4. Sections, 190, 191 and 192.
5. Section 190.
6. Section 191.
7. Section 192.

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Two other provisions contemplate particular methods of fabricating false evidence—namely, issuing or signing a false certificate[8] and the making of a false statement in any declaration which is receivable by law as evidence.[9] In some instances, the use of evidence known to be false is put on the same footing as the giving or fabricating of false evidence.[10] This includes the use of certificates and declarations which are known to be false in content.[11]

The definition of "giving false evidence" is embodied in section 188 of the Penal Code which declares that "Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence."[12] This provision goes on to state that "Wherever, in any enactment, the word 'perjury' occurs, such enactment shall be read as if the words 'giving false evidence' were therein used instead of the word 'perjury'".[13]

The main requisites, then, of the offence are the following: (a) the imposition of a legal obligation on the accused to state the truth; (b) the making of a statement which is in fact false; and (c) the existence of a particular state of mind in the accused. Requirement (c) is satisfied by one of three conditions: (i) knowledge that the statement is false, or (ii) belief that the statement is false, or (iii) lack of belief that the statement is true.

Elements (a) and (b) relate to the *actus reus* of the offence. Moreover, they envisage factors which are objectively ascertainable. Thus, the questions whether a legal duty to state the truth devolved on the accused or not and whether he in fact stated the truth or not, pertain to objective *facta* which are essential components of the offence. On the other hand, element (c) relates to the *mens rea* or the subjective condition of mind of the accused. Slight variations in content may be noticed among the three requirements postulated in regard to the mental element. For example, *belief* that a statement is false is a less positive criterion than *knowledge* that it is so. The accused may not have certain or definite knowledge that the statement is false, but the requisite *mens rea* is shown to exist if facts within his knowledge induce or encourage the impression in his mind that the statement is untrue. Lack of belief in the truth of the statement envisages a context in which the accused has knowledge neither that the statement is true nor that it is

8. Section 194.
9. Section 196.
10. Sections 193, 195 and 197.
11. Sections 195 and 197.
12. Section 188.
13. ibid.

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false, but the accused deliberately commits himself to a statement as to the truth or falsity of which he is indifferent. It seems an acceptable construction that what is contemplated here is a form of recklessness, since the accused does not care whether his statement is true or false.

The following points may be noted about the content and scope of the offence of giving false evidence:

(i) A verbal statement is not the exclusive means whereby the offence may be committed. The offence extends to statements made verbally or in some other way.[14]

(ii) The offence is not necessarily confined to statements made in a court of law. False evidence, whether given at any stage of a judicial proceeding or in some other case, is within the scope of the offence, and the sole difference between the two cases is concerned with the extent of the penalty. The maximum punishment which may be imposed in the two cases respectively, is imprisonment for seven years[15] and imprisonment for three years.[16]

As to the nature of a judicial proceeding, the following principles are adopted statutorily:

(a) A trial before a court-martial or before a military court of requests is a judicial proceeding;[17]

(b) An investigation directed by law, preliminary to a proceeding before a Court of justice, is a stage of a judicial proceeding, even though that investigation may not take place before a Court of Justice;[18]

(c) An investigation directed by a Court of Justice according to law, and conducted, under the authority of a Court of Justice, is a stage of a judicial proceeding, even though that investigation may not take place before a Court of Justice.[19]

It is clear that the element of a proceeding *coram judice* is not an indispensable constituent of the offence of giving false evidence.

(iii) The fact that the ultimate result sought to be achieved by a false statement, is conducive to the ends of justice, does not furnish a ground of exoneration. Thus, a false statement made in support of a claim which in itself is just, may amount to false evidence if the required *mens rea* is shown to exist in the accused.[20]

(iv) A false statement may be made in regard to a question of belief or a state of knowledge. Thus, it is a question of fact whether a person entertains a particular belief or has knowledge

14. Section 188, Explanation 1.
15. Section 190.
16. ibid.
17. Section 190, Explanation 1.
18. Section 190, Explanation 2.
19. Section 190, Explanation 3.
20. Section 188, Illustration (a) to Explanation 2.

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of a particular matter at a given time. A false statement in this regard suffices for a conviction of giving false evidence.[21] Where the accused has deposed that he believed X was in Colombo on a given day, the relevant question is not whether X was in fact in Colombo or not on that day, but whether the accused genuinely believed in the truth of his testimony. If the answer is in the negative, it makes no difference to his liability that the circumstance he deposed to turns out in the result to be objectively correct.[22] Conversely, where the accused professes to believe that a certain state of affairs exists—and he is sincerely convinced of the existence of that state of affairs—he does not become liable merely because his belief is shown to be unfounded.[23]

(v) The burden of establishing all the ingredients of the offence must be placed on the prosecution. A conviction of giving false evidence cannot be sustained in circumstances where the accused has been unjustifiably burdened with the duty of proof and required to offer explanations which he was not obliged to give. This is inherently sound in principle. On this point the Supreme Court of Ceylon[24] has readily followed Indian authority.[25] Moreover, the rule has been formulated that "There must be something in the case to make the oath of the prosecution witnesses preferable to the oath of the accused".[26] This, again, is manifestly defensible, since the scales would otherwise be evenly balanced as between the prosecution and the accused, with the result that an acquittal is unavoidable.[27]

(vi) The question has arisen in Ceylon whether a witness who has made contradictory statements in relation to the identical subject-matter, may be indicted for giving false evidence on the basis that one of his statements must be false.

So far as two specific contexts are concerned, this matter is governed by explicit provision contained in the Criminal Procedure Code.[28] It is provided that "If, in the course of a trial in any District Court or of a trial by jury before the Supreme Court, any witness shall on any material point contradict either expressly or by necessary implication the evidence previously

21. Section 188, Illustrations (b) and (e) to Explanation 2.
22. Section 188, Illustration (d) to Explanation 2.
23. Section 188, Illustration (c) to Explanation 2.
24. *Dharmasiriwardene* (1931) 33 N.L.R. 185.
25. *Tilak* I.L.R. 28 (Bom.) 479.
26. *Dharmasiriwardene, supra,* at p. 186.
27. In *Sirimane* (1925) 7 C.L. Rec. 7 it was even suggested that a person cannot properly be convicted of giving false evidence on the uncorroborated evidence of the prosecutor alone, but this formulation of the principle seems too absolute.
28. Section 439(1). See, section 448 of the Code of Criminal Procedure, No. 15 of 1979.

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given by him at the inquiry before the Magistrate, it shall be lawful for the presiding judge, upon the conclusion of such trial, to have such witness arraigned and tried on an indictment for intentionally giving false evidence in a stage of a judicial proceeding."[29]

This provision is clearly limited in its application to cases where the contradictory statements have been made in the first instance before a Magistrate and subsequently in a District Court or during a trial by jury before the Supreme Court. Other cases—for example, where the statements which are mutually irreconcilable, have been made before two Magistrates—are not provided for.

In the latter situations which are not within the purview of the statutory provision, a conflict of opinion emerges from the case law. In the early case of *Jasik Appu*[30] the indictment set out two incompatible statements made by the accused and averred that one of these statements was known by the accused to be false or not believed by him to be true. Browne A.P.J. upheld the propriety of this indictment in appeal. In the view taken by the court, the inconsistency of the two statements by the accused dispensed with the need for proof as to his intention. A similar view appears to have prevailed in *Thomas*.[31]

However, other cases have disapproved strongly of this approach. In *Dias*[32] three judges of the Supreme Court[33] were unanimous in their conclusion that evidence of inconsistency between different statements attributed to the accused, is insufficient to support a conviction of giving false evidence. Layard C.J. rejected the authority of *Jasik Appu*'s case in the following terms: "Browne J. merely states that he relies on this form (of the indictment) because it had been approved in India; but this form was approved in India under certain provisions of the law which are not in existence at the present time in this Colony. But even if Indian Courts had expressly adjudicated on the law as it exists at this time in Ceylon, I would not consider myself bound to follow those decisions unless they appeared to me to be manifestly sound."[34]

This attitude derives support from the judgment of Bertram C.J. in *Anantham* v. *Saiado*.[35] His Lordship observed; "The real principle at issue, I think, is this. Loose statements in immaterial introductory matters made in such a manner that it is obvious that the witness it not thinking what he is saying are not appropriate subjects for a charge of giving false evidence.

29. at p. 220.
30. (1900) 4 N.L.R. 18.
31. (1898) 7 C.L. Rev. 5.
32. (1903) 6 N.L.R. 258.
33. Layard C.J., Middleton J., Grenier A.J.
34. (1903) 6 N.L.R. 258 at pages 261-262, *per* Layard C.J.
35. (1920) 21 N.L.R. 407.

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Under such circumstances, as the mind of the speaker is not at the time conscious that the statement is false (inasmuch as his mind is not really directed to the question of its truth or falsity), it can hardly be said that he knows or believes the statement to be false at the time he makes it. It would be otherwise if the witness is speaking of something which is obviously crucial to the case, inasmuch as this would be a point to which his mind would in the circumstances necessarily be directed."[36]

It is submitted that the view reflected in *Dias'* case and in *Anantham* v. *Saiado* is preferable to that inherent in *Thomas* and *Jasik Appu*. The obective falsity of the statement is merely one aspect of the constituents of giving false evidence. It remains the responsibility of the prosecution to impute the relevant state of mind to the accused. It is unsafe to assume that the required mental element is necessarily demonstrable by reference to the irreconcilable character of statements made by the accused at different times. Innocent explanations of inconsistency cannot always be excluded. Thus, in *Jasik Appu*, the petition of appeal averred that it was not impossible for an illiterate person like the accused to forget the statement he had made at the initial inquiry and later to make a different and contradictory statement with regard to the same matter at the trial, especially when a period of three months had elapsed between the inquiry and the trial.[37] Factors peculiar to the accused may be vitally important in deciding whether the appropriate mental element is adequately established by the inconsistency alone. In *Anantham* v. *Saiado* Bertram C.J. aptly said: "It may be quite true that no ordinarily intelligent person who has travelled by a night train, does think afterwards that he has travelled by a day train. But whether or not this actually happened in the present case must depend upon what is called the mentality of the accused, which in this case was obviously a very low one."[38] In *Dias'* case Middleton J. supported his unwillingness to draw an inference of dishonesty from the inconsistent statements by the accused, on the basis of the principle relating to strict construction of the criminal law.[39]

The best approach, it is conceived, is to treat the matter as a question of fact which has to be determined in the light of the circumstances of each case. No general rule can be formulated since the nature of the discrepancy, the importance of the statement, the condition and background of the accused and the surrounding circumstances must all be taken into account in deciding whether the mental element called for in the accused

36. At p. 409. 37. (1900) 4 N.L.R. 18 at p. 19.
38. (1920) 21 N.L.R. 407 at p. 409.
39. (1903) 6 N.L.R. 258 at p. 263.

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has been proved. In general, it may be suggested on the footing of the later judgments that the courts are reluctant to accept the incompatibility of different statements, *per se*, as indicative of the relevant state of mind in the accused. The rationale underlying this liberal approach was succinctly expressed by Bertram C.J. in *Anantham*'s case: "It is not the intention of the law to punish every loose and unthinking statement which a witness makes in the box, but only such statements as are deliberately made with the intention of bringing about a miscarriage of justice. That appears to me to be the reason why it is incumbent on the prosecution to allege definitely the falsity of the statement on which the charge is based."[40]

(vii) A sufficient degree of specificity must characterize the charge. The accused must be provided with all such information as would enable him to comprehend the nature of the charge and to present his defence. The requirements of the law in this regard were set out by Layard C.J. in *Ponniah*:[41] "A charge of giving false evidence should contain a distinct assertion with regard to each statement intended to be characterized as false; that it was made; that it is untrue in fact; and that the accused knew it was so when he made it. It appears to me that it is only right that, when the Crown intends to establish that two or more statements contained in a lengthy deposition are false, it should distinctly set out each such statement separately, and state that it is not true in fact and that the accused knew that it was so when he made it."[42] His Lordship stated, as a ground for quashing the conviction in the case under appeal: "I must confess that I was unable to gather by merely looking at the indictment how many statements or what part of the statements set out in the indictment, were alleged by the Crown to be false....In my opinion, not only was the indictment not sufficiently precise, but it was absolutely unfair to the accused to call upon him to plead to an indictment which is so indefinite and so misleading." The principle involved is that, where the indictment is couched in terms which are so general as to border on vagueness, the conviction cannot be sustained in appeal.

As a corollary to this principle, some cases reflect the view that it is not open to the prosecution to base the charge on two or more statements in the alternative.[43] The better view in this connection is that the prosecution must commit itself to a specific statement which it alleges to be false, and prove that the statement was false to the knowledge of the person making it.[44]

40. (1920) 21 N.L.R. 407 at p. 409.
41. (1903) 8 N.L.R. 216 at p. 219.
42. ibid.
43. *Dias* (1903) 6 N.L.R. 258.
44. *Anantham* v. *Saiado* (1920) 21 N.L.R. 407 at p. 408.

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This requirement dispels any uncertainty or ambiguity which might otherwise have been a feature of the indictment.

Failure on the part of the prosecution to indicate with adequate clarity that portion of the accused's evidence which is impugned as false, is generally treated as fatal to a conviction. In an early anonymous case Bonser C.J., setting aside a conviction, stated: "The appellant was not informed, as he should have been, what part of the evidence, in the Magistrate's opinion, was false, he was simply told that he had given false evidence. This was not sufficient information to the appellant of the matter of which he was accused."[45]

(viii) Clearly, the accused ought to have understood the effect and content of his statement before he can be dealt with criminally. In *Ponnasamypillai*[46] the accused was charged with having made a false statement in an affidavit submitted by him in a civil suit. There was no indication, however, that the affidavit had been read over and explained to the accused. Schneider A.C.J. held in appeal that the conviction could not be sustained. This precaution is likely to have been particularly salutary at a time when the courts used a language which was not intelligible to the majority of witnesses who participated in their proceedings.

(ix) A further question is whether it is a precondition of liability that the statement by the accused should have been material, in the sense that it had a direct bearing on the outcome. It is clear that materiality, in this sense, is not an essential ingredient of liability. Thus, in *Habibu Mohamadu*[47] Bonser C.J. declared that the materiality of a statement was not of the essence of the offence. Nevertheless, the issue of materiality is not wholly irrelevant. Thus, Bonser C.J. said: "The statements may be so entirely unimportant that a jury may be justified in coming to the conclusion that the attention of the accused was not called to what he was saying, and that there was an absence of any intention wilfully to mislead them and to make an untrue statement." On the other hand, if the matter of which the accused was speaking was manifestly vital to the case, this would generally tend to suggest that the accused's mind was consciously directed to the effect of his testimony.[48]

(x) In *Sirimane*[49] it was held that, in a prosecution for giving false evidence, the court should observe the rule that a person ought not to be convicted on the uncorroborated evidence of the prosecutor. In the generality of cases, this rule would no doubt be seen to rest on a sound basis. Nevertheless, it must

45. 1899 Koch's Rep. 64.
46. (1926) 28 N.L.R. 156.
47. (1894) 3 C.L. Rep. 57.
48. ibid.
49. (1925) 7 C.L. Rec. 7.

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be regarded at most as a practical guideline and cannot be held to have crystallized into a rigid rule of law. In some contexts the courts have more or less uniformly adopted the practice of warning juries that it is unsafe to convict on uncorroborated evidence. The testimony of an accomplice or of the prosecutrix in the case of sexual offences, may be suggested as examples. A similar principle may perhaps be extended by way of analogy to the offence of giving false evidence. But an *a priori* assumption is probably unjustifiable and willingness to judge each case on its own merits represents a preferable approach. In any event, however, the case in which the uncorroborated evidence of the complainant is accepted as sufficient to justify a conviction of giving false evidence, must be identified as exceptional.

(xi) Some points in regard to the nature of the proof required in connection with a charge of giving false evidence, are clarified by the cases. In *Nagamany*[50] Hutchinson C.J. held that, where a charge of giving false evidence is based on the accused's having denied being sentenced to a term of imprisonment for stabbing, it was not sufficient for the prosecution to produce the alleged victim of the stabbing. The record of the case must be made available to the court and clear evidence must be adduced which enables identification of the accused as the person responsible.

The Civil Procedure Code of Ceylon contains explicit provision that the evidence of a witness has to be taken down by the judge.[51] This provision was not complied with in *Wijeyesekere*[52] where the accused's evidence, given in a civil proceeding, was taken down not by the judge himself but by a shorthand writer acting under the immediate direction of the judge. It was held in appeal that the shorthand record does not constitute legally admissible evidence against the accused in a prosecution for intentionally giving false evidence *coram judice*. Nihill J. observed: "The law requires that the evidence should be taken down by the judge. It is not possible to say here that, in any real sense, there was any taking down by the judge. The record which should have supported the charge of perjury is not available, and another record taken down by the shorthand writer is offered as proof. This cannot be allowed."[53] The principle deducible from this decision would appear to be that where a person is indicted for giving false evidence on the basis of a document, it is essential that the document should have been compiled in accordance with legal requirements which govern its preparation and production in court as evidence.

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50. (1908) 4 A.C.R. Supplement xxix.
51. Section 169.
52. (1940) 41 N.L.R. 512.
53. At p. 518.

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Three final points may be made in regard to the offence of giving false evidence:

(a) The Criminal Procedure Code provides that "No court shall take cognizance of any offence punishable under section 190...of the Penal Code when such offence is committed in or in relation to any proceedings in any court, except with the previous sanction of the Attorney-General."[54] This provision was construed, and the circumstances in which the Attorney-General's sanction is necessary were examined, in *Dharmalingam Chetty* v. *Vadivel Chetty*.[55] In this case the accused was charged with giving false evidence in the course of, or for the purpose of, an investigation directed by law not in court but prior to the institution of proceedings in court. The question for decision was whether the offence was committed "in any Court or in relation to any proceedings in any Court" within the meaning of section 147(i) (b) of the Criminal Procedure Code. The need for the Attorney-General's concurrence hinged on the answer to this question.

The most significant feature of the Supreme Court's judgmen in this case was the emphasis it placed on the difference in phraseology between section 190 of the Penal Code which prescribes the punishment for the offence of giving false evidence and section 147 (i) (b) of the Criminal Procedure Code which demarcates the limits within which a prosecution may be embarked upon only with the consent of the Attorney-General. The former provision, it was pointed out, distinguished expressly between giving false evidence in any stage of a judicial proceeding and giving false evidence otherwise than in any stage of a judicial proceeding and lays down a relatively onerous penalty for the former offence, while the latter provision referred not to "any judicial proceeding" but to "any proceeding in any Court". This difference was held to be of vital importance. The three Explanations appended to section 190 of the Penal Code have the effect of extending the meaning of the words "judicial proceeding " and of bringing within the scope of the phrase five distinct categories of inquiries—(1) a proceeding in a Court of Justice; (2) a trial before a Court Martial; (3) a trial before a Military Court of Requests; (4) an investigation directed by law preliminary to a proceeding before a Court of Justice; and (5) an investigation directed by a Court of Justice according to law.[56]

However, the expansive construction of the phrase "judicial proceeding" which is made possible by the Explanations attached to section 190 of the Penal Code, is limited in scope to that phrase and does not apply to the different words

54. Section 147(1) (b). See section 135 (1) c of Code of Criminel Produce No. 15 of 1979.

55. (1937) 39 N.L.R. 116.

56. At p. 117.

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"proceeding in any Court" which occur in section 147 (1) (b) of the Criminal Procedure Code. Soertsz J. declared: "The meaning of the word 'court' in section 147 (of the Criminal Procedure Code) has not been extended by explanation or otherwise in the way in which the words 'judicial proceeding' have been extended in section 190 (of the Penal Code),"[57] While it was accepted as correct, in the context of section 190 of the Penal Code, that "A wider meaning than the words usually bear has been given to 'judicial proceeding'",[58] it was stressed that, so far as section 147 of the Criminal Procedure Code is concerned, "The word 'court' must be given the meaning it has in the Courts Ordinance, No. 1 of 1889."[59]

The resulting position is that although the ambit of a "judicial proceeding" in the former context is extended appreciably in keeping with the Explanations incorporated in section 190 of the Penal Code, the word "court" in the relevant provision of the Criminal Procedure Code[60] requires to be interpreted as denoting "a Judge empowered by law to act judicially as a body, when such judge or body of Judges is acting judicially."[61] In view of this material difference, Soertsz J. concluded in *Dharmalingam Chetty* v. *Vadivel Chetty* that "The previous sanction of the Attorney-General is not necessary in the case of an offence committed in the course of, or for the purpose of, an investigation directed by law preliminary to a proceeding in any Court, for such an offence is not committed in any Court or in relation to any proceeding in any Court, although it is committed in a stage of a judicial proceeding, so far as section 190 of the Penal Code is concerned."[62] The applicable principle, then, is that, where false evidence is given in a stage of a "judicial proceeding", within the meaning of section 190 of the Penal Code, but not "in any Court or in relation to any proceeding in any Court", as required by section 147 (1) (b) of the Criminal Procedure Code, the sanction of the Attorney-General is not a prerequisite to the commencement of a prosecution for giving false evidence.

This procedural limitation is supported by a sound rationale in that, in the restricted category of circumstances to which it applies, there is obvious value in a rule which requires that all the relevant factors should be impartially considered by a responsible and detached official before the decision to institute criminal proceedings is taken. In cases of this kind it would generally not serve the ends of justice to allow a prosecution to be embarked upon entirely at the instance of interested parties

57. At p. 118. 58. ibid. 59. ibid.
60. Section 147(1)(b). See note 54, *supra*.
61. Section 2 of the Courts Ordinance, No. 1 of 1889.
62. (1937) 39 N.L.R. 116 at p. 118.

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who are bound to be influenced by partisan considerations. In this instance, therefore, the relevant restriction embodies a defensible precaution.

However, another aspect of the rule requiring the Attorney-General's consent to prosecutions for this offence, within the prescribed limits, may be assailed as anomalous. Thus, the scope of section 147 (1) (b) of the Criminal Procedure Code is strictly confined to thirteen specific sections of the Penal Code. The fabrication of false evidence is made punishable by section 190 of the Penal Code, but criminal liability for the abetment of a specified category of offences (including the offence constituted by section 190) is recognized by the distinct provision contained in section 101. Section 190 of the Penal Code falls within the purview of section 147 (1) (b) of the Criminal Procedure Code, but section 101 of the Penal Code does not. The effect of this position was considered by the Supreme Court, acting in revision, in *Vander Poorten* v. *Vander Poorten.*[63] In this case Soertsz A.C.J. posed the question: "Now it is quite clear that, for the prosecution of the offence of fabricating false evidence for the purpose of using it in or in relation to a judicial proceeding made punishable under section 190 of the Penal Code, the sanction of the Attorney-General is necessary to enable a private party to prosecute the alleged offender or offenders. Is the abetment of those offences subject to the same requirement?"[64] His Lordship answered this question unequivocally in the negative. In demarcating the ambit of the offences governed by section 147 of the Criminal Procedure Code, Soertsz A.C.J. observed: "I see no justification whatever for reading section 147 as if it contained the words 'and the abetment of these offences.' That would be to legislate, not to interpret."[65]

No doubt it is the position under our law that "Abetment of an offence is an offence of itself and is punishable under separate sections of its own.[66] Accordingly, it must be conceded that it is not a legitimate part of the judicial function to extend the area of the offences to which explicit reference is made in the relevant provision of the Criminal Procedure Code, by the addition of a separate group of offences which envisage abetment of the former offences or attempts to commit them. Nevertheless, as a matter of principle and policy, it is difficult to support the acceptance of a distinction in this regard between the offences referred to in section 147 of the Criminal Procedure Code and the abetment of these offences, since the Attorney-General's discretion is logically relevant in the latter context

63. (1946) 47 N.L.R. 89.
64. At p. 91.
65. ibid.
66. *Sheriff Saheb* 20 Madras 8, adopted in *Vander Poorten* v. *Vander Poorten* (1946) 47 N.L.R. 89 at p. 91, *per* Soertsz A.C.J.

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too, if it is considered relevant in the former. There should be no difference in this respect between giving false evidence oneself and doing so through the instrumentality of another.

(b) The Criminal Procedure Code provides that "If, in the course of a trial in any District Court or of a trial by jury before the Supreme Court, any witness shall on any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the Magistrate, it shall be lawful for the presiding judge, upon the conclusion of such trial to have such witness arraigned and tried on an indictment for intentionally giving false evidence in a stage of a judicial proceeding."[67] In *James*[68] the Court of Criminal Appeal had occasion to consider the proper time when a prosecution for giving false evidence could begin on the basis of this provision.

This was a case where, in the course of trial before the Supreme Court, the jury were discharged before the trial was concluded by the verdict of the jury. A month later, the appellant, who was a witness at the abortive trial, was arrainged and tried before the same jury for having given false evidence. Basnayake C.J. held: "In the instant case, the trial having ended abruptly and not with a verdict of the jury, the judge had no power to arraign the appellant and bring him to trial."[69] The reasons for this view were stated to be the following: "The consequences of arraigning a witness or witnesses under section 439 where a re-trial of the main case has been ordered, can be disastrous to the prosecution where the witness or witnesses are convicted, especially if they are witnesses whose evidence is material. At the re-trial the prosecution would be forced to rely on the evidence of witnesses who have been proved before that very Court to be unworthy of credit. The course adopted by the learned Commissioner would render a re-trial almost useless. It is most unlikely that the legislature intended that such consequences should flow from the use of the power conferred by section 439."[70] The decision that the arraignment of a witness in these circumstances cannot precede the conclusion of the trial, is warranted by the explicit terms of the statutory provision.

(c) A general observation may be made in regard to the *actus reus* of the offence of giving false evidence. It has been noted[71] that the *actus reus* ordinarily envisages the effect of conduct rather than the conduct itself. To take an example, the *actus*

67. Section 439. See, section 448 of Code of Criminal Produce.
68. (1962) 64 N.L.R. 169. 69. At p. 171.
70. ibid.
71. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), p. 14.

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reus of murder consists of causing the death of a human being without reference to the means by which this result is brought about—by shooting, stabbing, striking, administering poison and so on. A's act in shooting B does not constitute the *actus reus* of murder. The *actus reus* of this offence is established only when B succumbs to his injuries. This conception of the *actus reus* represents the general rule. But the offence of giving false evidence typifies an exception. Here the *actus reus* is complete no sooner than the false evidence is given, whether or not the false evidence culminates in attainment of the object desired by the accused. In this instance, then, the accused's act suffices to constitute the *actus reus*, irrespective of consequences.

"Fabricating false evidence" is the subject of a comprehensive definition,[72] the physical element of which is satisfied by one of three acts: (i) causing any circumstances to exist; (ii) making any false entry in any book or record; or (iii) making any document containing a false statement. In each of these cases, the requisite mental ingredient resides in the intention "that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant, as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding."[73] The mental element thus comprises the following salient features: (i) the intention of introducing false evidence in a judicial, quasi-judicial or arbitral proceeding; (ii) the intention of influencing, by means of false evidence, the judgment of the person responsible for conducting the inquiry or other proceeding; and (iii) the relevance of the matter in respect of which false evidence is introduced, to the finding reached at the proceeding.

The three possibilities concerning the *actus reus* represent different modes of fabricating false evidence. They are exhaustive in their effect, in that the fabrication must necessarily be proved to have been done in one of these three ways. The first method, in particular, is of exceedingly, wide scope. The causing of a circumstance, in this context, encompasses any alteration of the physical evidence—by introducing extraneous matter, by suppressing existing evidence or by changing the character of the available evidence—with a view to inducing or encouraging a false inference. An example is provided by illustration (a) to section 189 of the Penal Code. A puts jewels into a box belonging to Z., with the intention that they may be

72. Penal Code, section 189. 73. ibid.

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found in that box and that this circumstance may cause Z to be convicted of theft. Here, A's introduction of a foreign substance into Z's box would have the natural effect of suggesting an inference consistent with Z's guilt. Placing the jewels in Z's box amounts to the causing of a circumstance, in the sense relevant to the definition of fabricating false evidence.

The second and the third methods of fabricating false evidence —as set out in section 189 of the Penal Code—apply generally to books and documents which represent a record of facts, events or other information. The word "document" is defined elsewhere in the Penal Code as denoting "any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used or which may be used, as evidence of that matter."[74]

It is clear that the offence of fabricating false evidence is not restricted in its application to proceedings before courts of law. The terms of the provision are wide enough to cover several categories of proceedings other than those conducted by courts of justice. In this connection the official status of the person presiding over the proceedings—for example, whether he is a public servant or an arbitrator—and the nature and scope of the proceedings may be identified as relevant *indicia*.

The elements incorporated in the definition of fabricating false evidence have been construed judicially. In *Ranaweera*[75] A sued X in the Court of Requests of Galle to recover house rent which was due from X in respect of a house of which A's father, B, was the *de facto* owner. A obtained judgment against X and applied for a writ on 24 February, 1925. This application was allowed on 17 March, 1925. On 16 March, 1925, X took a certain letter to the Post Office at Galle, addressed it to B and insured it for Rs. 140. On receiving the letter, B found that it contained only a catalogue of no value. It was held that X had caused the issue of a receipt for the insured letter and had tendered the receipt. Since this receipt was capable of being used in evidence in the Court of Requests in the case which was still pending, the offence of fabricating false evidence was held to have been made out. The criterion applied in this case involved the question whether the circumstance which the accused contrived to cause, had any evidentiary value in the pending litigation between the parties.

In *Ramachandran*[76] the accused was charged, *inter alia*, under section 190 of the Penal Code with using as genuine a forged Citizenship Certificate and with using that Certificate for the purpose of obtaining a passport. Basnayake C.J., with whom

74. Penal Code, section 27.
75. (1927) 4 Times of Cey. 192.
76. (1962) 64 N.L.R. 512.

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Abeysundere J. agreed, held in appeal that knowledge on the accused's part that the certificate tendered as authentic was in reality forged, was an essential ingredient of the charge and that the burden devolved on the prosecution to establish this element. So far as the charge of fabricating false evidence is concerned, this undeniably represents the position, since the relevant knowledge is an indispensable aspect of the mental element postulated as a precondition of liability.

It may be noted in passing that the problem of accommodating within the framework of the general law of homicide the case of a person who gives false evidence, knowing that the evidence is false, at a capital trial and thus becomes instrumental in having the prisoner convicted and executed, has proved a difficult one for English law. Complex problems of causation are inevitably attendant on an attempt to evolve a solution on the basis of the law of homicide.[77] The Penal Code of Ceylon successfully obviates the difficulties inherent in this approach but reaches the same result by constituting a distinct offence.[78] The law of Ceylon provides that, where an innocent person is convicted and executed in consequence of false evidence given by the accused,[79] the person who gives such false evidence shall be punished with death.[80]

In regard to the extent of the punishment for giving or fabricating false evidence, our law draws an initial distinction between false evidence given in, or fabricated for use in, any stage of a judicial proceeding, on the one hand, and false evidence given or fabricated in other cases, on the other hand. The maximum punishment in these cases is imprisonment, for seven years and three years, respectively.[81] This quantitative distinction as to the applicable penalty is readily intelligible, since the community in general has a particularly vital interest in ensuring the sanctity of judicial proceedings and the attainment of justice in pursuance of such proceedings. For similar reasons, giving or fabricating false evidence with intent to procure conviction of the more serious varieties of offence, is punishable with exceptional severity.

This attitude may be illustrated by the fact that, where false evidence has the effect that a person is convicted of an offence which is punishable under the Penal Code of Ceylon or under the law of England with imprisonment for a term of seven years or upwards, the person responsible for giving or fabricating false evidence is liable not merely to the penalties prescribed by

77. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), pages 105-106.
78. Penal Code, section 191.
79. False to the accused's knowledge—section 188.
80. See note 78, *supra*.
81. Penal Code, section 190.

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the section which lays down the ordinary punishment for giving or fabricating false evidence but to the maximum punishment which could have been meted out validly to the person who is convicted on the strength of perjured testimony.[82] This is tantamount to the adoption of an entirely distinct principle regulating the quantum of punishment for giving or fabricating false evidence in cases where the result of perjury is the conviction of another for an offence belonging to a category which our Code treats as singularly heinous. In this case there is a deliberate departure from the general provision imposing punishment and the acceptance of an exemplary standard of punishment.

Separate provisions of the Penal Code deal with issuing or signing a false certificate[83] and making a false statement in a declaration which is legally receivable as evidence.[84] In a general sense these are enveloped by the comprehensive defintion of fabricating false evidence,[85] and may justifiably be regarded as particular instances of that general offence. However, *ex abundanti cautela*, they are explicitly adverted to in other sections of the statute.[86] While the criminal quality of these acts is thus placed beyond all doubt, the punishment remains the same as that ordained for giving or fabricating false evidence.[87] It follows that the differences of degree which characterize the determination of punishment for giving or fabricating false evidence in general, even to the extent of adopting materially different standards,[88] apply also to these specific contexts.

The provision which declares punishable the making of a false statement in an averment which is legally receivable as evidence[89] was applied by the Supreme Court in *Wijetunga*.[90] The plaintiff assigned his interest to S, who had himself substituted as plaintiff after due notice to the accused, the judgment debtor in the case. Thereafter the accused filed an affidavit in which he made the false statement that he had not been served with notice. He accordingly moved, by way of summary procedure under the Civil Procedure Code,[91] that the order of substitution be vacated. At the accused's trial for making a false averment which is capable in law of being received as evidence, the question was whether the statement by the accused could be treated as admissible evidence. Answering this question in the affirmative, Pereira J. said: "The Court was bound by law to receive it if it can be shown that the accused

82. Section 192.
83. Section 194.
84. Section 196.
85. Section 189.
86. See notes 83 and 84, *supra*.
87. ibid.
88. Penal Code, sections 190 and 192.
89. Section 196.
90. (1915) 18 N.L.R. 343.
91. Chapter XXIV.

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was entitled to file it in Court."[92] Ennis J. concurred in a separate judgment.

Just as the giving and the fabricating of false evidence are treated equally, so far as the quantum of punishment is concerned,[93] so also the Penal Code makes no distinction in regard to the degree of the appropriate penalty as between the giving of false evidence and the use of evidence which is known to be false. Thus, in several sections,[94] our Code treats the use of evidence known to be false as equivalent to giving false evidence. This is in keeping with the objectives of the law in this area since the stream of justice is defiled as much by the deliberate application of false evidence for one's own purposes as by the giving or the fabrication of false evidence directly.

II. IMPROPER SUPPRESSION OF EVIDENCE

The Penal Code imposes penalties for several distinct modes of suppressing evidence directly or indirectly. (a) causing the disappearance of evidence in respect of an offence which had been committed, or giving false information touching it, to screen the offender;[95] (b) intentional omission to give information of an offence by a person bound to inform;[96] (c) giving false information respecting an offence which had been committed,[97] (d) destruction of a document to prevent its production as evidence,[98] and (e) false personation for the purpose of any act or proceeding in a suit.[99]

(a) "Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false"[100] is said to commit an offence. The maximum punishment turns on the question whether the offence in respect of which evidence or information is suppressed is a capital offence, an offence punishable with imprisonment for ten years or a longer period, or an offence punishable with less than ten years' imprisonment.[101]

In regard to the first offence embodied in this provision, the physical act consists of causing the disappearance of evidence while the *mens rea* comprises two requirements: (i) the accused should know or have reason to believe that an offence has been

92. (1915) 18 N.L.R. 343 at p. 345.
93. Penal Code, section 190.
94. Sections 193, 195 and 197.
95. Section 198.
96. Section 199.
97. Section 200.
98. Section 201.
99. Section 202.
100. Section 198.
101. ibid.

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committed, and (ii) he should suppress evidence with the intention of screening the offender.

The Penal Code provides that "A person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing, but not otherwise."[102] A constructive imputation of belief is made possible by this provision in appropriate circumstances.[103] The relevant concept has been described in other contexts as "wilful blindness".[104]

The need for proof that the accused had the intention of screening the offender was insisted on in *Sugathapala* v. *Wijesinghe*[105] as an essential element of the prosecution's case. Keuneman S.P.J. declared: "I think the case fails because there is no evidence to show that the intention of this accused was to screen the offender."[106]

The scope of "evidence", the suppression of which is prohibited by this provision, was examined in *Sub-Inspector of Police, Eheliyagoda* v. *Posathamy*.[107] The accused was alleged to have requested two persons to whom one P had sold some rubber and who, the accused thought, would be asked by the police to identify the man who sold the rubber to them, to say that they could not be certain that it was P who sold the rubber to them. The question was whether this amounted to securing the disappearance of evidence, within the meaning of the relevant provision. Answering this question in the negative, Soertsz A.C.J. observed: "My view is that section 198 deals chiefly with such things as the *corpus delicti*, instruments or weapons of offence, marks, stains and other relevant indications of the commission of an offence. It may conceivably extend to cases of causing evidence already given by witnesses to disappear, for instance, the evidence given by a witness who is dead or cannot be called...but it certainly does not extend to a case like this.[108]

The court made reference to the following comment by Gour: "The disappearance of evidence does not include disappearance of a witness who would have given evidence in the case....It is here used in its primary sense as meaning any *thing* that is likely to make the crime evident or manifest—in short, it means such facts as may probably lead to the proof of a crime. An eyewitness is not such a fact, for the value of his evidence depends on his credibility."[109]

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102. Penal Code, section 24.
103. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), pages 43-44.
104. ibid.
105. (1945) 46 N.L.R. 476.
106. At p. 477.
107. (1939) 40 N.L.R. 514.
108. At p. 515.
109. ibid.

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The substance of Gour's view on the point is that evidence, in this context, denotes *material* evidence. The penal provision envisages substantive evidence and not the source from which the evidence proceeds. Potential evidence which, it is anticipated, would be given, is extrinsic to the scope of this provisions. While these observations are consistent both with Soertsz J.'s dictum and with the comment by Gour, a marginal difference may be noticed between these formulations of the principle applicable. Gour appears to restrict the ambit of the provision to the disappearance of physical objects, but Soertsz J. adopts a rather broader approach, in that he makes the concession that, in certain, limited contexts, evidence already given may be covered by the provision in question. On either view, however, the accused could not have been convicted, on the facts of *Sub-Inspector of Police, Eheliyagoda* v. *Posathamy*, of securing the disappearance of evidence within the meaning of section 198 of the Penal Code. While the nature of the indictment in this case rendered an acquittal inevitable, it is important to emphasize that the law does not reveal a lacuna in this regard, since the accused may have been properly charged with, and convicted of abetment of the second offence embodied in section 198 or the offence constituted by section 200 of the Penal Code.

In cases where the disappearance effected is that of the *corpus delicti*, the question arises whether a charge of murder may be properly joined with one of causing the disappearance of evidence and, in the event of such a joinder of charges, whether a conviction of the latter offence may be sustained in circumstances where the accused has been acquitted of murder. This matter was considered in two cases.

In *Thambipillai*[110] the accused persons, who were all found carrying off a dead body, were charged with murder and, under section 198, with having caused evidence of the commission of the offence to disappear. The jury found that one or more of the accused committed the murder, but they could not decide which of them was responsible. They acquitted the accused on the charge of murder but convicted them on the second count. The majority of the court upheld the legality of this conviction.

The question which posed some difficulty and gave rise to a difference of judicial opinion, was whether the wording of section 198 had the effect of restricting its application to cases where the offence had been committed by a person or persons other than those alleged to have caused the disappearance of evidence, or whether the section included in its purview cases

110. (1920) 21 N.L.R. 455.

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where the commission of the crime and the removal of evidence relating to it are alleged to have been done by the same party. In a dissenting judgment, de Sampayo J. expressed the view that the section, on a proper construction, was limited to the first category of case. His Lordship observed: "The expressions 'knowing or having reason to believe' and 'with the intention of screening the offender' should be specially noted. It is, of course, possible to say of a person who has committed the offence, that he knows or has reason to believe that an offence has been committed. But, then, this language would be employed not in the ordinary, but in a non-natural, sense. . . . There is an element of detachment and impersonality in this locution which cannot with propriety be predicated of the person who has himself committed the offence."[111]

This premise was rejected by the majority. Bertram C.J. said: "There can be no question that the words 'whoever, knowing that an offence has been committed' are wide enough to include the case of a man who has himself committed the offence or...who has stood outside on guard to enable it to be committed. Who knows better that an offence has been committed than the man who has committed it, or who has stood by to ensure its commission? Why, then, should the words not receive their full significance? It is true that, in the first of the two cases just mentioned, they are not the most appropriate words, but that does not seem to me to be sufficient to exclude a case which they reasonably cover."[112]

It may be noted that section 198 of the Penal Code was originally part of the chapter on Abetment[113] where it could have received only the relatively narrow interpretation suggested by de Sampayo J. But the majority of the court took the view that the subsequent incorporation of this provision in the chapter dealing with offences against public[114] justice, had the effect of expanding the scope of the section, although this consequence may not have been intended. The change of context was construed as involving a widening of scope.[115]

The fact that the illustration appended to section 198 is concerned with a case where some person other than the perpetrator of the crime was sought to be screened, it was conceded, is not a compelling reason for construing narrowly the principle embodied in the provision. "The object of an illustration is to illustrate, and not either to exhaust or to delimit a subject."[116]

The submission may be made that, although the narrower construction is favoured by a strict analysis of the phraseology

111. At p. 464.
112. At p. 462.
113. Penal Code, Chapter V.
114. Penal Code, Chapter XI.
115. (1920) 21 N.L.R. at p. 462.
116. At p. 461.

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used in the section, the broader view as to its scope was considered desirable by the majority of the court for reasons of policy. Implicit in the reasoning of the majority is the apparent anomaly of excluding the author of a crime from the ambit of this provision. Preoccupation with this object of policy is clearly reflected in the observation by Schneider A.J. "I would say no more than that the consideration which mainly weighs with me is that such a construction is not inconsistent with the language of the section, nor repugnant to any recognized principle of criminal jurisprudence, while at the same time it meets the case where the evidence falls short of establishing the guilt of the murderer."[117]

The usefulness of the broader construction in this particular contingency is illustrated by the decision in *Karuppiah Servai*.[118] This was a case of murder by manual strangulation, and the question was whether it was A, B, or C who had killed the deceased. The Court of Criminal Appeal held that none of these three persons could be convicted of murder. "X (the person who strangled the deceased) may be A, B or C. In order to secure the conviction of A, the prosecution had to establish beyond reasonable doubt that X is *not* B or C. It is then, and only then, that the guilt of A can be said to have been established beyond reasonable doubt. In the present case, the prosecution has been unable to do that."[119] However, there was evidence that, after the deceased had been done to death, A had assisted in the decapitation and disposal of the body with the intention of screening A, B and C. On the basis of this evidence, Dias S.P.J. asserted that the conviction of A under section 198 of the Penal Code was entirely legitimate, notwithstanding his acquittal of murder.[120]

Attention must be drawn, in this connection, to a provision in the Code of Criminal Procedure which declares that, where it is doubtful what offence has been committed and the accused is charged with one offence but it appears in evidence that he committed a different offence with which he might have been charged under the provisions of a separate section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.[121] The application of this provision to the case under discussion warrants the result that a person who is charged with, but acquitted of, murder may properly be convicted under section 198 of the Penal Code, whether a charge which relates to the disappearance of evidence is included in the indictment or not. One difference between the cases of *Thambipillai* and *Karuppiah Servai* is that the accused.

117. At p. 466.
118. (1950) 52 N.L.R.227.
119. At p. 229.
120. At pages 229-230
121. Section 177.

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besides being charged with murder, was specifically indicted under section 198 in the former case but not in the latter. This difference, however, was not regarded as material for the purpose of determining the propriety of the conviction for the lesser offence in the circumstances contemplated by these cases. In the result, the established view for the law of Ceylon appears to be that a conviction under section 198 would be sustained in both situations.

The *corpus delicti* is clearly an example of the kind of evidence, the deliberate suppression of which is made punishable by section 198. However, a limiting criterion as to the nature of the evidence contemplated is inherent in the requirement that the evidence should relate to the commission of an offence. The epitome of the offence of causing the disappearance of evidence consists of the accused's endeavour to conceal the fact that an offence had been committed. On a strict construction, therefore, evidence which does not obscure the commission of an offence but pertains merely to circumstances surrounding the offence and other related matters—for example, the time or place at which the offence was committed—may conceivably be held extrinsic to the province of this offence, although there are cogent objections of policy which militate against the adoption of such an approach.

A restrictive feature which undoubtedly characterizes the offence in regard to causing the disappearance of evidence emerges from the construction of the word "offence" in the body of section 198 of the Penal Code. "Offence" in the phrase "whoever...causes any evidence of the commission of an offence to disappear" has[122] to be interpreted in the light of section 38 of the Penal Code. It is provided that "Except in the Chapter and sections mentioned in subsections (2) and (3), the word 'offence' denotes a thing made punishable by the Penal Code."[123] Since section 198 is not among the sections referred to in 38(2) and 38(3), there is no doubt that section 198 imposes liability only for causing the disappearance of evidence relating to the commission of an act[124] which constitutes an offence under the Penal Code. Removal of evidence of commission of offences created by other statutes is not provided for by this section.

The second limb of section 198 makes punishable the act of giving any information respecting an offence which the person furnishing the information knows or believes to be false, if he has acted with the intention of screening the offender from

122. Penal Code, section 198.
123. Section 38(1).
124. As to omissions, see section 31(2).

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legal punishment.[125] A difference as to the scope of the offences created respectively by the first and the second limb of section 198, may be indicated at this point. While the view has now prevailed in Ceylon that the former offence—namely, that of causing the disappearance of evidence—may be established whether the person removing the evidence is himself the author of the crime or not,[126] the latter offence—that of giving false information touching the offence—can be committed only by some person other than the actual perpetrator of the crime.

The reason is that "It cannot be supposed that the law intends to punish an offender for trying to defend himself by making false statements."[127] In this respect, the latter offence is more stringently delimited in scope than the former.

(b) "Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give" is declared to commit an offence.[128] The essential aspects of the required mental element are (i) that the accused should *know* or *have reason to believe* that an offence has been committed, and (ii) that his failure to provide information should be *intentional*. The meaning of the phrase "having reason to believe " has already been dealt with.[129]

However, the vital ingredient of the offence resides in the element that the accused should be under a *legal obligation* to supply the information which he deliberately withholds. The offence is not made out in circumstances where the accused is not legally compellable to divulge the relevant information, although he ought to have been willing to accept a moral duty to do so. In *Samarakkody* v. *Don James*[130] Withers J. held that refusal to answer questions by a person who was not legally bound to speak the truth, was not tantamount to an intentional omission to give information.[131] The decision turned on the criterion of a legal duty. In this context, "A person is said to be 'legally bound to do' whatever it is illegal in him to omit".[132] The word 'illegal' is of wide scope, in that it encompasses both civil and criminal liability. The Penal Code contains explicit provision that "The words 'illegal' and 'illegally' are applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action."[133]

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125. Section 198.
126. See notes 110-120, *supra*.
127. (1920) 21 N.L.R. 455 at p. 464, *per* de Sampayo, J.
128. Penal Code, section 199.
129. See notes 102-104, *supra*.
130. (1897) 6 C.L. Rev. 107 cf. *Balthazar* v. *Gunawardana* (1895) 1 N.L.R. 158.
131. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), pp. 106-110.
132. Penal Code, section 42.
133. Section 41.

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Ex facie the statutory provision, it is a clear precondition of liability under this head that an offence has in fact been committed. The accused's belief on reasonable grounds that an offence has been committed, is not sufficient. In *Bucher* v. *Pusumba*[134] a man took lodging one night in the accused's house and was found hanging by the neck and dead the following morning. In view of a verdict of suicide which is not treated as an offence by the Penal Code of Ceylon, it was held that the accused's omission to give information about the death did not involve him in criminal liability. The basic prerequisite that an *offence* should have been committed, was not satisfied on the facts of this case.

(c) "Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false"[135] is said to commit an offence.

An apparently similar offence is constituted by the second limb of section 198 of the Penal Code. But it is seen, on analysis, that these two offences are distinguishable in the following respects:

(i) Different principles regulate the quantum of punishment. Section 200 stipulates a single maximum penalty for giving false information, irrespective of the nature and gravity of the offence in regard to which false information is deliberately supplied. This is not true of the approach to punishment reflected in section 198. Here the penalty attendant on the giving of false information depends on the seriousness of the offence which had been committed in the first instance.

(ii) Section 198 requires that false information should have been furnished "with the intention of screening the offender from legal punishment" but this intention does not seem to be a necessary element of liability in the context of section 200. So far as the latter offence is concerned, knowledge or belief that the information is false, suffices for imposition of liability, without any further requirement as to a particular intention in the person giving the information.

(iii) The most important difference is that, where liability is invoked within the framework of section 198, the "offence" as to which false information is given must necessarily be an offence created by the Penal Code, but where the charge is brought under section 200, the "offence" which had been committed may be one created by the Penal Code or by any other law. This is the effect of application of sections 38(1) and 38(2) of the Penal Code.

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134. (1916) 3C. W.R. 118.
135. Penal Code, section 200.

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(d) An offence founded on the destruction of a document[136] to prevent its production as evidence is accorded an elaborate definition.[137] "Whoever secretes or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice,[138] or in any proceeding lawfully held before a public servant as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose"[139] may be held guilty of this offence. A noteworthy feature of this provision is that the offence it embodies is not restricted to proceedings in duly constituted courts of law. The categories of persons who may function as public servants for purposes relevant to this provision, are enumerated elsewhere in the Penal Code.[140]

(e) "Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued, or becomes bail or security, or does any other act in any suit or criminal prosecution"[141] commits a distinct offence.

The purpose of this offence is to prevent the subversion of justice on account of personation. It is not necessary, however, that an actual miscarriage of justice or unjustifiable detriment to any person should be proved. Nevertheless, due emphasis must be placed on the words "any suit or criminal prosecution" which occur at the end of the provision. It is an essential requirement that the civil or criminal proceedings during which the impersonation takes place, should be valid proceedings. If they are vitiated because of some defect or irregularity, a conviction of false personation cannot be sustained.

In *Seneviratne*[142] the accused was charged with falsely personating another for the purpose of accepting summons. The summons was issued by the Magistrate's Court at Gampaha and was served in Colombo outside the local limits of the jurisdiction of the Gampaha Court. The Code of Criminal Procedure contains provision that summons should not be served outside the limits of the jurisdiction of the court issuing it unless the summons are endorsed by the court with a specified form of words.[143] In *Seneviratne*'s case the summons issued by the Gampaha court did not have the required endorsement and, consequently, could not have been served in Colombo. In

136. Section 27.
137. Section 201.
138. Section 18.
139. See note 137, *supra*.
140. Section 19.
141. Section 202.
142. (1940) 42 N.L.R. 111.
143. Section 64.

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appeal Wijeyewardene J. (with whom Cannon J. agreed on this point) said: "The document that was delivered to the unknown man by the Inspector at Colombo was not a 'summons' as it was not a process of Court that could have been served.... The 'summons' was nothing more than a mere piece of paper when it was handed to the unknown man."[144] The accused was acquitted on the ground that his act in receiving the piece of paper which purported to be a summons, was not an act "in any suit or criminal prosecution", within the meaning of section 202.

The acts enumerated in section 202 are not exhaustive but merely contemplate instances. The scope of the provision is widened by the words "any other act". A necessary feature of "any other act", however, is that it should be committed in a suit or prosecution. In *Seneviratne*'s case it was contended by counsel for the accused that the act of suffering summons to be delivered could not be construed as "any other act", in this context,[145] but the court did not decide this point. This contention is unlikely to succeed, since "any other act in any suit or criminal prosecution" should include an act involving the process of a court of law.

The provisions incorporated in this section seek to punish, in specific contexts, the suppression or distortion of existing evidence so as to jeopardize the administration of justice.

III. IMPROPER USE OF JUDICIAL PROCESS

Several offences may be classified appropriately as belonging to this category. Fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of the decree of a court,[146] a fraudulent claim to property made for the purpose of preventing its seizure as a forfeiture or in execution of the decree of a court[147] and fraudulently suffering a decree for a sum not due[148] are all treated as specific offences. They have in common the feature that the process of a court is deliberately misapplied so as to defeat the ends of justice.

Imputability of fraud to the accused is a requisite of each of these offences. The principle has been applied in this context that a reasonable inference of fraud from the surrounding circumstances is sufficient. *Tambimuttu*[149] was a case where the accused was charged with having fraudulently transferred some property with the intention of preventing it from being taken in execution of a decree which, he was aware, was about to be made in a civil suit against him. The accused had given the complainant a promissory note and deposited title deeds of his

144. (1940) 42 N.L.R. 111 at p. 119.
145. At p. 118.
146. Penal Code, section 203.
147. Section 204.
148. Section 205.
149. (1907) 2 A.C.R. Suppl. x.

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property with the latter as additional security. However, the accused subsequently obtained copies from the Registrar and transferred all the properties to his sister. In appeal, the main contention on behalf of the accused was that no fraud had been established, in that unjustifiable loss need not have been caused to the complainant so long as the accused had other property which was capable of being seized at the complainant's instances. Middleton J. disallowing this argument, held that the accused's act in depriving the complainant of the collateral security which the latter had purported to acquire, strongly suggested a fraudulent intention in the accused. The court asserted that this inference of fraud could be displaced only by clear evidence that the accused possessed other property which could be taken in execution of the decree.

The definition of 'fraud' is set out in section 23 of the Penal Code which declares that "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." It would appear that no material assistance can be derived from this definition. But the ingredient of fraud has a specific connotation in the area of offences involving misapplication of the process of a Court of Justice. In all these cases the accused's object is to vitiate the purpose sought to be achieved by the decree, whether already pronounced or likely to be pronounced. Intention to defeat this purpose, or knowledge that the purpose would be rendered impossible of attainment because of the accused's act, would satisfy the requirement of fraud in this context.

In regard to the offence of making a false claim in a Court of Justice,[150] the elements of fraud and dishonesty are incorporated as alternative mental requisites. This offence is thus of wider scope than the offences embodied in the three preceding sections."[151] While "fraudulently" denotes an intention to defraud,[152] "dishonestly" refers to "the intention of causing wrongful gain to one person, or wrongful loss to another person."[153] The effect of inclusion of both adverbs disjunctively in the definition of the offence pertaining to the assertion of a false claim in a Court of Justice is that, so far as the mental component of the offence is concerned, an intention to defraud is sufficient even though there is no proof of intent to cause either wrongful loss or wrongful gain to any person.

The scope of the word "claim", in the context of this offence, has been construed judicially. In *Catherinahamy*[154] Shaw J. felt no doubt that the offence of making a false claim in a Court of Justice could be committed in the course of an

150. Penal Code, section 206.
151. See notes 146-148, *supra*.
152. Penal Code, section 23.
153. Section 22.
154. (1916) 2 C.W.R. 101.

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application for an order of maintenance. His Lordship observed: "I am of opinion that the application for maintenance, which led to the issue of summons, amounted to a 'claim' within the meaning of section 206 of the Penal Code."[155] In *Seneviratne*'s case[156] Counsel for the accused queried whether proceedings under the Maintenance Ordinance could be considered a "suit or criminal prosecution" within the meaning of section 202 of the Penal Code.[157] While this question was not answered in the judgment in that case, it may be suggested, as the preferable view, that proceedings under the Maintenance Ordinance fall within the purview of section 202, as well as of section 206, of the Penal Code.

Fraudulently obtaining a decree for a sum not due[158] is a distinct offence. This represents the converse of the case constituting the offence of fraudulently suffering a decree for a sum not due.[159] The mental component comprised in the two offences is indistinguishable.

Section 208 creates liability in respect of a false charge of an offence made with intent to injure. The substance of the offence lies in the institution or causing the institution of any criminal proceeding against any person, or falsely charging any person with having committed an offence, with the knowledge that there is no just or lawful ground for such proceeding or charge against that person.[160]

The following points may be made in regard to this offence:

(a) Where the accused is alleged to have made a "false charge", to whom should the charge have been made? In *Carolis*[161] Drieberg A. J. said: "The words 'false charge' in the section must not be interpreted in any restricted or technical sense, but must be understood in its ordinary meaning of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities with a view to investigation or other proceedings and so setting the criminal law in motion."[162] The essential criterion, according to this statement, is that the recipient of the information should be under a legal duty to act on it in some way. This criterion was held to be satisfied in *Carolis*' case where a false complaint in respect of a non-cognizable offence had been made to the Police. Thus, it is an essential element of the offence that the charge should be made to a particular category of person.

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155. At p. 102.
156. (1940) 42 N.L.R. 111.
157. At p. 118.
158. Penal Code, section 207.
159. Section 205.
160. Section 207.
161. (1927) 28 N.L.R. 446.
162. At p. 448.

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(b) The accused should have made the complaint or laid the charge with a particular intention—namely, the intention to set the criminal law in motion. This was stated at the beginning of the century in an anonymous case.[163] In *Carolis*[164] Drieberg A.J. observed: "The object of the section was to make it punishable if a person set the criminal law in motion against another in certain circumstances."[165] Any other object—for example, that of securing the complainant's dismissal from his employment[166] is insufficient for a prosecution under section 208 of the Penal Code. Implicit in the requirement of intent to set the criminal law in motion is the element that the person to whom the complaint is made should have lawful power[167] to inquire into or otherwise pursue the matter.

(c) Where the accused is alleged to have made a charge, the charge must necessarily pertain to a criminal offence. An assertion of civil liability is inadequate. This is made explicit by the terms of section 208.

(d) The accused, to be liable, should have had knowledge that the charge was false. What is contemplated here, it must be noted, is actual knowledge and not constructive knowledge. It is not sufficient that the accused had reason to believe that the charge was false. This latter circumstance may involve the accused in liability of a different kind—for example, delictual liability for the institution of a malicious prosecution—but it cannot support *criminal* liability within the framework of section 208 of the Penal Code.

Honest belief by the accused in the truth of the charge he makes, conclusively negatives criminal liability. Exoneration from liability may depend on a mistake of fact which the accused had genuinely made. This is illustrated by the decision in *Menikrala.*[168] The accused had instituted against the complainant a charge of committing mischief by burning the accused's house. Moreover, the accused testified that he had seen the complainant in the vicinity of the house. The complainant had been acquitted on proof of an alibi. On an indictment being brought against the accused for instituting a false charge, the district judge found that the complainant had been elsewhere. On this basis the accused was convicted of the offence with which he had been charged. However, it was held in appeal that, in the absence of evidence establishing that the accused was aware of the falsity of the charge or negativing an honest belief on his part that he had seen the complainant at the spot, the conviction had to be quashed.

(e) The accused's statement, which is alleged to amount to a

163. (1906) 2 Leem. Rep. 43.
164. (1927) 28 N.L.R. 446.
165. At p. 447.
166. See note 163, *supra*.
167. ibid.
168. (1889) 9 S.C.C. 10.

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false charge, must be entirely voluntary, in the sense that it should have been spontaneously made. A statement elicited by rigorous or sustained questioning, for example, may not always satisfy this requirement. In *Chinnatamby* v. *Kanagasabai*[169] the accused, in providing information, responded to a single question put by a Police Vidane. It was held that this question did not deprive the accused's statement of its voluntary character. An accused person who was compelled to give an answer, cannot be held to have entertained such an intention as would justify the imposition of liability.

(f) Section 208 deals with two distinct matters—namely, the institution of criminal proceedings and the making of a charge. The latter signifies much less than the former. Examples of the former are provided by a complaint made directly to a Police Magistrate having jurisdiction or a complaint to the Police regarding the commission of a cognizable offence.[170] The latter category, however, would include a complaint in a non-cognizable offence made to a police officer and, in some cases, complaints made to public servants other than police officers.

While it is clear that there is no requirement that the accused should have instituted the prosecution himself, it becomes necessary in both contexts to determine when the accused's responsibility ceases for the commencement of criminal proceedings against the complainant. Some helpful dicta on this point are contained in the judgment of Drieberg A.J. in *Carolis*' case. His Lordship stated: "I may now deal with the argument that the appellant was acting under a statutory duty in reporting the matter to the Police, and that any responsibility for further proceedings rested with the Police. There are many cases in which this would be a good defence. But the real test appears to be the intention of the person making the report; did he act with the intention and object of setting the criminal law in motion against the person against whom the false charge was preferred?"[171]

If the accused placed information before the relevant authorities with the intention that they should exercise an independent discretion in the matter, responsibility for instituting proceedings cannot be attributed to him. In this event, provided that the information supplied is not known by the accused to be false, the intervention of public authorities operates to break the nexus between the accused's initiative and the subsequent commencement of proceedings. In a situation of this kind, the accused cannot be said to have done more than directed the

169. (1937) 17 C.L. Rec. 200.
170. *Carolis* (1927) 28 N.L.R. 446 at p. 447.
171. At p. 448.

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attention of the authorities to matters within his knowledge and left it entirely to them to decide whether any action should be taken. The issue involved is one to which general principles of causation are applicable.

In circumstances where a public official acts simply as the agent of the accused, the latter's responsibility for the institution of proceedings remains intact. In *Girihagama*[172] the accused gave information to a Superintendent of Police that certain named persons had committed a cognizable offence by setting fire to a house which belonged to him. In *Perera* v. *Don Simon Appu*[173] the accused gave information to a Police Headman regarding the alleged commission of a cognizable offence. In both cases the accused was held to have instituted criminal proceedings. While these decisions are clearly correct, the court seems to have gone too far in *Kiri Banda.*[174] This was a case where the Police Magistrate listened to the accused's complaint, made inquiries of both the accused and the party against whom the allegation had been made, and thereafter suggested that the accused's proper remedy was a civil action. The court held that the accused may still be considered to have preferred a false charge. This conclusion would seem unsupportable both because the action ultimately instituted was a civil action and because the Magistrate, having been invited to use his discretion, did so by advising the accused to resort to a particular course of action.

(g) Where the accused is indicted for abetting the institution of a false charge, the bare evidence which he gave in support of the false charge is not sufficient. It must be shown that the testimony was preceded by a conspiracy which had this object in view.[175]

It is appropriate to point out at this stage the similarity between the offences recognized by section 180 and section 208 of the Penal Code. Section 180 makes punishable the giving of false information with intent to cause a public servant to use his lawful power to the injury of another person. Clearly, this offence has much in common with the making of a false charge with intent to injure.[176]

Although there is some overlap between the two provisions, several differences between them may be noticed:

(i) While section 208 necessarily requires either the institution of proceedings or the making of a charge, section 180 is of wider scope, in that it extends to the mere supplying of information which does not involve a charge.

172. (1909) 12 N.L.R. 137. 173. (1909) 3 Weer. Rep. 57.
174. (1887) 1 S.C.R. 104.
175. *Dias* v. *Deno* (1916) 2 C.W.R. 221.
176. Penal Code, section 208.

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(ii) In regard to the mental element postulated by the respective offences, section 180 is marginally stricter in its effect. Section 180 requires knowledge or belief in the accused that the information he gives is false, while section 208 envisages not any definite knowledge of or positive belief in falsity but merely appreciation that the charge is not based on any just or lawful ground.

(iii) A prosecution under section 180 cannot be instituted except with the sanction of the Attorney-General or on the complaint of the public servant concerned, while no comparable limitation attaches to section 208.[177]

(iv) An offence under section 180 is triable summarily, but an offence under section 208 is treated as an indictable offence.[178]

(v) The offence under section 208 includes, as part of its area, the offence under section 180. It is therefore open to a court to proceed under either section, but in cases of a relatively serious nature, invocation of section 208 which imposes a more exacting penalty, represents the preferable course.[179]

(vi) A false charge which is the product of sustained premeditation or preparation is governed by section 208, but a charge which has been made recklessly on the spur of the moment without witnesses to support it is dealt with adequately under section 180.[180]

(vii) An allegation that a non-summary offence had been committed by a particular person, should generally fall within the purview of section 208.[181]

IV. OTHER METHODS OF PARTICIPATING IN THE SUBVERSION OF JUSTICE

This category of offences comprises harbouring and the offer or the acceptance of a gratification for the purpose of harbouring.

Whenever an offence has been committed, it is an independent offence to harbour, conceal, assist or maintain a person whom one knows or has reason to believe to be the offender, with the intention of screening him from legal punishment.[182] It is also an offence to accept, or attempt to obtain, or agree to accept any gratification in consideration of screening an offender from lawful punishment or not proceeding against any person for the

177. E.. P. Wijetunge, *A Digest of Case Law on the Penal Code* (1955), p.194.
178. ibid.
179. *Appuhamy* v. *Siddappu* (1922) 24 N.L.R. 394; *Sub-Inspector of Police* v. *Babbi* (1923) 25 N.L.R. 117.
180. *Kandiah* v. *Thambipillai* (1932) 1 C.L.W. 334.
181. *Seraph* v. *Kandyah* (1905) 13 N.L.R. 10; *Jayasinghe* v. *Siyadoris Appu* (1909) 13 N.L.R. 9; *Tillekeratne* v. *Appudurai* (1932) 1 C.L.W. 381.
182. Penal Code, section 209.

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purpose of bringing him to legal punishment.[183] Moreover, the offer of a gratification is as much an offence as the acceptance of a gratification for this purpose.[184] The harbouring of an offender who has escaped from custody or whose apprehension has been ordered, is treated as a separate offence.[185]

The provisions constituting these four offences have in common the feature that the maximum penalty for harbouring depends on the gravity of the offence which is sought to be concealed. Thus, in regard to the punishment for harbouring, a threefold division is recognized among capital offences, offences punishable with ten year's imprisonment and offences punishable with less than ten year's imprisonment.[186]

The following principles may be extracted from the case law dealing with the offence of harbouring.

(a) The charge must be framed with sufficient clarity and specificity. Any lapse in this respect is generally fatal to a conviction. Thus, where a statutory provision renders punishable the "harbouring", "concealing", "assisting" or "maintaining" of an offender, this terminology must be reflected in the charge brought against the accused. An indictment which does not refer to any of these terms but merely charges the accused with "saving" an offender may be successfully impugned on the ground of vagueness.[187]

(b) Where the charge relates to the offer of an illegal gratification to the police, it is not open to a court to hold that the offer of the gratification did not amount to an offence and at the same time to withold from the accused a refund of the sum paid. The forfeiture, if ordered in these circumstances, is contrary to law.[188]

Principles (a) and (b) represent aspects of the doctrine of legality enshrined in the maxim, *nulla poena sine lege*. Criminal liability may be imposed only in circumstances where the act committed by the accused is unequivocally characterized as an offence by some provision of law which enjoins penal responsibility and specifies the penalty to which the offender is made subject.

(c) A *cursus curiae* has the effect of establishing for our law the proposition that the crime committed by the offender whom the accused is alleged to have harboured, must be clearly stated.[189] Where the offender was alleged to have committed one crime, but is proved to have been guilty of another, a conviction of

183. Section 210.
184. Section 211.
185. Section 213.
186. Sections 209, 210 and 211.
187. *Mudianse* v. *Mary Nona* (1914) 2 Bal. N.C. 35.
188. *Sub-Inspector of Police, Chilaw* v. *Horathala* (1921) 22 N.L.R. 350.
189. cf. *Notley* v. *Antonis* (1921) 22 N.L.R. 335; *Amith* (1930) 31 N.L.R. 457.

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harbouring the offender would ordinarily not be sustained. This rule entails some measure of legitimate protection for the accused, in that he is required to be given precise information as to the nature of the charge and the law ensures that he is not taken by surprise at the trial.

(d) Where the charge is based on the offer of a gratification, the purpose or motive of the person offering it is a crucial consideration. The motive must involve the deliberate suppression of evidence regarding the commission of a crime. If no such motive can be proved and the accused's purpose is of an innocuous character, there can be no liability. In *Benedict* v. *Marikar*[190] the accused had offered a Police constable a gratification merely with a view to avoiding inconvenience to himself by obtaining permission to go home as soon as possible. He was held not liable.

(e) Where an accused is charged with harbouring an offender or offering a gratification for the purpose of screening an offender from legal punishment it must be proved, according to one strand of authority, that an offence has actually been committed by the person who was sought to be harboured or screened.[191] If this is not established, the charge of harbouring or screening from punishment is sometimes said to fail *in limine*.

While this view is supported by the majority of decisions,[192] it was held in one case[193] that a conviction of offering a pecuniary gratification to a person in consideration of his not proceeding against certain other persons for the purpose of bringing them to lawful punishment on a charge of stealing goats, could be upheld even in circumstances where the initial offence of stealing was not proved to have been committed.

The proper approach, it may be thought, necessitates the recognition of a distinction between a charge of harbouring, on the one hand, and a charge relating to the offer or acceptance of a gratification, on the other. Section 209 which constitutes the offence of harbouring an offender contains the clause "whenever an offence has been committed", but sections 210 and 211 which impose liability, respectively, for the taking or the offering of a gratification with a view to screening an offender, do not explicitly embody this requirement. However, the better view seems to be that sections 210 and 211, too, envisage liability only in circumstances where an offence has been actually com-

190. (1939) 8 C.L.W. 127.
191. *Ramalingam* (1886) 2 N.L.R. 48; *Mudiyanse* v. *Mary Nona* (1914) 2 C.A.R. of Cey. 8; *Notley* v. *Antonis* (1921) 22 N.L.R. 335; *Piyadasa* v. *Herath* (1952) 54 N.L.R. 552.
192. See note 191, *supra*.
193. *Thirimalle Kankany* v. *Sinnasamy* (1885) 7 S.C.C. 132.

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mitted. This conclusion is supported by analysis of the language used in these provisions. Thus, the gratification should have been taken by, or offered to, a person "in consideration of his concealing an *offence* or of screening any person from *lawful punishment*". Thus, the commission of an offence would appear to be contemplated as a preliminary requirement for the question of lawful punishment would not otherwise be relevant. Moreover, the punishment for taking or offering a gratification has to be determined in relation to the gravity of the crime from the consequences of which the offender is sought to be screened.

It would seem, therefore, that the offence of harbouring, as well as the offences predicated on the taking or the offer of a gratification, require proof that a crime has been committed by the person who is harboured or screened. No distinction is properly maintainable between these categories of offences. From the standpoint of policy, there is no doubt a cogent rationale for punishing a person who endeavours to screen another, in the belief that the latter had committed an offence, but the provisions of our law do not warrant adoption of this course. In the result, absence of proof that a crime has been committed makes necessary an acquittal, whether the charge is one of harbouring an offender or one of taking or offering a gratification for the purpose of screening an offender.

(f) Where a gratification is alleged to have been accepted or offered for this purpose, the offence which had been committed and which is sought to be suppressed, should have been a non-compoundable offence. The courts of Ceylon have held that the act of taking or offering a gratification with a view to screening an offender who had committed a compoundable crime, does not itself amount to an offence.[194] This conclusion is based on the premise that attempts to conceal only the graver crimes, should involve penal sanctions.

(g) In regard to the offence of taking a gratification to help recover stolen property,[195] the burden of proof as to one element of the offence presents some difficulty. This offence is committed in circumstances where the accused takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he has been deprived by any offence punishable under the Penal Code "unless (the accused) uses all means in his power to cause the offender to be apprehended and convicted of the offence".[196]

The issue here is where the prosecution must establish, as an indispensable ingredient of the offence, that the accused has not

194. (1899) Koch's Rep. 1 cf. *Notley* v. *Antonis* (1921) 22 N.L.R. 335.
195. Penal Code, section 212. 196. ibid.

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used all means in his power to achieve this object, or whether it is for the accused to make out a case for release from liability by showing that he had done all he was legally required to do. The former view was accepted in only one Ceylon case,[197] while the latter view appears to be generally supported.[198]

Ex facie the definition of this offence, it would seem that the concessional clause embodies an essential requirement of liability, so that the burden of establishing that the contingency envisaged by the concessional clause did not apply, can be expected to have devolved on the prosecution, according to a strict construction of the language used in the provision. However, the burden of proof in this situation has to be determined in the light of rules contained in the Evidence Ordinance.[199] Section 105 of this Ordinance has the effect of placing on the accused the duty of proving a general or special exception from criminal liability in all circumstances. In *Kirineris*[200] Wood Renton C.J. held that the concessional clause incorporated in the definition of the offence of taking a gratification to help recover stolen property, assumed the character of a special exception within the meaning of section 105 of the Evidence Ordinance. It may be questioned, however, whether this represents a sound approach, since the negative element emerging from the concessional clause, appears to be part of the definition of the offence.

The matter may be clearly resolved, however, by having recourse to section 106 of the Evidence Ordinance which declares that "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The fact that the accused has used all means in his power to secure the apprehension and conviction of the offender may be described as a circumstance especially within his knowledge. Accordingly, proof of this fact may be required of the accused, as a condition of exculpation, on the basis of section 106 of the Evidence Ordinance.[201]

(h) Harbouring an offender who has escaped from custody or whose apprehension is ordered, constitutes a distinct offence.[202] This differs from the offence of harbouring an offender, made punishable by section 209 of the Penal Code, in that the additional element that the person harboured is in lawful custody or has been ordered to be placed in lawful custody, characterizes the former offence but not the latter. This accounts for the

197. (1905) 5 C.L. Rev. Notes 75.
198. *Ranhamy Dingiri* v. *Banda* (1906) 5 C.L. Rev. 137; *Naidappu* (1906) 1 A.C.R. 48; *Kirineris* (1916) 2 C.W.R. 14.
199. Cap. 14.
200. (1916) 2 C.W.R. 14.
201. cf. *Naidappu* (1906) 1 A.C.R. 48.
202. Penal Code, section 213.

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imposition of heavier penalties for the former offence than are applicable to the latter.[203]

V. COMPLICITY OF PUBLIC OFFICIALS IN OFFENCES INVOLVING JUSTICE

The involvement of public officials in designs to defeat the ends of justice is made punishable by a series of provisions. The following acts by public officials amount to offences:

(a) disobeying a lawful direction with intent to save a person from punishment or to save property from forfeiture;[204]

(b) framing an incorrect record or other writing with the intention of saving a person from punshment or of preventing the forfeiture of property;[205]

(c) an intentional omission to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence;[206]

(d) an intentional omission to apprehend or to keep in confinement any person under sentence of a Court of Justice for any offence, or intentionally allowing such person to escape or intentionally aiding such person in escaping or attempting to escape from lawful confinement;[207]

(e) negligently allowing a person to escape from lawful confinement.[208]

The following points may be noted in regard to the scope and rationale of these offences:

(i) A heavier penalty is imposed on public servants than on other persons for the commission of offences involving the administration of justice. The relative severity of the punishment meted out to public servants is due to the consideration that they are shown to have violated a special obligation imposed on them by the law. In view of the particular responsiblity attaching to their office, an offence of this nature committed by them is considered especially heinous. A similar attitude is adopted by our criminal law in other contexts as well. An instance is provided by the law of abetment.[209] If the abettor or the person abetted is a public servant whose duty it is to prevent the commission of the offence in question, a more exacting penalty is applicable, as a rule, to the offence of abetment[210]. A similar distinction as to the degree of punishment

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203. Compare sections 209 and 213.
204. Penal Code, section 214.
205. Section 215.
206. Section 216.
207. Section 217.
208. Section 218.
209. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), p. 413.
210. Penal Code, section 109.

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applies to a public servant concealing a design to commit an offence which it was his duty to prevent.[211] The same reasons of policy account for the exceptional quantum of punishment which is visited upon public servants who, in contravention of their duty, assist intentionally in the suppression of evidence relating to a crime which had already been committed, or who deliberately allow an offender to evade punishment.[212]

(ii) In this context, criminal liability may be imposed on public servants not only for positive acts of commission but even on the ground of omissions. This result, again, savours of unusual strictness. The explanation is that the omissions contemplated on the part of public officials amount to illegal omissions, in the sense relevant to criminal liability,[213] in that they entail the breach of duties enjoined upon them by law.[214]

(iii) It is a prerequisite for invocation of the heavier penalties to which public servants are subject, that the duty they are held to have contravened should be a special duty attaching to them by reason of their office and not merely a general duty which applies to all persons. In *Gunaratne* v. *Wickremanayaka*[215] the accused, who was a public servant, was alleged to have seized an unlicensed gun and, contrary to a lawful direction, returned the gun to its owner subsequently. Lawrie J., setting aside the conviction in appeal, stated: "The direction of law disobeyed ought to be set forth in the charge, and it must be a positive direction, not the mere general obligation by which every subject is bound not to stifle a prosecution. Consequently, the direction of law must be distinctly proved".[216] His Lordship spelt out as follows the ground on whch the acquittal was based: "I find no authority given to headmen to seize unlicensed guns, nor any direction given to them to produce the guns before a Court."[217] Accordingly, no special duty devolved on the accused, *qua* public servant.

(iv) All but one of the offences involving public servants envisaged by these provisions, relate to assistance given to an offender knowingly or intentionally.[218] The sole exception is embodied in section 218 which constitutes the offences committed by a public servant in negligently allowing a person to escape from lawful confinement. In this instance alone does negligence suffice to establish the liability of a public servant for an offence connected with public justice.

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211. Section 112
212. Scetions 214-218.
213. Penal Code, section 30.
214. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), pages 106-110.
215. (1897) 2 N.L.R. 298.
216. At p. 298.
217. ibid.
218. Penal Code, sections 214-217.

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VI. RESISTANCE OR OBSTRUCTION OF LAWFUL ARREST OR DETENTION

Resistance or obstruction by a person (a) of his lawful apprehension in connection with criminal proceedings,[219] or (b) of the lawful apprehension of himself under civil process[220] or (c) of the lawful apprehension of another person in connection with criminal proceedings[221] are recognized as offences. Prevention of arrest and escape from lawful detention after the arrest is made, are both punishable under these offences. Resistance, escape or rescue in cases not specifically provided for,[222] escape from lawful custody in which a person is held for failing to furnish security for good behaviour[223] and contravention of condition subject to which remission of punishment is allowed[224] are other methods whereby lawful custody may be violated. Intentional insult offered to, or interruption of, a public servant in any stage of a judicial proceeding[225] and personation of a juror or assessor[226] are other offences which may be classified as belonging to this category.

The following points may be noted in regard to these offences:

(a) In cases where the accused is indicted for offering resistance or obstruction to the lawful apprehension of himself for any offence with which he is *charged*,[227] the question arises whether liability under this provision can be imposed exclusively in circumstances where a judicial charge has been formulated at the conclusion of evidence recorded in a court of law. It is clear, in the light of case law, that this question must be answered in the negative. It has been held that the word "charge", in this context, is used "in the popular sense as implying (no more than) an imputation of the alleged offence"[228] and that "charge" has the broad connotation with which it is invested by other sections of the Penal Code, including section 208.[229] The better view is that the arrest of a person on suspicion by a police officer is tantamount to "charging" him with an offence, within the meaning of the relevant provision of law,[230] and that resistance by such person to his apprehension or his escape from custody after the arrest had been made, constitutes the offence made punishable by this provision.[231]

219. Section 219.
220. Section 219A.
221. Section 220.
222. Section 220A
223. Section 221.
224. Section 222.
225. Section 223.
226. Section 224.
227. Penal Code, section 219.
228. *Karunaratne* v. *Siyatu* (1931) 33 N.L.R. 299.
229. *Obeyesekera* v. *Perera* (1920) 7 C.W.R. 140.
230. Penal Code, section 219.
231. *Nawana* v. *Fernando* (1908) 4 A.C.R. Suppl. vi; *Johoran* v. *Saranelis* (1929) 31 N.L.R. 146; *Naranapillai* v. *Sinnetamby* (1933) 11 Times of Cey. 54; *Rajendram* v. *Perera* (1941) 20 C.L.W. 124

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There are a few cases[232] which support the contrary view, but these will probably be held to have been wrongly decided.

(b) A Magistrate's court is entitled to exercise jurisdiction over a person who is charged with having escaped from lawful custody only if the offence for which the accused was lawfully detained in custody, was an offence cognizable by a Magistrate's Court.[233]

(c) The detention from which the accused escapes or which the accused resists or obstructs, must be *lawful* detention. Thus, where the issue of a warrant is a condition precedent to the legality of an arrest, the absence of a warrant renders the arrest illegal, so that escape from such detention would not entail criminal liability.[234] Detention ordered by a court lacking competent jurisdiction, cannot be treated as lawful detention.[235] Failure to record the reasons for an arrest may render the arrest unlawful.[236] Again, where the warrant is defective for want of compliance with a formality regarded as imperative by the law,[237] the legality of the arrest and of the subsequent detention may be vitiated. However, the legality of an arrest cannot be assailed on the ground that the arrest was made outside the limits of the area placed under the charge of the police station to which the officer making the arrest is attached.[238]

On the other hand an arrest made by a public officer in excess of his lawful powers is not a lawful arrest.[239] Also it is an indispensable requirement that a warrant must state the name and address of the person whose arrest is ordered, a general warrant not being valid.[240] Where the effectiveness of a warrant is not limited in point of time, the warrant remains valid until the arrest is made.[241] If the returnable date is stated on the face of the warrant, voluntary surrender by the person against whom it is issued does not, *ipso facto*, invalidate the warrant prior to the relevant date.[242] An unsigned warrant is necessarily void, and no arrest can be made in pursuance of it.[243] An arrest made by Excise Guards who acted without lawful right,

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232. *Abubakker* (1923) 1 Times of Cey. 168.
233. *Rambukpota* v. *Menika* (1893) 2 S.C.R. 73; *Dingiri Banda* v. *Punchi Rala* (1894) 3 S.C.R. 32; *Krishnaratna* v. *Siyan Appu* (1914) 17 N.L.R. 276.
234. *Sourjah v. Reddy* (1936) 1 C.L.J.N. 48
235. *Naranapillai* v. *Sinnetamby* (1933) 13 C.L. Rec. 79.
236. *Wijeyesekera* v. *Semera Lebbe* (1905) 8 N.L.R. 136.
237. *Sithamparapillai* v. *Murugesu* (1941) 42 N.L.R. 219.
238. *Gressy* v. *Perera* (1901) 5 N.L.R. 116.
239. *Bawa* v. *Perera* (1893) 6 C.L. Rev. 13.
240. *Perera* v. *Rutiyah Kangany* (1896) 6 C.L. Rev. 62.
241. *Suinady* (1931) 32 N.L.R. 330.
242. *Silva* v. *Aya* (1894) 6 C.L. Rev. 77.
243. *Deputy Fiscal, Kegalle* v. *Tikiri Banda* (1928) 29 N.L.R. 443.

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has been held to be an unlawful arrest.[244] Similarly, where an Excise officer was authorized to make an arrest only after compiling a record required by statutory provisions, the absence of a record has been considered to militate against legality of the arrest.[245] If the offence of which the accused is suspected is not a cognizable offence, his escape from custody does not entail criminal liability provided it can be shown that the arrest had been made without a warrant.[246] Where the purported detention is for a longer period than is allowed by law, the legality of the detention is restricted to the maximum number of days during which custody is statutorily justifiable.[247]

(d) As to what constitutes "obstruction",[248] the view has prevailed that mere evasion is not sufficient and that something more must be proved against the accused. In *Toussaint* v. *Marshall*[249] an Inspector of Police went to the accused's house to arrest the accused on a criminal charge. The Inspector found the door of the house locked but saw the accused appear at a window. The accused, on being asked to come out of the house, escaped by a back door. It was held that he could not be convicted of obstructing a lawful arrest.

(e) Although the position is now established in the law of Ceylon that a judicial charge, in the sense of a charge made before a Court of Justice is not necessary, the minimum requirement is that the accused should be a person "against whom a reasonable complaint had been made or credible information had been received or a reasonable suspicion existed"[250] of his having been concerned in the commission of a cognizable offence. Where this requirement is not fulfilled, the detention is not lawful. In *Muttusamy* v. *Inspector of Police, Kahawatte*[251] Gratiaen J. stated, as a ground for declaring the arrest unlawful: "The Inspector has nowhere in the course of his evidence referred to any complaint or information or suspicion, the reasonableness of which could have been tested by the Magistrate whose function it was to inquire into the officer's state of mind at the time that he ordered the arrest."[252]

(f) In *Muttusamy* v. *Inspector of Police, Kahawatta*[253] Gratiaen J. went so far as to hold that, whether the arrest is made with or without a warrant, the requirements of the law can generally be

244. *Gunasekera* (1937) 9 C.L.W. 40.
245. *Appusingho* v. *Van Buren* (1948) 49 N.L.R. 399.
246. *Sheriff* v. *Bongso* (1947) 34 C.L.W. 63.
247. *Ponniah Kumaresu* v. *District Revenue Officer, Vavuniya* (1949) 51 N.L.R. 31
248. Penal Code, sections 219, 219A, 220 and 220A.
249. (1930) 11 C.L. Rec. 13.
250. Code of Criminal Procedure, section 32(1)(b).
251. (1951) 44 C.L.W. 33.
252. At p. 37, *per* Gratiaen J.
253. (1951) 44 C.L.W. 33.

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said to have been complied with only if the accused was informed, at the time of the arrest, of the reason why the arrest was made. Where the arrest is made on the authority of a warrant, a statutory obligation is imposed on the person making the arrest to "notify the substance of the warrant to the person arrested"[254] and, if so required, to "show him the warrant or a copy thereof issued by the person issuing the same".[255] Gratiaen J. observed: "*A fortiori*, whenever a police officer arrests a person on suspicion without a warrant, common justice and common sense require that he should inform the suspect of the nature of the charge upon which he is arrested."[256]

As Gratiaen J. himself conceded,[257] some exceptions to this principle must obviously be recognized. For instance, it would not be insisted on in cases where the person arrested made it impossible for the other party to inform him of the reason for the arrest or where the exigencies of the situation made necessary instantaneous action. In all other cases, according to the view expressed by the court in *Muttusamy's* case, the provision of an explanation in regard to the cause of the arrest is a condition precedent of legality of the arrest. It would follow from this approach that, where this requirement is not satisfied, resistance of the arrest or escape from custody does not involve the accused in criminal responsibility.

It must be pointed out, however, that this principle is not part of the *ratio decidendi* of *Muttusamy's* case, since the actual decision could be supported on the ground that the arrest was unlawful, in so far as there was an absence of reasonable cause for suspicion against the accused. Nevertheless, although the observations of Gratiaen J. on the point are probably *obiter dicta* and, as such, not binding in terms of the doctrine of *stare decisis*, they are based on a principle of fundamental importance. Gratiaen J. accepted, as being applicable to the law of Ceylon,[258] the statement by Viscount Simon L.C. in a leading English case, that "Citizen A is not bound to submit unresistingly to arrest by citizen B in ignorance of the charge against him."[259] There is no doubt that this represents a salutary principle in regard to protection of basic rights in Ceylon.

(g) Our courts have asserted that "Where a citizen is charged with offering resistance to his lawful apprehension, it is incumbent on the prosecution to prove without doubt that the apprehension was in fact lawful and justified in the circumstances

254. Code of Criminal Procedure, section 53.
255. ibid.
256. (1951) 44 C.L.W. 33 at p. 37.
257. At p. 37.
258. At p. 38.
259. *Christie* v. *Leachinsky* (1947) L.J.R. 757.

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of the case."[260] The effect of this view is that it is for the prosecution to prove that the arrest was lawful, and not for the accused to establish the unlawful character of the arrest or detention. Moreover, since legality of the arrest or custody is an indispensable prerequisite of the accused's liability for resisting arrest or escaping from detention, the prosecution is bound to establish this element beyond a reasonable doubt.

(h) Conviction of the offence of escaping from lawful custody[261] warrants imposition of a sentence of imprisonment *in addition to* the punishment which the accused was already undergoing at the time of his escape. A sentence of imprisonment which is ordered to run concurrently with the sentence that had been pronounced on the accused previously, is not appropriate in these circumstances.[262]

(i) The offence of harbouring an offender cannot be committed by one spouse in relation to the other.[263] However, this exception is not applicable to charges of resisting or obstructing the lawful apprehension of another person.[264] The phrase "another person", in the latter context, includes the husband or wife of the accused. In *Wadduwa Police* v. *Silva*[265] the accused was charged with having offered resistance intentionally to the arrest of his wife by the Police Vidane on a warrant issued by the Village Tribunal. The accused was acquitted on the ground that the evidence did not indicate that the accused's wife had been charged with any offence. But it was assumed that, if this had not been so, conviction of the accused would not have been precluded by the relationship between the parties.

VII. THE SCOPE OF OFFENCES IN RESPECT OF PUBLIC JUSTICE

The crimes recognized by Chapter XI of the Penal Code have as their object the imposition of liability for improper interference with the apprehension and punishment of those who have committed offences. However, the word "offences" is not given a uniform meaning throughout this Chapter of the Penal Code. Thus, in the context of liability for giving or fabricating false evidence with intent to procure conviction of a capital offence,[266] giving or fabricating false evidence with intent to procure conviction of an offence punishable with imprisonment for seven years or upwards,[267] giving false information in

260. (1951) 44 C.L.W. 33 at p 37.
261. Penal Code, section 220.
262. *Sanmugam* v. *Sinnappen* (1907) 2 A.C.R. Suppl. xi.
263. Exception to section 213 of the Penal Code.
264. Penal Code, section 220.
265. (1916) 2 C.W.R. 57.
266. Penal Code, section 191.
267. Section 192.

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respect of an offence committed,[268] making a false charge of an offence with intent to injure,[269] taking[270] or offering[271] a gratification for the purpose of concealing an offence, intentional omission by a public servant to apprehend a person charged with an offence[272] or under sentence of a Court of Justice for any offence,[273] the act of a public servant in negligently suffering any person charged with or convicted of any offence to escape from confinement,[274] and the offering of resistance or obstruction by any person to the lawful apprehension of himself[275] or any other person[276] for any offence with which the person in question has been charged or of which he has been convicted, the word "offence" denotes a thing punishable in Ceylon under the Penal Code or under any law other than the Penal Code.[277]

A second category is comprised by the crimes of causing the disappearance of evidence of an offence which had been committed,[278] intentional omission to give information of an offence by a person bound to inform,[279] harbouring a person who had committed an offence,[280] and harbouring a person who, having committed an offence, had escaped from lawful custody.[281] In these contexts, the word "offence" denotes a thing made punishable by the Penal Code or by any other law, provided that "the thing punishable under any law other than the Penal Code is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."[282]

In all other contexts where the word "offence" occurs in Chapter XI of the Penal Code, it denotes a thing made punishable in Ceylon by the Penal Code only and by no other law.[283]

The meaning of the word "offence", then, is widest in the first category and narrowest in the third category, the second category occupying an intermediary position.

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268. Section 200.
269. Section 208.
270. Section 210.
271. Section 211.
272. Section 216.
273. Section 217.
274. Section 218.
275. Section 219.
276. Section 220.
277. Section 38(2).
278. Section 198.
279. Section 199.
280. Section 209.
281. Section 213.
282. Section 38(3).
283. Section 38(1).

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CHAPTER 10

OFFENCES INVOLVING PUBLIC SERVANTS

The Penal Code of Ceylon, in several contexts, incorporates special provisions governing public servants. The consideration that public servants are vested with particular responsibilities and that these necessitate the conferment of special powers, is part of the general scheme of the Code. Thus, the right of private defence cannot be exercised against a public servant to the same extent that its use is legally permitted against ordinary persons.[1] This reflects the greater need for protection which has been conceded to public servants, engaged in the lawful discharge of their functions. On the other hand, the provisions of the Code ensure adequate protection for members of the public who suffer injury or loss at the hands of public servants. While action taken by public servants in good faith in excess of their strict legal powers do not necessarily deprive them of the legal protection to which they are ordinarily entitled,[2] the courts of Ceylon have insisted that a distinction must be drawn between acts by public servants which are not strictly lawful and acts by them which are altogether unlawful.[3] The effect of this distinction which emerges explicitly from the case law,[4] is to place the latter category of acts firmly outside the protection conferred by law. Moreover, malice or any other improper motive attributable to a pubic servant vitiates the basis of the protection which may otherwise have been available to him. These are means whereby the citizen is safeguarded from the consequences of arbitrary action which may be resorted to by public officials.

It must be emphasized that the existence of a separate body of provisions applicable to public servants does not place them in a basically privileged position under the criminal law of Ceylon. Far from there being any contravention of the postulate of equality before the law, the sole effect of the provisions by which public officials alone are governed, is to ensure for them some measure of protection of which they stand legitimately in need in the performance of public duties entrusted to them by law. It is not a feature of our criminal law that the

1. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pp. 308-320.
2. Penal Code, sections 92(1) and 92(2).
3. G. L. Peiris, op. cit., pp. 312-320.
4. ibid.

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provisions applying exclusively to public servants, always embody advantages which may not be claimed by ordinary citizens. On the contrary, the difference in treatment may well involve the imposition of more exacting penalties on public servants who are convicted of an offence. For example, the punishment for abetment is greater when the abettor is a public servant than it is when an ordinary person is convicted of abetment.[5] The attitude of the law is that the public servant's offence is relatively more heinous because of the particular confidence reposed in him by virtue of his office.

The position, then, is that the criminal law neither favours nor discriminates against public servants as a matter of general policy, whether in regard to the incidence of liability or as to the quantum of punishment. Their special duties and responsibilities justify particular protection in some contexts but render applicable sanctions of exceptional severity in others.

Offences involving public servants comprise a distinct category of offences for which provision is made in two chapters of the Penal Code.[6] It is proposed, in keeping, with the nomenclature used in these chapters, to discuss these offences under two main heads: (A) Offences by or relating to public servants; and (B) Contempts of the lawful authority of public servants.

(A) *Offences by or Relating to Public Servants*

1. ACCEPTANCE OF AN ILLEGAL GRATIFICATION TO INFLUENCE THE ACTS OF A PUBLIC SERVANT

Section 158 of the Penal Code makes it an offence for a public servant[7] to take a gratification other than legal remuneration in respect of an official act. The elements of this offence are: (i) the recipient should be, or should expect to be, a "public servant", within the meaning of that phrase as defined in the Penal Code;[8] (ii) he should accept, obtain, agree to accept or attempt to obtain from any person, for himself or for any other person, any gratification[9] other than legal remuneration; (iii) the gratification should have been accepted as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the Government of Ceylon or with any public servant, as such. In regard to element (iii), a vital ingredient is the aim of influencing

5. G. L. Peiris, op. cit., p. 413.
6. Chapters IX and X of the Penal Code.
7. Penal Code, section 19.
8. ibid.
9. According to the Explanation to section 158, "gratification" is not restricted to gratifications estimable in money.

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a public servant in regard to an *official act*. In accordance with general principles, this would also extend to omissions.[10] It must be noted, furthermore, that the commission of, or forbearance from, the act in consideration of which the gratification is accepted, is not an essential element of liability. The offence constituted by section 158 is complete no sooner than the gratification is accepted with the relevant motive.

Section 158 makes punishable the acceptance of a bribe by a public servant. The question arises whether there is any provisions of law under which a person who *offers* a bribe to a public servant with the motive of influencing his judgment in regard to his official functions, may be punished. A substantive offence on these lines is not contained in the Penal Code. But criminal liability in the reciprocal case of offer of a gratification to a public servant may be supported on the basis of the principle of abetment.[11] Since taking of the gratification constitutes a substantive offence, the giver of the gratification may be charged with abetment of the offence committed by the taker. This solution has been adopted in several Ceylon cases.[12] It may be noted, moreover, that the abettor may be liable even in circumstances where the person abetted is exonerated from criminal responsibility.[13] Thus, the liability of the person offering the bribe is not affected by the fact that the offeree disdains the gratification.

A further question which arises in this connection is whether a person who offers a bribe may be convicted of abetment of the offence recognized by section 158 of the Penal Code, in circumstances where the public servant to whom it is offered, has no power to act officially in the matter in question. This issue has received detailed consideration elsewhere, and the conclusion has been suggested that the question, in the light of decided Ceylon cases, has to be answered in the negative.[14] In *Selliah*[15] the court specifically addressed its mind to the issue whether the public servant had lawful power to perform the service which was expected of him by the person offering the gratification.

In regard to preparation of the indictment and the leading of evidence, the Supreme Court, in *Lambadusuriya* v. *Robins*,[16]

10. cf. G. L. Peirs, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pp. 106-110.
11. Penal Code, sections 100 and 101.
12. *de Zoysa* v. *Subaweera* (1941) 42 N.L.R. 357; *Perera* v. *Kannangara* (1939) 40 N.L.R. 465; *Silva* v. *Imbuldeniya* (1948) 49 N.L.R. 159; *Tennakoon Dissanayake* (1948) 59 N.L.R. 403.
13. Penal Code, section 101, Explanation 2.
14. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed). pp. 404-406.
15. (1922) 24 N.L.R. 18.
16. (1948) 49 N.L.R. 418.

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insisted on a salutary precaution designed to protect the accused. In this case the accused, a public servant, was charged with accepting an "illegal gratification of cash Rs 250". The case presented at the trial by the prosecution was in accordance with this specific charge. However, at the conclusion of the trial, the Magistrate convicted the accused of obtaining an "illegal gratification of a *loan* of Rs 250" for performing an official act different from that stated in the indictment.

Wijeyewardene A.C.J. said: "It was argued by Crown Counsel that, even if the sum of Rs 250 was taken as a loan, yet the accused would be guilty of an offence under section 158 of the Penal Code, if the loan was asked for and obtained as a reward for the accused showing some favour to R in the exercise of his official functions. That, no doubt, is a sound proposition of law. But it does not follow that a man could be charged for accepting 'a gratification of cash Rs 250' for doing a certain official act and could be convicted in spite of the evidence for the Crown, of obtaining a loan of Rs 250 for doing a different official act."[17] This decision may be supported on the ground that the contrary view involves unfair prejudice to the accused, in so far as he is taken by surprise at the trial and called upon to meet a case different from that he reasonably expected the prosecution to present.

Sections 159 and 160 differ from section 158, in the sense that they, unlike section 158, envisage the acceptance of a gratification not by a public servant but by a third person who undertakes to secure a favour at the hands of a public servant. In circumstances falling within the scope of sections 159 and 160, there need not necessarily be any complicity on the part of a public servant at all. It is intended in these cases that the acceptance of the bribe by a third party will ultimately have some effect on the official act of a public servant, but whether this intention is accomplished or not, receipt of the gratification by the third party suffices to establish criminal liability on the part of the recipient of the bribe.

While sections 159 and 160 have in common the feature that the offence constituted by these provisions entails the acceptance[18] of a gratification by a third party, the difference between the two sections relates to the means whereby a public servant's judgment as to an official matter is sought to be influenced. Section 159 is of appreciably wider scope than section 160, in this respect. Section 159 contemplates the influencing of a public servant by *any* corrupt or illegal means, but section 160 envisages corrupt or illegal means of a particular kind—namely,

17. At p. 422.
18. "Acceptance" includes an agreement to accept or an attempt to accept.

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personal influence which the recipient of the gratification purports to wield with the pubic servant from whom a favour is expected.

Where a charge is brought under section 159, the question whether corrupt or illegal means are in fact employed to influence a public servant or not, is irrelevant to liability. Similarly, where the indictment is brought within the framework of section 160, it is immaterial whether the recipient of the gratification was actually in a position to use personal influence with the public servant in question or not. In *Coomaraswamy*[19] the accused pleaded that, having accepted the gratification, he confined himself to soliciting an interview with the public servant. There was no evidence that the accused enjoyed the special confidence of the public servant. Nevertheless, the accused was held liable. What matters, in the case of offences under sections 159 and 160 of the Penal Code is that the recipient of the bribe should have induced in the offeror's mind the belief that a public servant would be led to perform an invidious service for the offeror on account of the recipient's intervention. Liability does not depend on steps which the recipient subsequently takes or refrains from taking to transform his promise into reality.

It has been pointed out that, in cases where the third party recipient of the gratification incurs criminal liability for an offence under section 159 or section 160 of the Penal Code, a public servant need not necessarily be guilty of any offence. But a separate punishment is prescribed if complicity on the part of a public servant is established.[20] In this event, the maximum punishment to which the offending public servant is liable is the same as that imposed on the third party recipient, in the case of offences under section 159, but greater than that applicable to the third party in the case of offences under section 160.

II. MISCONDUCT BY A PUBLIC SERVANT

A public servant who disobeys a direction of the law with intent to cause injury to any person or to the Government[21] or who frames or translates a document which he knows or believes to be incorrect, with intent to cause injury[22] is declared to commit an offence. Other offences of this category recognized by the Penal Code are: fraudulent or malicious infraction of duty by a public servant in the Posts and Telecommunications Department;[23] drunkenness, carelessness or other misconduct

19. (1921) 3 C.L. Rec. 93.
20. Penal Code, section 161.
21. Section 162.
22. Section 163.
23. Section 164.

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on the part of a public servant employed in that Department of Government;[24] fraud by a public servant in that Department;[25] and injury to messages, letters or postal packets committed by a public servant in that Department.[26] A feature of these four offences is that they are restricted in scope to public servants employed in a particular Department—namely, the Posts and Telecommunications Department of the Government of Ceylon.

III. MISCELLANEOUS OFFENCES

Wilful personation of a public servant is a distinct offence. Section 168 of the Penal Code declares that "Whoever pretends to hold any particular office, as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office" commits an offence. The punishment for this offence is imprisonment of either description for a term which may extend to two years, or a fine, or both.[27]

However, where the accused has placed on a document a signature which purports to be that of a public servant, the appropriate offence of which he should be convicted may be forgery[28] rather than personation of a public servant.[29] A situation of this kind is exemplified by the facts of *Eliatamby*.[30] The accused was charged with "having pretended to hold a certain office as a public servant, namely, the office of the President of the Village Tribunal of Valaieravu". The evidence indicated that the accused issued for service a summons signing it as follows: "E. Crowther, President of the Village Tribunal." Lawrie J., quashing the conviction in appeal, observed: "In my opinion, the facts proved would support an indictment for committing the offence under section 455—forgery of a document purporting to be a proceeding of a court of justice—but the accused at no time pretended to be Village Tribunal President, and did no act in such assumed character."[31] The only way in which the accused purported to be the President of the Village Tribunal was by signing as the latter. On the facts of the case, the charge of forgery was thought to be the proper charge.

Wearing or carrying with fraudulent intent a garb or token used by a public servant constitutes a separate offence.[32]

IV. RATIONALE OF THESE OFFENCES

The offences involving public servants which have so far been considered, have reference to three primary objectives: (a) dis-

24. Section 165. 25. Section 166. 26. Section 167.
27. Section 168. 28. Section 455.
29. Section 168. 30. (1897) 2 N.L.R. 318.
31. At p. 318. 32. Penal Code, Section 169.

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couraging improper interference with the official work of public servants; (b) making punishable fraudulent, dishonest or reckless acts of public servants while engaged in the performance of official duties; and (c) attaching penal sanctions to the personation of public servants by other persons.

(a) The official functions of public servants often involve the making of decisions as to which the discretion vested in the public officer is a vital factor. It is obviously in the public interest that this discretion should be fairly and impartially exercised, without reference to partisan considerations. Consequently, it becomes the concern of the criminal law to punish attempts at influencing, by improper or corrupt means, the judgment of a public servant in his official work. The community at large has a sufficient interest in the integrity of the public service to warrant imposition of criminal liability for acts which are intended to produce corruption in the public service.

A public servant who accepts an unlawful gratification for an improper purpose incurs criminal liability, whether he allows his judgment to be swayed or not by the bribe. Quite apart from the difficulty of ascertaining whether the object of the person offering the gratification has been achieved or not, there remains the consideration that the image of the public service, in the sense of its esteem in the eyes of the public, should not be allowed to become tarnished. Moreover, the law endeavours to protect public servants from temptation. This attitude of the law is reflected in the provisions which prescribe punishment for the giver as well as the taker of the gratification and in the exposure to criminal liability of third parties who stipulate for and accept a gratification as the price of inducing a public servant to grant an invidious favour to the giver of the bribe. A deficiency in the law which may be assailed from the standpoint of policy, is manifest in the result that a person who gives a bribe to a public servant with the expectation that the latter would improperly use his official position for the benefit of the giver of the gratification, cannot be convicted of abetment of the offence constituted by section 158 of the Penal Code, if the public servant lacked the power to assist the other party in the matter in question. This anomaly, which runs counter to the basic policy objective of discouraging all attempts at corrupting public servants—irrespective of the question whether they will succeed or fail—derives from the structure of our law and cannot be rectified at this stage without modification of the statutory provisions governig the matter.

(b) Public servants setting about their official duties are naturally expected to approach their work with a proper degree of diligence and caution. They are bound to be mindful of the

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jeopardy in which the public may well be placed as the result of a lapse on their part. The particular responsibility with which they are entrusted by virtue of their official position enjoins on them a relatively high degree of care. In the result, fraud or dishonesty is not invariably a precondition of the criminal liability of public servants. Carelessness may be sufficient in some contexts.[33] This represents stricter standard than is generally adopted by the criminal law.

(c) Clearly, the public are likely to be imperilled if the functions devolving on public servants are carried out by impostors who have no official status. This would open the door to dishonesty and corruption. It is essential to the proper discharge of their functions by public servants that their office should be respected and their identity recognized. For this reason the personation of public servants and the use of official tokens and apparel by unauthorized persons are treated as offences.

(B) *Contempts of the Lawful Authority of Public Servants*

These offences stem from the premise that compliance with the lawful directions of public servants and acknowledgement of their authority are necessary conditions for the effective performance of their duties. Accordingly, the Penal Code recognizes several offences which are based on defiance of the lawful power conferred on public servants. The elements of these offences may be examined, in the light of decided cases.

1. ABSCONDING TO AVOID SERVICE OF SUMMONS BY A PUBLIC SERVANT

The requisites of this offence[34] are (i) that the accused should have absconded in order to avoid being served with a summons, notice or order proceeding from any public servant; and (ii) that the public servant should have been legally competent, as such public servant, to issue the summons, notice or order. Element (i) envisages a physical act done by the accused with a particular end in view, while (ii) requires consideration of the scope of the public servant's powers with a view to ascertaining whether the act, from the consequences of which the accused endeavoured to escape, was within the legal competence of the public servant.

In regard to the quantum of punishment for this offence a distinction is recognized between a summons to attend in person or by agent or to produce a document in a Court of Justice, on the one hand, and any other summons, on the other.[35] Where the former type of summons is involved, the maximum punish-

33. Section 165.
34. Section 170.
35. ibid.

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ment is simple imprisonment for six months, or a fine of one hundred rupees, or both. In the latter case, the maximum punishment for the offence is reduced to simple imprisonment for one month, or a fine of fifty rupees, or both the fine and imprisonment.[36]

II. PREVENTING SERVICE OR PUBLICATION OF SUMMONS BY A PUBLIC SERVANT

The offence of preventing *service* of summons[37] is committed by any person who "in any manner intentionally prevents the serving on himself, or on any other person, of any summons notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons notice or order". The offence of preventing *publication* of summons[38] may be committed in one of three ways: (a) by intentionally preventing the lawful affixing to any place of any such summons, notice or order; or (b) by intentionally removing any such summons, notice or order from any place to which it is lawfully affixed; or (c) by intentionally preventing the lawful making of any proclamation under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made.

It must be empasized, however, that liability may be imposed for either of these offences only in circumstances where the summons, notice or order conforms with the requirements of the law. Where the summons is legally defective, or where the person on whom it is served is legally justified in refusing to accept the summons for some other reason, no question of criminal liability for preventing the service of summons arises. In *Perera* v. *Rupesinghe*[39] the summons was addressed to "Rupesinghe" but no initials preceded the name, nor was there any other indication that the accused was the person for whom the summons was intended. It was held that the accused committed no offence in declining to accept the summons.

In regard to the offence of preventing service or publication of summons, a distinction is drawn, so far as the penalty is concerned, between a summons to attend in person or by agent or to produce a document in a Court of Justice, on the one hand, and any other summons, on the other[40].

III. NON-ATTENDANCE IN OBEDIENCE TO A PUBLIC SERVANT

The elements of this offence[41] are the following: (i) The accused should have been legally bound to attend in person or

36. ibid. 37. Section 171. 38. ibid.
39. (1891) 6 C.L. Rev. 17. 40. Penal Code, section 171.
41. Section 172.

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by agent at a certain time and place in obedience to a summons, notice, order or proclamation proceeding from a public servant; (ii) The public servant, in his official capacity, should have had lawful power to issue the summons; (iii) The accused should either (a) intentionally omit to attend at that place or time, or (b) depart from the place where he is bound to attend before the time at which it is lawful for him to depart.

The following principles in regard to this offence are established by the case law:

(a) In the generality of circumstances, a Magistrate is not entitled to try summarily a person accused of this offence. An exception to this rule may be admitted in situations where (i) the assumption of jurisdiction by a Magistrate is expressly sanctioned by the Attorney-General;[42] or (ii) a complaint has been made by the public servant whose authority is alleged to have been defied, or on behalf of such public servant.[43] Where summons issued by a Magistrate is alleged to have been disobeyed, the case cannot be tried by the same Magistrate but must be taken up before another Magistrate.[44] This is in keeping with the principle that justice must manifestly and apparently be seen to be done.

(b) Our courts have recognized, as a practical precaution, that a conviction of this offence should not be sustained unless the summons, which has not been complied with is made available in evidence. In *Wace* v. *Lewishamy*[45] Bonser C.J. observed: "The only evidence in support of the charge was the evidence of the process server who says that he served a summons on (the accused). The summons was not produced. Without the production of the summons, it is impossible to say that (the accused) was legally bound to obey it."[46] On this ground the conviction was quashed and the case remitted for re-trial.

(c) The summons, order or proclamation should have complied with imperative requirements of law, so that the accused's obligation to obey the summons is clearly established. In *Wace* v. *Lewishamy* Bonser C.J., referring to the summons involved in that case, said: "It may have been such a summons as I have seen in this Court, one signed by somebody for the chief clerk in which case (the accused) would not have been bound to obey it".[47]

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42. *Julis Appu* v. *Surawell* (1910) 5 Bla. 27.
43. *Silva* v. *Razak* (1932) 1 C.L.W. 213.
44. (1910) 7 C.L. Rev. 84.
45. (1898) 3 N.L.R. 260.
46. At p. 261.
47. ibid.

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(d) Where a case is adjourned and a witness cited for the first date is required by notice to appear on a subsequent date, the notice is equivalent to a subpoena, and defiance of it is punishable on the basis of the provision under discussion.[48]

IV. FAILURE TO PRODUCE A DOCUMENT TO A PUBLIC SERVANT

This offence[49] is committed in circumstances where (i) the accused is under a legal obligation to produce or deliver up the document in question to a public servant, acting in his official capacity; and (ii) the accused intentionally omits to produce or deliver up the same.

If the document is to be produced or delivered up to a Court of Justice, the punishment for the offence is simple imprisonment for a term which may extend to six months, or a fine which may extend to one hundred rupees, or both. In other cases, the maximum punishment is simple imprisonment for one month, or a fine of fifty rupees, or both.[50]

V. FAILURE TO GIVE INFORMATION TO A PUBLIC SERVANT

The requisites of this offence[51] are that (i) the accused was legally bound to give any notice or to furnish information on any subject to any public servant, acting in his capacity as such public servant, and (ii) the accused intentionally omitted to give such notice or to furnish such information in the manner and at the time required by law.

The salient requirements, then, reside in the ideas of legal obligation and intentional omission. As to the first of these elements, it was held in *Modder* v. *Loos*[52] that a person who failed to supply information regarding an abortive attempt at suicide by another, could not be convicted of this offence, since no legal obligation devolved on the accused to give the relevant information.

The usual penalty for this offence is simple imprisonment for a term which may extend to one month, or a fine which may extend to fifty rupees, or both.[53] However, if the notice or information legally required to be given concerns the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to secure the apprehension of an offender, the punishment applicable is enhanced to

48. *Vigors* v. *Cornelius* (1888) 6 C.L. Rev. 53.
49. Penal Code, section 173.
50. ibid.
51. Section 174.
52. (1897) 6 C.L. Rev. 120.
53. Penal Code, section 174.

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simple imprisonment for a term which may extend to six months, or a fine which may extend to one hundred rupees, or both.[54]

VI. FURNISHING FALSE INFORMATION

The essential ingredients of liability are (i) that the accused was legally bound to furnish information on some subject to a public servant, as such, and (ii) that he furnished, as true, information on the subject which he knew or had reason to believe to be false.[55] This offence was held to have been committed in *Hurelle* v. *Appuwa*[56] where the accused, whose duty it was to serve summons on certain persons, reported falsely—and with knowledge that the statement was untrue—that summons had been served.

Liability cannot be imposed for this offence in the absence of proof both of a legal obligation to provide the relevant information and of knowledge or belief in the accused that the information he supplied was untrue. In *Assistant Government Agent, Kalutara* v. *Lebbe Marikar*[57] the accused, a police vidane of a village, was exonerated from liability on the ground that a legal duty in him to collect the statistics in question had not been proved.

The punishment for this offence is simple imprisonment for a term which may extend to six months, or a fine which may extend to one hundred rupees, or both.[58] But if the information which the accused was legally bound to give concerns the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to secure the apprehension of an offender, the punishment is increased to imprisonment of either description for a term which may extend to two years, or a fine or both.[59]

In all these contexts, a person is said to be "legally bound to do" whatever is illegal in him to omit.[60] This definition is of wide scope, since "illegal" refers not merely to an offence or to something prohibited by law but even to a ground of civil liability.[61]

VII. REFUSING AN OATH DULY ADMINISTERED BY A PUBLIC SERVANT

This offence[62] requires (i) that a public servant should have required the accused to bind himself by an oath; (ii) that the public servant is legally competent to make this demand in the

54. ibid. 55. Section 175. 56. (1899) 5 C.L. Rev. 124.
57. (1896) 6 C.L. Rev. 102. 58. Penal Code, Section 175.
59. ibid. 60. Section 42.,
61. Section 41. 62. Section 176.

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circumstances of the case; and (iii) that the accused refused to bind himself by an oath or affirmation to state the truth.

For the purpose of this offence, the word "oath" includes "a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a Court of justice or not."[63]

The punishment for this offence is simple imprisonment for a term which may extend to six months, or a fine which may extend to one hundred rupees, or both.[64]

VIII. REFUSING TO ANSWER A QUESTION PUT BY A PUBLIC SERVANT

The following may be identified as the component elements of this offence: (i) the accused should be legally bound to state the truth on any subject to a public servant; (ii) the accused should refuse to answer any question demanded of him touching that subject by such public servant; and (iii) the public servant, in making the demand, should have acted within the scope of his lawful powers[65].

In *Samarakkody* v. *Don James*[66] the accused was held not guilty of this offence on the ground that no duty to speak the truth, in the circumstances of the case, was imposed on him by law. However, the further observation made in the judgment that this offence contemplates a judicial proceeding and a refusal to answer questions in the course of such a proceeding, appears to be based on an unduly restrictive interpretation of the offence. There is no warrant for confining the scope of the offence to judical proceedings exclusively.

Several points in regard to this offence are established by the case law:

(a) Where information relating to the commission of a cognizable offence is received by a police officer, the latter is empowered, under Chapter XI of the Code of Criminal Procedure to embark on an investigation and to interrogate orally any person who is thought to be acquainted with the facts and circumstances of the case.[67] Any person interrogated in this manner is legally bound "to answer truly all questions relating to such case put to him by such officer."[68] An intentional omission to discharge this duty entails the imposition of criminal responsibility.[69]

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63. Section 50.
64. Section 176.
65. Section 177.
66. (1897) 6 C.L. Rev. 107
67. Code of Criminal Procedure, section 10(1).
68. Code of Criminal Procedure, section 10(2).
69. *Van Cuylenberg* v. *Sellamuttu* (1933) 35 N.L.R. 99.

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(b) However, a person interrogated under Ch. XI of the Code of Criminal Procedure is absolved from the duty of answering truly "questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture".[70] Where the questions put by the police officer or inquirer belongs to this category, the person questioned does not incur criminal liability in declining to answer it. The scope of this exception to the general duty recognized by law is discussed in the cases.

The following principles may now be regarded as established:

(i) The person interrogated is not the sole judge as to whether his answer to the question asked would tend to expose him to a criminal charge. "To entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger from his being compelled to answer."[71] In other words, the existence of the danger must be proved by reference to objective criteria.

(ii) The danger apprehended must be real and appreciable with regard to the ordinary operation of the law, and not merely a danger of an imaginary and unsubstantial character, or a remote possibility unlikely to arise in the ordinary course of the law.[72]

(iii) Where the fact of the witness being in danger has been proved objectively, "great latitude should be allowed to him in judging for himself of the effect of any particular question, since a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering".[73] Applying this principle to the facts of the case before him, Dalton S.P.J. observed in *Van Cuylenberg* v. *Caffoor*:[74] "There is no reason to doubt, in my opinion, that the appellant was at that stage suspected by the Inspector as being the person for whom he was looking, namely, the driver of the car and responsible for the collision, that he was seeking to obtain from the appellant information that might assist the Inspector on this point and that the appellant was in danger of a charge being brought against him".[75] A similar attitude was adopted in *Deheragoda* v. *Alwis*[76] where Ennis J. declared: "It has been urged that the question put in this case to the accused by the

70. See note 68, *supra*.
71. *Boyes* 30 L.J.Q.B. 301, *per* Cockburn C.J. approved and followed by Dalton S.P.J. in *Van Cuylenberg* v. *Caffoor* (1933) 34 N.L.R. 433 at p. 436.
72. ibid.
73. ibid.
74. (1933) 34 N.L.R. 433.
75. At p. 436.
76. (1913) 16 N.L.R. 233.

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Sub-Inspector of Police was one which had a tendency to expose him to a charge under section 211 of the Penal Code. Exactly what degree of evidence is required to decide whether any question has a tendency to one thing or another is difficult to say, but in this case the question put to the brother of the person who is alleged to have stolen property as to whether he recovered that property and returned it to the complainant would, in my opinion, possibly have a tendency to expose him to a charge of attempting to compound the offence."[77]

(iv) The burden of establishing that he may be placed in jeopardy by answering the question, is on the person refusing to answer. In *Van Cuylenberg* v. *Caffoor*[78] Dalton S.P.J. said: "The law applicable in a case such as this, where a person being questioned claims the privilege of silence, is the same as that applicable in the case of a witness claiming the privilege in a judicial proceeding".[79]

(v) The accused need not prove that an answer to the question would necessarily incriminate him. A *tendency* to incriminate is sufficient.[80] Nor need any charge have been brought against the witness at the time of refusal to answer.

(vi) *Mala fides* destroy the privilege available to the person under interrogation. "If a judge thinks a witness is objecting to answer, not bona fide with the view of claiming privilege for himself, but in order to prevent other parties from getting that testimony which is necessary for the purpose of justice, the law requires that the witness should answer".[81]

The punishment for refusing to answer a public servant authorized by law to question is simple imprisonment for a term which may extend to six months, or a fine which may extend to one hundred rupees, or both.[82]

IX. REFUSAL TO SIGN A STATEMENT

The ingredients of this offence are (i) that the accused has refused to sign a statement made by him; (ii) that he has been required to sign the statement by a public servant; and (iii) that the public servant was legally competent to require that the statement should be signed.[83]

The punishment for the offence is simple imprisonment for a term which may extend to three months, or a fine which may extend to one hundred rupees, or both."[84]

77. At p. 234
78. (1933) 34 N.L.R. 433.
79. At p. 436.
80. Penal Code, section 177.
81. *Van Cuylenberg* v. *Caffoor* (1933) 34 N.L.R. 433 at p. 437, *per* Dalton S.P.J.
82. Penal Code, section 177.
83. Section 178.
84. ibid.

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X. MAKING A FALSE STATEMENT ON OATH

The elements of this offence may be defined as follows: (i) the accused was legally bound by an oath or an affirmation to state the truth on any subject to a public servant or other person; (ii) the public servant or other person should be authorized by law to administer such oath or affirmation; (iii) the accused should make to such public servant or other person, touching that subject, any statement which is false; and (iv) the accused should (a) know that the statement is false, or (b) believe that it is false, or (c) not believe that it is true.[85]

In *Samarasinghe* v. *Don Charles*[86] the accused was acquitted on the ground that element (ii) of the definition of the offence had not been established. The outcome in this case turned on the finding that there was no provision of law authorizing a Fiscal or Deputy Fiscal to administer an oath or affirmation for the purpose of verifying the service of a notice or summons issued under the Waste Lands Ordinance.

XI. GIVING FALSE INFORMATION TO A PUBLIC SERVANT

Liability for this offence depends on proof of the following elements: (i) the accused has given to any public servant any information which he knows or believes to be false; (ii) the accused has done so, intending thereby to cause, or knowing it to be likely that he will cause, such public servant to use his lawful power to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him.[87]

A false certificate issued by a vidane aratchy to the effect that the complainant in a case was indisposed,[88] a false report addressed to an Assistant Government Agent about a village headman,[89] false information given to a fiscal's process server as to the person on whom summons should be served,[90] and a false report by a summons server that summons had been served on certain persons[91] have been held to establish liability for this offence.

Moreover, a verbal statement by the accused is not essential. The *factum* of the offence is satisfied by the accused's pointing

85. Section 179.
86. (1930) 3 C.A.R. of Cey. 122.
87. Penal Code, section 180.
88. *Carbry* v. *Perera* (1897) 6 C.L. Rev. 74.
89. *Murphy* v. *Punchiappu* (1921) 23 N.L.R. 274.
90. *Hurulle* v. *Appuwa* (1899) 6 C.L. Rev. 124.
91. *Thuraiappah* v. *Eliyawan* (1941) 42 N.L.R. 258.

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out to a police officer, for the purpose of arrest, the wrong person.[92]

The different features of the offence may now be commented on in turn:

(a) It is not sufficient that the information given is false. The person giving the information must know or believe that it is false.

This requirement may be further analyzed as follows:

(i) Liability cannot be imposed for this offence unless it is shown by fair inference from the surrounding circumstances that the accused was aware of the falsity of the information he gave.[93] This element of knowledge or belief is indispensable for a conviction.[94] The onus in this regard is on the prosecution.[95]

(ii) Mere proof of malice or ill-will on the accused's part is not enough.[96] The prosecution cannot succeed by establishing that the accused had reasonable grounds for believing the information to be false or by showing that the accused did not entertain positive belief in the truth of the information.[97] There must be proof of actual knowledge or actual belief in the accused that the information he supplied, was false.[98]

(iii) It follows that liability can never be recognized in circumstances where, although the information was in fact false, the accused had reasonable grounds for believing that it was true.[99]

(iv) Nevertheless, where the prosecution is able to demonstrate wilful blindness on the part of the accused, the requisite knowledge of falsity would be held to have been established. In *Horsburgh* v. *Nagamany*[100] Wood Renton C.J. observed: "There is . . . affirmative evidence to the effect that the accused had made inquiries from which he must have known that the particular allegation, which the Police Magistrate has held to have been false, was false and also he was certainly in the presence of information which, if he had made any kind of reasonable inquiry, would at once have put him in possession of the truth".[101]

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92. *Fernando* v. *Moor* (1887) 6 C.L. Rev. 18.
93. *Kitchell* v. *Pieries* (1890) 9 S.C.C. 53.
94. *Ranghamy* v. *Rajapakse Mudalihamy* (1888) 6 C.L. Rev. 47; *Government Agent, N.W.P.* v. *Ukku Banda* (1936) 1 C.L.J.N.S.; *Ponnudurai* v. *Anakodai Police* (1947) 49 N.L.R. 93.
95. *Narayanen* v. *Katibu Musapen* (1886) 6 C.L. Rev. 1.
96. *Eaton* v. *Norris Appu* (1888) 6 C.L. Rev. 46.
97. *A. G. A. Mullaitivu* v. *Selvadurai* (1940) 17 Times of Cey. 163.
98. ibid.
99. *Nerencha* (1930) 31 N.L.R. 423
100. (1917) 4 C.W.R. 270.
101. At p. 271.

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(b) Where the accused has given false information to a public servant about X, is it necessary that the accused should be afforded an opportunity of instituting a prosecution againt X before he can be indicted under section 180 of the Penal Code? So far as the law of Ceylon is concerned, the effect of the cases is that this question may now be answered confidently in the negative.[102] However, a necessary qualification is that, if a prosecution against X has already been commenced by the accused, he connot be charged under section 180 of the Penal Code until X's trial is completed.[103]

(c) Section 180 envisages the "giving" of information. A relevant issue in this regard is whether the accused ought necessarily to have volunteered the information, or whether the offence is committed even in circumstances where the information is given by the accused while answering questions put to him.

Some cases have held that criminal liability may be imposed only where the accused's statement is voluntary[104] and does not extend to answers furnished by the accused to questions addressed to him.[105] On the other hand, this approach has been challenged in other cases.[106] The better view, it is submitted is that answers to questions need not be excluded from the ambit of liability, so long as it is clear that the information was given spontaneously (in the sense that there was no interference with the accused's volition by the use of duress or by other means) and with knowledge of its probable consequences.[107]

In any event, the consensus of judicial opinion in Ceylon is that a statement made to a police officer engaged in an investigation under section 110 of the Code of Criminal Procedure is within the scope of this offence.[108] However, in these circumstances, the caution has been administered that the informant must be given the opportunity of substantiating his charge and that he can be held criminally responsible only if there is no reasonable doubt that the information was given with the intention or knowledge envisaged by the offence of supplying false information to a public servant.[109] This is a necessary limitation if persons are not to be discouraged from coming forward with

102. *A. S. P. Matara* v. *Gunasekera* (1913) 3 C.A.C. 26; *Goonetilleke* v. *Elisa* (1917) 20 N.L.R. 136.
103. *Kindersley* v. *David* (1908) 11 N.L.R. 371.
104. *Thampu* v. *Nagan* (1923) 1 Times of Cey. 224; *Dyson* v. *Kanagammah* (1930) 31 N.L.R. 473.
105. *Bromley* v. *Ramen* (1931) 8 Times of Cey. 112.
106. *Kindersley* v. *Bandaranaike* (1909) 2 Weer. 66.
107. cf. *Chinnatamby* v. *Kanagasabai* (1937) 17 C.L. Rec. 200.
108. *Jamaldeen* v. *Caruppen* (1927) 28 N.L.R. 458, *Peiris* v. *Fernando* (1937) 39 N.L.R. 269.
109. *Juan Appu* v. *Fernando* (1948) 37 C.L.W. 41.

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information which might prove helpful to the police in the investigation of an offence.

(d) The *effect* of the information provided by the accused should have been to enable a public servant to use his lawful power to the injury or annoyance of some person or persons.[110] Where the information given could not have brought about this consequence, no liability arises. This requirement was held not to have been satisfied on the facts of *Browning* v. *Mohamadu Ibrahim*.[111] In this case A informed a public servant that he overheard B saying that the Moors were not sufficiently punished by the Sinhalese during the riot of 1914 and that the Sinhalese would teach them a lesson subsequently. It was held that the information given by A did not satisfy the requisites of liability under section 180 of the Penal Code, since the information did not have the effect of justifying a public servant in the use of his lawful power to the injury or annoyance of B.

(e) It is not an indispensable element of liability under section 180 that the person against whom the information was given, should be alleged to have committed an offence.[112]

(f) It is a requirement of the offence that information should have been given to a public servant.[113] The term "public servant" is the subject of an elaborate definition set out in the Penal Code.[114] In keeping with this definition, it has been held that the Registrar-General[115] and a police sergeant acting as a clerk in a police station[116] are public servants, while an inquirer into deaths[117] and the Chairman of a Local Board[118] are not.

(g) The information supplied by the accused should have been such as to enable the use of "lawful power" by a public servant to the injury or annoyance of any person. The lawful power should have been reposed in the public servant, in his capacity as such.

The meaning of "lawful power", in this context, is explained in the cases. In *Kindersley* v. *David*[119] Grenier A.J. said: "The question is whether the complainant had it in his lawful power, as Chairman of the Local Board, to cause injury to the person against whom the information... was given.... I am strongly of opinion that an offence under section 180 is committed in cases where a person gives false information to a public servant who has power, to be exercised by him to the direct

110. *Silva* v. *Nanayakkara* (1948) 39 C.L.W. 28.
111. (1915) 1 C.W.R. 89.
112. *Brace* v. *de Silva* (1889) 9 S.C.C. 42.
113. Penal Code, section 180.
114 Section 19.
115. (1910) 7 C.L. Rev. 96.
116. 1 Leem. 39.
117. *Banda* v. *Mohotty Hamy* (1894) 4 A.C.R. 46.
118. *Chairman, Local Board, Matara* v. *David* (1908) 2 Leader L. R. 87.
119. (1908) 11 N.L.R. 371.

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and immediate prejudice of another. . . . It seems to me that it is of the utmost importance to ascertain in a case of this kind whether or not it was in the lawful power of the public servant to whom the false information was given, to act in such a manner and so directly and perhaps effectually as to cause injury to the person complained against."[120]

In *Cookson* v. *Appuhamy*[121] Wood Renton J. observed: "It is clear that the words 'lawful power' mean a power which is vested in a public officer by virtue of his office, and that the section is not applicable in a case where a public officer can do no more than pass on information to another where he is, so to speak, merely a channel for the conveyance of the information to the proper quarter. On the other hand, it is equally clear that if a public servant is vested with special power which enables him to take independent action on the information brought before him in a petition, he possesses 'lawful power' within the meaning of section 180 of the Penal Code".[122]

"Using the lawful power of such public servant" has been judicially construed as meaning "using a power which is vested in the public officer in virtue of his office".[123] A statement made to a public servant who is only a subordinate officer not legally entitled, without reference to a higher authority, to act on the statement, is not sufficient.[124] The emphasis is on the power of independent action on his own responsibility by the public servant who is the recipient of the information. This excludes cases where the public servant to whom the information is supplied, functions merely as a conduit for the transmission of that information.[125]

Moreover, our courts have insisted that, where an indictment is framed under section 180 of the Penal Code, the existence of lawful power in the public servant receiving the information to act upon it, must be averred specifically.[126] If the scope of the lawful powers conferred on the public servant in question is not clear, the Supreme Court may remit the case for fuller information on this point.[127]

(h) The scope of the words "injury or annoyance" requires demarcation. "Injury" denotes "any harm whatever illegally caused to any person in mind or body, reputation or property".[128]

120. At pages 372-373. 121. (1911) 15 N.L.R. 120.
122. At p. 123.
123. *Banda* v. *Mohotty Hamy* (1894) 6 C.L. Rev. 40; *Cookson* v. *Appuhamy* (1911) 6 Weer. 38.
124. *Perera* v. *Silva* (1905) 4 A.C.R. 33.
125. *Appuhamy* v. *Keerale* (1885) 6 C.L. Rev. 45; *Chupper* v. *Chandrasegara* (1893) 6 C.L. Rev. 43.
126. *Ukku Banda Korala* v. *Cassim* (1899) Koch's Rep. 28.
127. *Ekneligoda* v. *Kiri Banda* (1898) 6 C.L. Rev. 110.
128. Penal Code, section 43.

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The word "illegally" has a wide connotation, in that it applies to acts giving rise to civil, as well as criminal, liability.[129] However, the Ceylon cases establish the proposition that mere inquiry into a complaint does not involve "injury or annoyance", within the meaning of the relevant provision.

(j) For the purpose of liability under section 180 of the Penal Code, it is not necessary that a public servant should have actually used his lawful power to the injury or annoyance of the complainant, or that the public servant had done or omitted anything which he ought not to do or omit. It is sufficient that the accused gave his information with the intention or knowledge that the public servant should use his lawful power for this purpose, provided that the nature of the information supplied by the accused justified the use of lawful power for the ends envisaged, by the public servant receiving the information[130].

(k) Injury or annoyance to "any person"[131] should have been intended by the accused, or should have been known to be likely. "Any person" has been held to include a subordinate public officer likely to be prejudiced by action which a public officer of higher rank is invited to take against him.[132]

(l) Although there is a partial overlap between section 180 of the Penal Code which constitutes an offence based on false information given with intent to cause a public servant to use his lawful power to the injury of another person, and section 208 which imposes criminal liability for a false charge made with intent to injure, our courts have held consistently that, where the complaint is of a relatively serious kind, the charge should be brought within the framework of the latter provision which enables the imposition of a heavier sentence.[133]

Finally, it must be pointed out that the law relating to this offence involves the working out of a compromise between two conflicting objectives. As Wood Renton J. has observed, "On the one hand, nothing ought to be done which can interfere with the bona fide exercise of the right to petition, and there should be no readiness to brand as intentionally false mere exaggerations or even misstatements. On the other hand, the presentation of false and malicious petitions is an offence frequently committed in this country, and one that causes great hardship to the persons against whom such petitions are

129. Penal Code, section 41.
130. *Pinhamy Aratchi* v. *Dingiria* (1906) 9 N.L.R. 291.
131. Penal Code, section 180.
132. *Peiris* v. *Kankani* (1893) 4 A.C.R. 111.
133. *Seraph* v. *Kandyah* (1905) 13 N.L.R. 10; *Jayasinghe* v. *Siyadoris Appu* (1909) 13 N.L.R. 9; *Girihagama* (1909) 12 N.L.R. 137; *Sub-inspector of Police* v. *Babbi* (1923) 25 N.L.R. 117.

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aimed."[134] The first of these objectives is achieved by the emphasis on substantive elements of the offence, such as the intention or knowledge required in the accused, the awareness of falsity of the information, and the exclusion of liability in cases where the veracity of the information is being tested by criminal proceedings. However, once the requirements of liability are satisfied, "There ought to be no indisposition on the part of the courts of law to apply the provisions of section 180 of the Penal Code in all cases that really come within the scope of that enactment, even although the administration of the law in that sense may lay the foundation for an argument that the right to petition is being interfered with".[135]

The penalty for the offence of giving false information to a public servant is imprisonment of either description for a term which may extend to six months, or a fine which may extend to one thousand rupees, or both.[136]

XII. RESISTANCE TO THE TAKING OF PROPERTY BY A PUBLIC SERVANT

The *factum* of this offence consists of resistance offered to the taking of any property by the lawful authority of a public servant.[137] The required *mens rea* resides in the element that the accused should know or have reason to believe that the person attempting to seize the property is a public servant.[138]

As to the kind of property encompassed by this offence, it has been held that only movable property is within its purview. Accordingly, resistance to the seizure of land does not involve liability under this provision.[139]

The seizure must be attempted, in the first instance, by a public servant. In this context, a fiscal's officer executing judicial process is treated as a public servant,[140] but a person holding a municipal licence to seize stray cattle is not.[141]

Moreover, before this offence can be held to have been committed, there must be proof that the public servant was acting strictly within his lawful authority. Action taken by a public servant in excess of his lawful powers does not enable establishment of this charge.[142] However, if the public servant purports to act on the basis of a writ, he would be regarded as acting within his lawful authority, so long as the writ appears

134. *Cookson* v. *Appuhamy* (1911) 15 N.L.R. 120 at p. 121, *per* Wood Renton J.
135. ibid., at p. 122.
136. Penal Code, section 180.
137. Penal Code, section 181.
138. ibid.
139. *Karunaratne* v. *Lebbe Marikar* (1893) 6 C.L. Rev. 8.
140. *Karunaratne* v. *Lebbe Marikar* (1893) 6 C. L. Rev. 8.
141. *Zilva* v. *Girigoris* (1908) 11 N.L.R. 67.
142. cf. *Sittara Pupalu* v. *Nallatampi* (1901) 5 N.L.R. 118.

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prima facie to be regular and it is proved to have been issued by a court of competent jurisdiction.[143]

The punishment for this offence is imprisonment of either description for a term which may extend to six months, or a fiine which may extend to one hundred rupees, or both.[144]

XIII. OBSTRUCTING SALE OF PROPERTY BY A PUBLIC SERVANT

This offence is committed in circumstances where (i) the accused intentionally obstructs any sale of property offered for sale by or on behalf of a public servant; and (ii) the offer of the property for sale is made on the lawful authority of a public servant, as such.[145] Where the prosecution fails to establish the existence of lawful authority in the public servant to offer the property for sale, a conviction of this offence can in no circumstances be sustained.[146]

Unlike the offence relating to resistance to the taking of property by a public servant,[147] the offence of obstructing the sale of property offered for sale by the lawful authority of a public servant[148] may be committed in respect of both movable and immovable property. In this sense, the latter offence is of wider scope.

The punishment for the offence under discussion is imprisonment of either description for a term which may extend to one month, or a fine which may extend to one hundred rupees, or both.[149]

XIV. OBSTRUCTING A PUBLIC SERVANT IN THE DISCHARGE OF HIS PUBLIC FUNCTIONS

The elements of this offence consist of (i) voluntary obstruction (ii) of any public servant or of any person acting under the lawful orders of such public servant (iii) in the discharge of his public functions.[150]

(i) The element of "voluntary obstruction" may be analyzed in detail as follows:

(a) A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.[151] As to the meaning

143. *Wijetunge* v. *Podi Sinno* (1902) 3 Browne 57.
144. Penal Code, section 181.
145. Penal Code, section 182.
146. *Plant* v. *Uduma Lebbe* (1913) 2 Bal. N. of C. 43.
147. Penal Code, section 181.
148. Section 182.
149. ibid.
150. Penal Code, section 183.
151. Penal Code, section 37.

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of the last phrase, a person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing, but not otherwise.[152]

(b) There must be a specific averment in the charge that the accused's conduct was tantamount to voluntary obstruction of a public servant.[153] It is necessary, furthermore, that the manner in which the obstruction is alleged to have taken place, should be spelt out clearly.[154]

(c) It is part of the requirement of a "voluntary obstruction", in this context, that the accused was aware, or had reason to be aware, of the identity of the public servant, as such.[155] Thus, the courts have adverted, in appropriate circumstances to the question whether the public servant who is alleged to have been obstructed, was in his uniform or not at the material time.[156]

(d) Once this requirement is satisfied, the motive underlying the obstruction offered by the accused has no bearing on the issue of liability.[157]

(e) Application of force is not an indispensable ingredient of "obstruction", for the purpose of this offence.[158] A threat of violence[159] and, *a fortiori*, a threat against the life of the public servant,[160] express or implied, is sufficient. Cases of physical restraint used against a public servant are rare.[161] Even the refusal to open a gate and to admit a public servant has been held to be sufficient obstruction.[162]

(f) The element of obstruction has been considered to be satisfied by incitement of others.[163] In these circumstances the actual obstruction is offered by others, but the accused is responsible for instigating the obstruction.

(g) It is not necessary that the accused should have intended, by his obstruction, to protect himself. He incurs liability in circumstances where his object is to protect others from the lawful consequences of action taken by a public servant.[164]

(h) A mere protest[165] or even a verbal refusal to comply with

152. Section 24.
153. *Muthusamy* v. *Inspector of Police, Kahawatta* (1951) 52 N.L.R. 324.
154. *Paranampalam* (1935) 37 N.L.R. 384.
155. *Munasinghe* v. *Sinnappu* (1908) 3 A.C.R. 153.
156. ibid.
157. *Veerasingham* v. *Meenatchy* (1941) 43 N.L.R. 167.
158. *Punchi Banda Korala* v. *Marthelis* (1926) 28 N.L.R. 305; *Police Sergeant Hambantota* v. *Silva* (1939) 40 N.L.R. 534.
159. *Davidson* v. *Rahiman Lebbe* (1901) 2 Browne 281.
160. *Abeykoon* v. *Sodalayandi Achari* (1900) 4 N.L.R. 151.
161. *Appuhamy* v. *Fernando* (1914) 1 Bal. N. of C. 56.
162. *Inspector of Police* v. *Kaluaratchi* (1942) 43 N.L.R. 533.
163. *Fernando* v. *Wickremasinghe* (1931) 33 N.L.R. 304.
164. *de Silva* v. *de Silva* (1930) 52 N.L.R. 94.
165. *Jansz* v. *Simon* (1898) 6 C.L. Rev. 114.

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the directions of a public servant[166] is not ordinarily sufficient. Unwillingness to participate in an inquiry initiated by a public servant,[167] instructions issued to the accused's employees not to answer questions asked by a public servant,[168] a request made to a public servant deliberately to delay the execution of a writ,[169] a warning not to make a search in a house,[170] and a query what the public servant would do with some animals he proposed to seize[171] have all been held not to amount to obstruction, within the meaning of the relevant provision of law. Equally, it has been held that addressing the personal attendant of a public servant with undue familiarity, while under the influence of liquor, does not justify imposition of liability for this offence.[172]

(ii) The term "public servant" is defined in a separate provision of the Penal Code.[173] This definition governs the scope of liability for the offence under discussion. For this purpose, a surveyor employed by the fiscal[174] or deputy fiscal,[175] a commissioner appointed under the Partition Ordinance,[176] a person acting in pursuance of a commission issued to him by a court,[177] the Deputy Registrar of Births and Deaths,[178] customs officers,[179] a Local Board officer engaged in preventing offences[180] and a surveyor licensed to prepare Crown surveys[181] have all been held to be public servants. On the other hand, it would appear that a cattle-seizer is not treated for the purpose of this offence as a public servant.[182]

The meaning of the phrase "any person acting under the lawful orders of such public servant" was carefully explained by Bonser C. J. in *Brodhurst* v. *Hendrick Sinno*.[183] His Lordship

166. *Hendrick* v. *Kirihami* (1909) 12 N.L.R. 28; *Laurenz* v. *Jayasinghe* (1913) 16 N.L.R. 505, *Fernando* v. *Alia Marikar* (1912) 1 C.A.C. 173; *Muthusamy* v. *Inspector of Police, Kahawatta* (1951) 62 N.L.R. 324.
167. *Sydeen* v. *Heen Baba* (1925) 6 C.L. Rec. 177. Note, however, that no definite charge had been brought against the accused.
168. *Peter* v. *Razack* (1938) 13 C.L.W. 39.
169. *Perera* v. *Velun Appuhamy* (1938) 3 C.L.J. 181.
170. *Samoradira* v. *Netorissa* (1892) 6 C.L. Rev. 51.
171. *Nawattegama Udaiyar* v. *Madar* (1896) 6 C.L. Rev. 88.
172. *Fernando* v. *Manual Appu* (1896) 6 C.L. Rev. 67.
173. Penal Code, section 19.
174. *Veerasingham* v. *Meenatchcy* (1941) 43 N.L.R. 167. cf. *Brodhurst* v. *Hendrick Sinno* (1896) 4 N.L.R. 213.
175. *Deputy Fiscal, Kalutara* v. *Erouisa* (1900) 1 Br. 14; *Kiel* v. *Mathes Appuhamy* (1943) 44 N.L.R. 576.
176. *Rajapakse* v. *Warusa* (1926) 28 N.L.R. 179.
177. *Bowes* v. *Meera Tamby* (1905) 8 N.L.R. 311.
178. *Davidson* v. *Rahiman Lebbe* (1901) 2 Br. 281.
179. *Ferdinando* v. *Silva* (1914) 1 Bal. N. of C. 54.
180. *Welenis Appuhamy* v. *Salena* (1888) 6 C.L. Rev. 34.
181. *Jansz* v. *Simon* (1898) 6 C.L. Rev. 114.
182. *Jayawardene* v. *Ismail* (1905) Leem. Rep. 80.
183. (1896) 4 N.L.R. 213.

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observed: "These words are an addition of local manufacture. They are not found in the Indian Penal Code; and it is very difficult to give any meaning to them. The words "in the discharge of his public functions" must refer to a public servant, because the person acting under the lawful orders of a public servant is supposed *not* to be himself a public servant, and therefore cannot exercise public functions. If he were a public servant, these added words would be unnecessary."[184]

Bonser C. J. suggested an example of a situation, envisaged by the words "any person acting under the lawful orders of such public servant": "A Magistrate, in the exercise of his public functions, orders the arrest of a man in his presence, and calls upon the bystanders to assist him. Then, if the bystanders, in attempting to execute the order of the Magistrate, are obstructed, that may be regarded as an obstruction of the Magistrate himself."[185] It is clear, then, that the phrase construed by Bonser C. J. is of quite limited scope.

(iii) The public servant should have been engaged in the discharge of his "public functions".

This requirement involves the following elements:

(a) There must be a specific averment that the public servant alleged to have been obstructed, was engaged in the performance of his public duties.[186]

(b) The burden of proof in regard to this element devolves on the prosecution.[187]

(c) The powers which the public servant purported to exercise at the material time should have been strictly lawful.[188] Where the action taken by the public servant is in excess of his lawful powers, liability for obstructing the public servant cannot be imposed.[189]

(d) Belief in good faith by the public servant that he is acting within the limits of his lawful authority, is not sufficient.[190] The question whether the public servant was legally competent to perform the act or not, has to be answered objectively, without reference to his state of mind.[191]

(e) Where the public servant purports to make an arrest which is lawful only on production of a warrant or on adoption of a procedure laid down by law, an arrest made in the absence of compliance with these requirements is unlawful and may be,

184. At p. 214. 185. ibid.
186. *Seenithamby* v. *Jansz* (1946) 47 N.L.R. 496.
187. *Deputy Fiscal of Kalutara* v. *Balahamy* (1902) 3 Browne 80.
188. *Goonesekera* v. *Appuhamy* (1935) 37 N.L.R. 11.
189. ibid.
190. *Mudalihamy* v. *Isma* (1916) 19 N.L.R. 286.
191. But see *Don Juwanis* v. *Perera* (1885) 6 C.L. Rev. 35.

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resisted legitimately.[192] It may be stated, as a general rule that where the legality of an arrest or other action depends on satisfaction of a condition precedent, obstruction of the arrest or other action does not give rise to criminal liability in circumstances where the condition has not been satisfied.[193]

(f) Action resorted to by a public servant on the basis of an order made *ultra vires* does not amount to discharge of "public functions".[194] The order must be entirely justifiable in contemplation of law.[195]

(g) Where a public servant must have the authority of a superior officer to perform an act, absence of the latter's acquiescence may be fatal to the legality of action taken or ordered by the public servant.[196] However, an irregularity concerning the appointment of a public servant is not necessarily relevant.[197] This is the effect of provision contained in the Penal Code that "Wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal effect there may be in his right to hold that situation".[198] However, a public servant who himself makes an appointment unauthorized by law, does not perform "public functions".[199] Likewise, a direction by a public servant which is outside the scope of his assigned duties may be resisted lawfully.[200]

(h) An invalid warrant does not invest with legality the act of a public servant.[201] However, a distinction is recognized in this regard between a warrant which is obviously defective and a warrant which, on the face of it, appears to be regular. The former vitiates the legality of action taken by a public servant,[202] while the latter does not.[203] A warrant which omits to specify

192. *Velupillai Udear* v. *Velupillai* (1891) 6 C.L. Rev. 57; *Jainudeen Mohamed* v. *Bongso* (1947) 34 C.L.W. 63; *Appusingho* v. *Van Buren* (1948) 49 N.L.R. 399.
193. *Deen Assen* v. *Silva* (1887) 6 C.L. Rev. 61; *Amarasekera* v. *Baiya* (1893) 6 C.L. Rev. 5.
194. *Bawa* v. *Perera* (1893) 6 C.L. Rev. 13; *Sapapathipillai* v. *Alagaratnam* (1922) 24 N.L.R. 56.
195. *Pinto* v. *Ukku* (1908) 4 A.C.R. 163; *Telesinghe* v. *Anthony* (1893) 2 S.C.R. 129; *Soysa* v. *Aron Singho* 6 Weer. 87; *Kathirgamer* v. *Walliamai* (1938) 12 C.L.W. 121; *Darlis* v. *Rajendra* (1946) 33 C.L.W. 94; *Dharmatilleke* v. *Perera* (1954) 51 C.L.W. 79.
196. *Rodriguesz* v. *Kiri Menika* (1928) 29 N.L.R. 355.
197. *Laxana* v. *Abdul Cader* (1923) 5 C.L. Rec. 115.
198. Penal Code, section 19, explanation 2.
199. *Deputy Fiscal, Kalutara* v. *Maya Nona* (1906) 8 N.L.R. 348.
200. *Van Cuylenberg* v. *Fernando* (1930) 3 C.A.R. of Cey. 61; *Bandaranayake* v. *Appusingho* (1935) 37 N.L.R. 273.
201. *Sidamparapillai* v. *Veeran* (1941) 20 C.L. Rec. 5; *Dias* v. *de Silva* (1950) 43 C.L.W. 24.
202. *Silva* v. *Pedris Hamy* (1885) 6 C.L. Rev. 60.
203. *Abdul* v. *Abdul Rahiman* (1893) 6 C.L. Rev. 11; *Kannangara* v. *Peris* (1928) 30 N.L.R. 78.

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the name and address of the person whose arrest is directed, is wholly bad and its execution does not represent a lawful act which is enjoined upon a public servant.[204]

(j) Where a power vested in a public servant has been improperly delegated by the public servant to another person, action taken by the delegate may be lawfully obstructed.[205] In this connection, the cases have applied the rule, *delegatus non potest delegare*.[206]

(k) Legitimate protection of person or property by use of the right of private defence provides a ground of exoneration from a charge of voluntarily obstructing a public servant in the discharge of his public functions.[207] Where the public servant is a trespasser on private premises, he may be evicted lawfully.[208]

(l) Where an arrest has been made without a warrant, the arrest would be treated as lawful only if the person making the arrest had grounds for reasonable suspicion that a cognizable offence had been committed. In *Muttusamy* v. *Kannangara*[209] Gratiaen J., applying the provisions of the Criminal Procedure Code[210] to the facts of the case, said: "The legality of the arrest depended upon whether the (persons arrested) were persons against whom a *reasonable complaint* had been made, or *credible information* had been received, or a *reasonable suspicion* existed of a (cognizable offence)."[211] The Ceylon court adopted the following rationale underlying this rule: "The principle of personal freedom, that every man should be presumed innocent until he is found guilty, applies also to the police function of arrest .... For that reason it is of importance that no one should be arrested by the police except on grounds which, in the particular circumstances of the arrest, really justify the entertainment of a reasonable suspicion."[212] If the arrest is made without reasonable grounds for suspicion, obstruction of the arrest does not give rise to criminal liability.[213]

204. *Rasool* v. *Samuel Appu* (1892) 6 C.L. Rev. 17; *Perera* v. *Rutiyah Kangany* (1896) 6 C.L. Rev. 62; *Dharmatilleke* v. *Perera* (1954) 51 C.L.W. 79.
205. *Rahim* v. *Salgado* (1890) 6 C.L. Rev. 28; *Peris* v. *Munasinghe* (1906) 9 N.L.R. 323.
206. ibid.
207. *Munasinghe* v. *Sinnappu* (1908) 3 A.C.R. 153; *Fernando* v. *Andris Silva* (1930) 3 C.A.R. of Cey. 110; *Goonewardene* v. *Fernando* (1926) 8 C.L. Rec. 30; *Sub-Inspector of Police, Matara* v. *Jayawardena* (1934) 14 C.L. Rec. 60.
208. *Obeysekera* v. *William* (1916) 3 C.W.R. 308; *Banda* v. *Tikka* (1917) 4 C.W.R. 242; *Police Vidane* v. *Goonewardene* (1922) 1 Times of Cey. 55; *Seneviratne* v. *Arumothan* (1890) 6 C.L. Rev. 26; *Gunasekera* v. *Manuel* (1892) 6 C.L. Rec. 32.
But see *Rajah* v. *Sabar* (1890) 6 C.L. Rev. 30; *Pinto* v. *Ukku* (1908) 4 A.C.R. 163.
209. (1951) 52 N.L.R. 324.
210. Section 32(1)(b).
211. At p. 330.
212. *Dumbell* v. *Roberts* (1944) 1 All E.R. 326.
213. *Marimuttu* v. *Dissanayake* (1939) 15 C.L.W. 121—a case decided under the Excise Ordinance.

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(m) When the public servant's act is not altogether lawful, but the accused, in resisting such act, causes physical injury to the public servant, the question may arise whether the accused is liable (a) for obstructing a public servant in the discharge of his public functions, and (b) for causing hurt to the public servant. Question (a) has to be answered in the negative, since it is a requisite of liability under this head that the public servant was acting strictly within the limits of his lawful authority.[214] But different considerations govern issue (b). In this context, although the right of private defence is ordinarily available to the accused, the right may not be exercised in these special circumstances, unless reasonable apprehension of death or grievous hurt is caused, against a public officer acting in good faith under colour of his office. Accordingly, the accused may be convicted in this situation of causing hurt to a public servant, even though the public servant's act is not entirely justifiable by law.[215]

The punishment for voluntarily obstructing any public servant or any person acting under the lawful orders of a public servant in the discharge of his public functions, is imprisonment of either description for a term which may extend to three months, or a fine which may extend to one hundred rupees, or both.[216]

XV. CONTRAVENTION OF A LEGAL DUTY TO ASSIST A PUBLIC SERVANT

The elements of this offence are (i) the existence of a legal duty in the accused to render or furnish assistance to a public servant in the execution of his public duty; and (ii) intentional omission to give such assistance.[217]

The normal punishment for the offence is simple imprisonment for a term which may extend to one month, or a fine which may extend to fifty rupees, or both.[218] However, the punishment is increased to simple imprisonment for a term which may extend to six months, or a fine which may extend to one hundred rupees, or both, if the assistance which the

214. See the cases cited at notes 188 and 189, *supra*.
215. Penal Code, sections 92(1) and 92(2).
The leading Ceylon cases are *Silva* v. *Ibrahim Lebbe* (1905) 6 Tamb. 9; *Dias* (1917) 4 C.W.R. 200; *Fernando* (1930) 32 N.L.R. 156; *Vancuylenberg* v. *Fernando* (1930) 32 N.L.R. 45; *Dissanayake* v. *Marimuttu* (1939) 15 C.L.W. 121 and *Ponniah Kumaresu* v. *District Revenue Officer, Vavuniya* (1949) 41 C.L.W. 38. cf. *Simon Appu* (1936) 38 N.L.R. 240 and *Sinnalebbe* (1946) 47 N.L.R. 405.
For a full discussion of the problem see G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980 2nd ed.), pages 308-320.
216. Penal Code, section 183. 217. Section 184.
218. ibid.

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accused intentionally omitted to give was demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, unlawful assembly or affray, or of apprehending a person charged with or guilty of an offence or of having escaped from lawful custody.[219]

XVI. DISOBEDIENCE TO AN ORDER BY A PUBLIC SERVANT

The requisites of this offence are the following: (i) the accused should know that an order has been promulgated by a public servant; (ii) the public servant should have been lawfully empowered to promulgate the order in question; (iii) the order should direct the accused to abstain from a certain act, or to take certain steps in regard to property in his possession or under his management; (iv) the accused should disobey the direction; and (v) the disobedience should have caused or tended to cause *either* (a) obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, *or* (b) danger to human life, health or safety, or a riot or affray.[220]

In *Cookson* v. *Tampaia*[221] the accused persons were acquitted on the ground that the order they disobeyed had not been issued lawfully. The Police Magistrate was held to have acted in excess of his powers in purporting to order fishermen who were not committing a nuisance, to refrain from fishing in a specified spot temporarily.

On the other hand, a Registrar of Marriages, who, after being suspended from office, refused to hand over his official papers to the subsequent appointee,[222] the members of a religious procession who, in defiance of a direction by an inspector of police, insisted on beating tom-toms in the vicinity of a Muslim mosque,[223] a religious procession passing through a cholera-stricken area contrary to a Magistrate's orders,[224] violation of a curfew imposed by lawful authority[225] and contravention of an order made by a Magistrate in an action for criminal trespass[226] have all been held to fall within the purview of this offence.

So far as criminal liability in this situation is concerned, it is not necessary that the accused should intend to produce harm,

219. ibid.
220. Section 185.
221. (1894) 6 C.L. Rev. 36.
222. *Goonewardene* v. *Ranasinghe* (1891) 6 C.L. Rev. 22.
223. *Pieris* v. *Baba Appu Mudalali* (1893) 6 C.L. Rev. 9.
224. *Careem* v. *Fernando* (1891) 6 C.L. Rev. 58.
225. *Inspector of Police* v. *James Sinno* (1915) 18 N.L.R. 283.
226. *Rogerson* v. *Bodiya* (1917) 19 N.L.R. 510.

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or contemplate his disobedience as likely to produce harm. It is sufficient that he knew of the order which he disobeyed, and that his disobedience produced, or was likely to produce, harm.[227]

XVII. THREAT OF INJURY TO A PUBLIC SERVANT

The components of this offence are: (i) the accused should have held out a threat of injury (ii) to any public servant or to any person in whom he believed that public servant to be interested, (iii) for the purpose of inducing that public servant to do any act or to forbear or delay to do any act, (iv) the act being connected with the exercise of the public functions of such public servant.[228]

"Injury", in this context, "denotes any harm whatever illegally caused to any person in body, mind, reputation or property".[229]

As to requirement (i), an actual injury is not essential, a threat of injury being sufficient. However, the threatened injury, if it is to entail criminal liability in this context, must satisfy certain objective criteria. These were adverted to by the Supreme Court in *Herath* v. *Rajapakse*.[230] Jayawardene A. J. observed: "It is necessary to prove that the threats were really calculated to cause the person to whom they were held out, to act otherwise than he would have done of his own free will. What the section deals with are menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself. The word threat should not be narrowly construed as meaning a mere effusion of passion unattended with any fixed purpose of doing harm.."[231] The essence of threatened injury is that "The threat must be of coming injury such as is likely to operate on the mind of the public servant and to cause him to do or forbear, or delay doing any act, connected with the exercise of his public functions."[232]

Elements (ii) and (iii) envisage, respectively, the identity of the person threatened and the purpose for which the threat is made. The substance of requirement (iv) resides in interference with the official functions of a public servant. Necessarily, then, the offence cannot be committed in circumstances where the public servant was acting in excess of his lawful powers.[233]

The punishment for this offence is imprisonment of either description for a term which may extend to two years, or a fine, or both.[234]

227. Explanation to section 185 of the Penal Code.
228. Penal Code, section 186. 229. Penal Code, section 43.
230. (1932) 34 N.L.R. 319. 231. At p. 320. 232. ibid.
233. *Sappathypillai* v. *Alagaratnam* (1922) 4 C.L. Rec. 172.
234. Penal Code, section 186.

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XVIII. THREAT OF INJURY TO FORESTALL LEGITIMATE PROTECTION

The requisites of this offence are the following: (i) the accused should hold out a threat of injury to any person (ii) for the purpose of inducing that person to refrain or desist from making a legal application for protection against injury (iii) to any public servant legally empowered as such to give such protection or to cause such protection to be given.[235]

The offence is punishable with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[236]

235. Penal Code, section 187.
236. ibid.

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CHAPTER II

OFFENCES RELATING TO DOCUMENTS, PROPERTY MARKS, CURRENCY NOTES AND BANK NOTES

1. DOCUMENTS

The Penal Code of Ceylon recognizes a variety of offences relating to documents: (a) forgery;[1] (b) making a false document;[2] (c) using as genuine a forged document;[3] (d) making or possessing a counterfeit seal, plate or other instrument;[4] (e) having possession of a forged record, valuable security or will, known to be forged;[5] (f) counterfeiting a device or mark used for authenticating documents or possessing counterfeit marked material;[6] (g) sending a false message by telegraph;[7] (h) fraudulent cancellation or destruction of a will;[8] (i) falsification of accounts;[9] and (j) possession of any imitation of any currency note, bank note or coin.[10]

(a) *Forgery*

The *actus reus* of this offence consists of the making of any false document or part of a document.[11] A "document", for this purpose, "denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter".[12]

The *mens rea* of the offence is satisfied by one of five kinds of intent—namely, intent (i) to cause damage or injury to the public or to any person or to the Government; or (ii) to support any claim or title, or (iii) to cause any person to part with property; or (iv) to enter into any express or implied contract; or (v) to commit fraud.[13]

The offence of forgery necessarily presupposes falsity of the document, for the physical element of the offence would otherwise not be established. Thus, in *Konar*,[14] a conviction of forgery was quashed in appeal on the ground that the evidence did not preclude the possibility of the document being actually signed by the person whose signature it purported to bear. In

1. Penal Code, section 452.
2. Section 453.
3. Section 459.
4. Sections 460 and 461.
5. Section 462.
6. Sections 463 and 464.
7. Section 465.
8. Section 466.
9. Section 467.
10. Section 468.
11. Section 452.
12. Section 27.
13. Section 452.
14. (1937) 9 C.L.W. 152.

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the result, uncertainty as to a vital element of the *actus reus* was held to vitiate the conviction.

While objective falsity of the document in some particular is an essential requirement, it is not sufficient to sustain a conviction of forgery. The requisite intention on the part of the accused must be clearly established. In *Toussaint* v. *Menika*[15] it was held that an indictment alleging forgery must contain a specific averment in regard to the intention of the person accused of forgery. In *Periyatamby*[16] the accused, having bought the complainant's cart and paid for it in full, forged the complainant's signature on a letter which he prepared for the purpose of inducing a third party to deliver possession of the cart to the accused. It was held that the charge of forgery must fail, since no damage or injury was intended to be caused to any person or to the public, nor was there intent to commit a fraud. Moncreiff A.C.J. observed: "The word 'defraud'. . . implies the infliction of some kind of loss upon the person defrauded. It is not mere deceit. And if I am asked whether the accused in this case intended to inflict some loss upon either the prosecutor or the custodian of the cart, I must say that I do not think that he did."[17]

Similarly, in *Ramachandran*[18] where the accused was charged with using as genuine a forged Citizenship Certificate, Basnayake C.J. held that knowledge was an essential ingredient of the charge against the accused and that the burden devolved on the prosecution to establish the element of knowledge. In *Veerappen* v. *Attorney-General*[19] where the allegation was one of forgery of a birth certificate in connection with an application made by the accused for a certificate of citizenship in terms of the Citizenship Act, the Privy Council upheld the conviction only because their Lordships were satisfied that the act of forgery had been committed with the required intention.

(b) *Making a False Document*

The making of a false document or part of a document is necessarily involved in the crime of forgery.[20] A person may be said to make a false document in any one of three situations:

(i) where he dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed, by or by the authority of a person

15. (1937) 16 C.L. Rec. 261.
16. (1902) 5 N.L.R. 338.
17. At p. 341.
18. (1962) 64 N.L.R. 512.
19. (1969) 72 N.L.R. 361.
20. Penal Code, section 452.

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by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

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

(iii) where the accused dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him he does not, know the contents of the document or the nature of the alteration.[21]

In each of these situations, the mental element envisaged is represented by the adverbs "dishonestly or fraudulently". These terms are explained by other provisions of the Penal Code. "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'."[22] "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.[23] "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.[24] "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."[25] In keeping with these definitions, it has been judicially recognized that "fraudulently" is of more extensive scope than "dishonestly".[26]

While incorporation of "fraudulently" as well as "dishonestly" in the definition is a feature which the three limbs of the provision have in common, there are significant differences among them.

The first case involves the making of a document, the second envisages the cancellation or alteration of a document, and the third relates to the act of causing another to sign, seal or alter a document.

Nevertheless, *mens rea* in some form emerges as a prerequisite of liability in each situation. The mental element contemplated

21. Penal Code, section 453.
22. Penal Code, section 22.
23. Section 21(1).
24. Section 21(2).
25. Section 23.
26. *Fernando* (1945) 46 N.L.R. 321.

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by the first case received emphasis in *Kanjamanaden.*[27] Layard C.J. declared: "The evidence here discloses that the entries were false, but does not show any intention on the part of the prisoner that the entries should pass as the act of any other person than himself".[28] Middleton J. said: "It must appear on the face of it that it is intended to pass as the act of another person. The examples under the sub-section seem to me to support this construction".[29] On this footing the question of law reserved for consideration by the Supreme Court was answered in favour of the accused, and the indictment was quashed. The intention to act dishonestly or fraudulently is one of the requirements spelt out by the second limb, while a definite state of knowledge is adverted to by the third.

Insertion of a witness' name in a report on a crime after the report had been duly completed and submitted to the appropriate authorities, has been held to establish liability under the second limb.[30] However, a witness who attests a document with knowledge that the signature by the person making the document is forged, is not guilty of forgery but may be convicted properly of abetment of forgery.[31]

The following further characteristics of the offence of forgery may be noticed:

(i) A person's signature of his own name may be tantamount to forgery.[32] Thus, where A signs his own name to a bill of exchange, intending it to be believed that the bill was drawn up by another person of the same name, A would be held to have committed forgery.[33]

(ii) The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.[34]

Proposition (ii) is illustrated by several cases. In *Adaman*[35] the view was taken that entries by some unknown person in a bank pass book amounted to a false document. In *William Silva*[36] it was held that the offence may be committed by signing a cheque with a fictitious name.

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27. (1903) 7 N.L.R. 52.
28. At p. 62.
29. At P. 67.
30. *Wijesinghe* v. *Ekanaike* (1906) 3 Bal. 168.
31. *Kapurala* (1897) 2 N.L.R. 330.
32. Penal Code, section 453, Explanation 1.
33. Illustration (a).
34. Penal Code, section 453, Explanation 2.
35. (1899) 1 C.L. Rev. 91.
36. (1886) 7 S.C.C. 161.

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The punishment for forgery is imprisonment of either description for a term which may extend to five years, or a fine, or both.[37]

It must be noted that the character of the document which is falsified, has a bearing on the gravity of the offence of forgery. The applicable penalty is enhanced in circumstances where the forged document is a record of a Court of Justice, or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit or to take any proceedings therein or to confess judgment, or a power of attorney;[38] or where the forged document is one which purports to be a valuable security or a will, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security;[39] or where the forgery has been committed with the intention that the document forged should be used for the purpose of cheating.[40]

For the purpose of the second of these contexts, "a will" denotes any testamentary document,[41] while the words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability or has not a certain legal right.[42]

Aggravation of the penalty is founded in the first two instances on the category of document involved, and in the third instance on the purpose underlying the forgery. In all these cases identification of the elements making for enhancement of the punishment prescribed is attended by some degree of arbitrariness, but the gradations of punishment are explicable on the basis that kinds of harm which entail relatively greater jeopardy to the social interest, are suppressed with particular severity.

(c) *Using as Genuine a Forged Document*

"A forged document" is defined in this context as "a false document made wholly or in part by forgery"[43] The offence

37. Penal Code, section 454.
38. Section 455.
39. Section 456.
40. Section 457.
41. Section 29.
42. Section 28.
43. Section 458.

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is declared to be committed by any person who "fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document".[44] The punishment for the offence is the same as that for forgery of the document in question.[45]

The following features in regard to this offence may be noted:

(i) The principle is now established for the law of Ceylon that a charge of using as genuine a forged document may be validly based on the alteration of a document which was a nullity *ab initio*. In *Attorney-General* v. *Anthonipillai*[46] the accused was charged with inserting without lawful authority a new phrase in a certificate after it had been signed and issued by the person who purported to be the relevant authority for the purpose, and with making use of the improperly altered document. It transpired, however, that the certificate, even as it was originally issued, lacked validity for want of compliance with legal requirements. Nevertheless, Windham J. held in appeal that this circumstance did not vitiate a conviction of using as genuine a forged document.

(ii) A conviction of using as genuine a forged document may be sustained in circumstances where no loss is caused to any person, to the public or to the Government. *Silva*[47] was a case where the accused obtained a loan from a Co-operative Society on the strength of a forged certificate of death, but subsequently repaid the loan in full. No financial detriment was therefore caused to anyone. Not withstanding this fact, the accused was held guilty of using as genuine a forged document. The explanation is that the concepts of "fraud" and "dishonesty" are both embodied in the statutory definition of the offence and that the former concept, unlike the latter, does not necessarily involve "wrongful loss" or "wrongful gain" within the meaning of these terms in the relevant context.[48]

(iii) Where the accused is proved to have made use of a forged document with the requisite actual or constructive knowledge, he may be properly convicted of the offence of using as genuine a forged document, even though it may not be possible to secure a conviction of forgery because the identity of the person responsible for the forgery remains a matter of doubt.[49]

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44. Section 459.
45. ibid.
46. (1948) 50 N.L.R. 227.
47. (1935) 37 N.L.R. 7.
48. Penal Code, sections 21 (1) and 21(2).
49. *Peiris* (1946) 32 C.L.W. 64.

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(d) *Making or Possessing a Counterfeit Seal, Plate or Other Instrument*

The physical element of this offence consists of (i) making or counterfeiting any seal, plate or other instrument for making an impression, or (ii) having in one's possession any such seal, plate or other instrument.[50] The *mens rea* relevant to (i) resides in the intention that the instrument should be used for the purpose of committing a forgery, while the mental element associated with (ii) is knowledge pertaining to the counterfeit character of the instrument in the accused's possession.[51]

These elements suffice to establish liability for the offence. However, the appropriate punishment is governed by the distinction between intention attributable to the accused that the instrument should be used for the purpose of committing any forgery of a will or valuable security, on the one hand, or of any other document, on the other.[52] The penalty imposed in the former situation is appreciably more exacting than that enjoined by law in the latter case.[53]

(e) *Having Possession of a Forged Record, Valuable Security or Will, Known to be Forged*

The *actus reus* of this offence is established by proof of possession of a forged document belonging to the relevant class.[54] *Mens rea* consists of knowledge that the document is forged and intention that it should be used fraudulently or dishonestly as genuine.[55] But here, again, the quantum of punishment depends on the category of document involved. If the document purports to be a record or proceeding of or in a Court of Justice,[56] or a register of birth, baptism, marriage or burial, or a register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit or to take any proceedings therein or to confess judgment, or a power of attorney, the punishment is imprisonment of either description which may extend to a term of seven years, and also a fine.[57] If, on the other hand, the forged document which the accused had knowingly kept in his possession is a valuable security or will, he may be punished with imprisonment of either description for a term which may extend to ten years, and also with a fine.[58]

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50. Penal Code, sections 460 and 461.
51. ibid.
52. ibid.
53. ibid.
54. Section 462.
55. ibid.
56. Section 18.
57. Section 462.
58. ibid.

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(f) *Counterfeiting a Device or Mark Used for Authenticating Documents or Possessing Counterfeit Marked Material*

The physical element of this offence is satisfied by proof *either* that the accused counterfeited upon or in the substance of any material any device or mark used for the purpose of authenticating a will or valuable security, *or* that the accused had in his possession any material upon or in the substance of which any such device or mark had been counterfeited.[59] In either case the required intention is that the device or mark should be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material.[60]

Where the document in question is a will or a valuable security,[61] the punishment imposed for the offence is imprisonment of either description for a term which may extend to seven years, or a fine.[62] However, where the document involved is other than a will or valuable security, liability for the offence may still be recognized but, in this event, the appropriate punishment is governed by a separate provision.[63]

(g) *Sending a False Message by Telegraph*

The act required for liability is that the accused should have caused to be transmitted by telegraph, or should have tendered to any public officer employed in the Posts and Telecommunications Department for transmission, any false message.[64] The *mens rea* consists of (i) knowledge that the message is false, and (ii) intention to defraud, injure or annoy any person, or to spread any false rumour which may be detrimental to the Government or to the interests of the public.[65] The punishment for the offence is imprisonment of either description for a term which may extend to one year, or a fine, or both.[66]

(h) *Fraudulent Cancellation or Destruction of a Will*

The *actus reus* of this offence is committed by any person who cancels, destroys, injures or defaces, or attempts to cancel, destroy, injure or deface, or secretes or attempts to secrete any document which is or purports to be a will, or any valuable security, or any record, register, book or document kept by any public servant in his capacity as such or by any person in pursuance of any enactment or statute, or commits mischief in respect of such record, register, book or document.[67] The mental element appropriate to the offence is signified by the

59. Section 463.
60. ibid.
61. ibid.
62. ibid.
63. Section 464.
64. Section 465.
65. ibid.
66. ibid.
67. Section 466.

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words "fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person".[68] The penalty laid down for the offence is imprisonment of either description which may extend to seven years, and also a fine.[69]

(i) *Falsification of Accounts*

The physical aspect of the offence embraces the following requisites: (i) the accused should be a clerk, officer or servant, or should be employed or act in the capacity of a clerk, officer or servant; (ii) the accused should have destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or was in the possession of his employer or was received by him for or on behalf of his employer; (iii) where the accused's identity is as required by (i), the prosecution may establish, as an alternative to requirement (ii), that the accused made or abetted the making of any false entry in, or omitted or altered or abetted the omission or alteration of any material particular from or in any book, paper, writing, valuable security or account.[70] In other words, the prosecution is bound to establish elements (i) and either (ii) or (iii).

The relevant *mens rea* is defined by the requirement that the accused should have acted "wilfully and with intent to defraud". "With intent to defraud"[71] is synonymous with "fraudulently" in the sense in which that term is defined by the Penal Code,[72] and the meaning of "wilfully" has been examined elsewhere.[73] Our law contains explicit provision in this regard that "It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud or any particular day on which the offence was committed."[74]

The case law warrants the following submissions in regard to the scope of the offence of falsifying accounts:

(i) The mental element involved in the offence has to be established by the prosecution.[75] However, where the accused does not deny that material alterations were made by him without proper authority, dishonesty may be held to have been established if no plausible explanation is offered.[76] In *Ragal*[77]

68. ibid.
69. ibid.
70. Section 467.
71. ibid.
72. Section 23.
73. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pp. 24-25.
74. Penal Code, Explanation to section 467.
75. *Gunatunga* (1952) 53 N.L.R. 522.
76. *Christian* (1945) 46 N.L.R. 403.
77. (1902)5 N.L.R. 314, cf. *Somander* v. *Uduma Lebbe* (1924) 24 N.L.R. 146.

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Bonser C.J. observed: "If a person has falsified his accounts, then you have at once evidence of dishonesty". However, if the evidence suggests that the accused's purpose may have been innocuous, a conviction cannot be sustained unless the burden in regard to proof of wilful and fraudulent conduct has been discharged by the prosecution.

(ii) The law of Ceylon contains a requirement that, where offences of the same kind are included in one indictment, the offences should have been committed within a span of twelve months.[78] Nevertheless, where a person is charged with defalcation of several sums of money by means of falsification of accounts, a number of entries extending beyond twelve months may be legitimately proved in respect of each defalcation.[79]

The punishment for falsification of accounts is imprisonment of either description for a term which may extend to seven years, or a fine, or both.[80]

(j) *Possession of Any Imitation of Currency*

This offence is committed by any person who has in his possession any imitation of a currency note, bank note or coin.[81] A distinctive feature of the offence is that the duty of establishing lawful authority is placed on the accused.[82] "Imitation" is declared to include "cotton, silk or other woven goods impressed with designs in imitation of any currency note, bank note or coin".[83] The offence is punishable with imprisonment of either description for any period not exceeding two years, or with a fine, or with both.[84]

II. PROPERTY-MARKS

A property-mark is defined as "a mark used for denoting that movable property belongs to a particular person"[85]. The Penal Code contains a series of provisions which seek to punish improper use of property-marks.[86]

The specific offences recognized in this connection are (i) using a false property-mark with intent to deceive or injure any person;[87] (ii) counterfeiting a property-mark used by another with intent to cause damage or injury;[88] (iii) counterfeiting, with intent to cause damage or injury to the public or

78. Code of Criminal Procedure, section 174.
79. *Goonewardene* (1943) 44 N.L.R. 198.
80. Penal Code, section 467.
81. Section 468(1).
82. ibid.
83. Section 468 (2).
84. Section 468(1).
85. Section 469.
86. Sections 470-478.
87. Sections 470 and 471.
88. Section 472.

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to any person, a property-mark used by a public servant, or any mark used by him to denote the manufacture or quality of any property;[89] (iv) fraudulent making or having possession of any die, plate or other instrument for counterfeiting any public or private property-mark;[90] (v) knowingly selling goods marked with a counterfeit property-mark;[91] (vi) fraudulently making a false mark on any package or receptacle containing goods[92] and (vii) defacing any property-mark with intent to cause injury to any person.[93]

The object of these offences is to protect (a) manufacturers of goods from the consequences of their goods being passed off as the products of others, and (b) the public from deception in regard to the origin, manufacture or quality of goods which they purchase or otherwise acquire.

The mental ingredient inherent in these offences is denoted by terms like "fraudulently",[94] "knowingly",[95] and "with intent to cause damage or injury to the public or to any person".[96] The incorporation of these elements in the definition of the offences has the effect of excluding innocent passing-off from the ambit of criminal liability. This serves to distinguish the criminal action in this regard from the civil action for passing-off where the emphasis is on the likelihood that the public would actually be deceived rather than on the defendant's state of mind.

In an anonymous case decided at the turn of the century, Lawrie J. held that the offence of using a false property-mark was committed by a person who put his own brand marks on stolen cattle which, he was aware, did not belong to him.[97]

III. CURRENCY NOTES AND BANK NOTES

The Penal Code recognizes four offences in respect of currency notes and bank notes:

(i) forging or counterfeiting, or knowingly performing any part of the process of forging or counterfeiting, any currency note or bank note;[98]

(ii) selling to, or buying or receiving from, any other person or otherwise dealing in or using as genuine, any forged or counterfeit currency note or bank note, knowing or having reason to believe the same to be forged or counterfeit;[99]

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89. Section 473.
90. Section 474.
91. Section 475.
92. Section 476.
93. Section 478.
94. Sections 474, 476 and 477.
95. Sections 473 and 475.
96. Sections 472 and 473.
97. 1899 Koch's Rep. 54.
98. Penal Code, section 478A.
99. Section 478B.

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(iii) having in one's possession any forged or counterfeit currency note or bank note, knowing or having reason to believe the same to be forged or counterfeit, and intending to use the same as genuine, or that it may be used as genuine.[100]

(iv) making, or performing any part of the process of making, or buying or selling, or disposing of, or having in one's possession, any machinery, instrument or material for the purpose of bing used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency note or bank note.[101]

In regard to the mental element required for conviction of this offence, Gratiaen J. observed in *Michael Fernando's* case: "The commission of an offence punishable under section 478(b) of the Penal Code cannot be established unless the prosecution proves that the accused knew or had reason to believe that the forged or counterfeit currency note uttered by him on the date specified was in fact a forged or counterfeit note".[102] However, it was added that evidence of similar conduct by the accused in the past could properly be led for the purpose of establishing the required state of knowledge.

It is a noteworthy feature of liability in this area that the mere possession of an implement for the purpose of forging or counterfeiting currency, suffices for invocation of penal sanctions.[103] The rationale of this attitude emanates from the manifest absence of any innocuous objective which the accused may have intended to achieve.

100. Section 478C.
101. Section 478D.
102. (1951) 52 N.L.R. 571 at p. 573.
103. See note 101, *supra*.

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CHAPTER 12

OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

These offences which are constituted by Chapter XII of the Ceylon Penal Code, are best divided into several major categories and discussed separately. "Coin" is declared by the Penal Code to mean "metal used as money stamped and issued by the authority of the Government of any part of Her Majesty's Realms and Territories or by the authority of the Government of any foreign country in order to be so used".[1] "Current coin" is defined as "coin which is lawfully current in any part of Her Majesty's Realms and Territories or in any foreign country".[2] In view of the promulgation of the Constitution of the Republic of Sri Lanka on 22 May, 1972, the distinction between the Government of any part of Her Majesty's Realms and Territories, on the one hand, and the Government of any "foreign country", on the other, is no longer important.

I. COUNTERFEITING COIN AND ALLIED OFFENCES

The offence of counterfeiting coin is committed by any person who counterfeits or knowingly performs any part of the process of counterfeiting coin.[3] Liability for this offence may also be imposed on a person who, intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.[4] Counterfeiting current coin is a distinct offence, the elements of liability being similar to those defined in respect of the crime of counterfeiting coin.[5] Whoever, being within Ceylon, abets the counterfeiting of coin out of Ceylon, is liable to be punished in the same manner as if he abetted the counterfeiting of coin within Ceylon.[6]

In all these circumstances, an indispensable ingredient of liability is that the coin should be intended to be used as money.[7] Thus, medals are not included in the definition of coin.[8]

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1. Penal Code, section 225.
2. ibid.
3. Section 226.
4. Explanation to section 226.
5. Section 227.
6. Section 231.
7. Section 225, illustration (c).
8. ibid.

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II. OFFENCES INVOLVING INSTRUMENTS FOR COUNTERFEITING COIN

Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of any die or instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, commits an offence.[9] The offence of making or selling an instrument for counterfeiting current coin is defined in similar terms.[10] The rationale of these offences may be explained by saying that the purpose for which the instrument is used leaves no room for doubt as to the complicity of the accused in the illegal venture.

Possession of such instrument or material is sufficient for application of penal sanctions.[11] Here, again, mere possession of the instrument or material is fraught with such jeopardy to the public interest as to warrant imposition of liability. But, as a precondition of liability being recognized, the accused must be proved to have been in possession of the instrument or material *either* for the purpose of using the same for counterfeiting coin *or* knowing or having reason to believe that it is intended to be used for the purpose of counterfeiting coin.[12]

III. IMPORT OR EXPORT OF COUNTERFEIT COIN

Whoever imports into Ceylon or exports therefrom any counterfeit coin, knowing or having reason to believe that the same is counterfeit, is guilty of an offence.[13] The offence is aggravated if the counterfeit coin is passed off as current coin.[14]

IV. DELIVERY OF COUNTERFEIT OR ALTERED COIN

Delivery to another of counterfeit coin[15] or counterfeit current coin[16] possessed with the knowledge that it is counterfeit, constitutes an offence. However, delivery should have taken place fraudulently or with intent that fraud may be committed.[17]

Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be counterfeit, is also an offence but, in view of the accused's innocence at the time when the counterfeit coin came into his possession, a lighter penalty is applicable.[18] Similarly, delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered, involves criminal liability, albeit of a rela-

9. Section 228.
10. Section 229.
11. Section 230.
12. ibid.
13. Section 232.
14. Section 233.
15. Section 234.
16. Section 235.
17. Sections 234 and 235.
18. Section 236.

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tively less serious kind.[19] In both these instances, the accused accepts the coin in good faith but is aware of its counterfeit character when he disposes of it subsequently.

Delivery to another of coin possessed with the knowledge that it is altered[20] and delivery of coin with the knowledge that it is altered[21] are recognized as distinct offences.

V. POSSESSION OF COUNTERFEIT OR ALTERED COIN

Possession, fraudulently or with intent that fraud may be committed, of counterfeit coin[22] or counterfeit current coin[23] by a person who knew it to be counterfeit when he became possessed of it, gives rise to criminal liability. Equally, possession of altered coin[24] or altered current coin[25] by a person who knew it to be altered when he came into possession of it, constitutes an offence.

VI. ALTERING COIN OR DIMINISHING THE WEIGHT OF COIN

To perform fraudulently or dishonestly on any coin[26] or current coin[27] any operation which diminishes the weight or alters the composition of that coin, is an offence. So also is the performance on any coin[28] or current coin[29] of any operation which alters the appearance of that coin with the intention that the said coin shall pass as a coin of a different description.

VII. OFFENCES RELATING TO GOVERNMENT STAMPS

In the relevant provisions of the Penal Code,[30] the word "stamp" is declared to include postage stamps.[31] The following offences in respect of Government[32] stamps are constituted by these provisions:

(a) Counterfeiting a Government stamp or knowingly performing any part of the process of counterfeiting any stamp issued by Government or the purpose of revenue;[33]

(b) having possession of an instrument or material for the purpose of counterfeiting a Government stamp;[34]

(c) making, performing any part of the process of making, of buying, selling or disposing of any instrument for the purpose of counterfeiting a Government stamp;[35]

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19. Section 247.
20. Section 243.
21. Section 244.
22. Section 237.
23. Section 238.
24. Section 245.
25. Section 246.
26. Section 239.
27. Section 240.
28. Section 241.
29. Section 242.
30. Sections 258-256.
31. Sections 256A, Explanation.
32. Section 256A.
33. Section 248.
34. Section 249.
35. Section 250.

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(d) the sale, or offer for sale, of any stamp which the accused knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue;[36]

(e) having in one's possession any stamp which one knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp;[37]

(f) using as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue;[38]

(g) fraudulently effacing any writing from a substance bearing a Government stamp or removing from a document a stamp used for it with intent to cause loss to Government;[39]

(h) fraudulently or with intent to cause loss to the Government, using for any purpose a stamp issued by Government for the purpose of revenue, which one knows to have been used before;[40]

(i) fraudulent erasure or removal of a mark put or impressed on a stamp for the purpose of denoting that the stamp has been used previously.[41]

36. Section 251.
37. Section 252.
38. Section 253.
39. Section 254.
40. Section 255.
41. Section 256.

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CHAPTER 13

OFFENCES RELATING TO WEIGHTS AND MEASURES

Four offences in respect of weights and measures are incorporated in the Penal Code: (I) fraudulent use of a false weighing or measuring instrument;[1] (II) fraudulent use of a false weight or measure;[2] (III) being in possession of false weights or measures;[3] and (IV) making or selling false weights or measures.[4]

I. FRAUDULENT USE OF A FALSE WEIGHING OR MEASURING INSTRUMENT

The elements of this offence are (i) that the accused should have used any weighing or measuring instrument; (ii) that he should have acted fraudulently, and (iii) that he should have known the weighing or measuring instrument to be false.[5] The punishment for the offence is imprisonment of either description for a term which may extend to one year, or a fine, or both.[6]

II. FRAUDULENT USE OF A FALSE WEIGHT OR MEASURE

The essence of this offence is that the accused should have fraudulently used any false weight or false measure of length or capacity, or that he should have fraudulently used any weight or any measure of length or capacity as a different weight or measure from what it is.[7]

In *Meedeniya* v. *Saibo*[8] the instrument in question was a pear-shaped striker used for the purpose of measuring rice. Along the edge of the instrument was screwed a strip of iron, each edge of which was slightly above the wood to which it was fastened. It was proved that one edge of the strip of iron had two indentations, indicating that the side on which the indentations were visible was the side pushed or pulled along the edges of the measure. The result of this device was that the iron raked the rice at a slightly lower level than would have been the case if a proper striker had been used. It was held that use of the striker in question warranted conviction of the offence under discussion.

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1. Penal Code, section 257.
2. Section 258.
3. Section 259.
4. Sectiot 260.
5. Section 257.
6. ibid.
7. Section 258.
8. (1900) 1 Browne 195.

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Ramasuriya v. *Meerapulle*[9] concerned a striker which was not straight and of the same thickness from end to end but had, on one side, a bulge in the centre and, on the other side, a corresponding curve. The result of the curve in this position was that, in measuring a quantity of rice, there appeared to be a shortage which did not really exist. It was held that the use of a striker of this description could form the basis of a conviction for fraudulently using a false weight or measure.

III. BEING IN POSSESSION OF FALSE WEIGHTS OR MEASURES

The requisites of liability for this offence are that (i) the accused should have been in possession of any false weighing or measuring instrument, or of any false weight, or of any false measure of length or capacity, and (ii) the accused should have intended that the same may be fraudulently used.[10]

In *Ossen* v. *Siadoris*[11] the accused was a boutique keeper. He had been requested by a sergeant of police to bring his weights to a particular store to have them checked. The sergeant testified that he had examined the weights produced by the accused against standard weights and that he had found the former to be short. In appeal, Withers J. quashed the conviction and acquitted the accused on the ground that fraudulent intent had not been established. His Lordship observed: "The mere possession of a weight not conforming to the standard, and even using it, does not necessarily imply a fraudulent intent."[12] In the learned judge's opinion, the evidence was entirely consistent with innocent conduct on the part of the accused. Thus, it was said: "This weight bears the impression of '1 lb'. on it. Did the accused know it to be otherwise, or had he reason to suspect it? He at once brought it with his other weights to be tested. He said they were correct. Had he reason to believe they were not?"[13] The answer, it was held, was far from clear.

Similarly, the courts of Ceylon have insisted in a series of cases[14] that mere possession of a false weight or measure does not entail criminal liability and that the burden of imputing a fraudulent intention to the accused devolves on the prosecution.

In a recent case[15] the Supreme Court considered the meaning of "possession" in this context. *Dharmawardena* v. *Edirisinghe*[16]

9. (1900) 1 Browne 197.
10. Penal Code, section 259.
11. (1895) 1 N.L.R. 223.
12. At p. 225.
13. At pp. 224-225.
14. *Modder* v. *Sinnatamby* (1891) 1 C.L. Rep. 68; *Jayawardena* v. *Sellappu* (1905) 4 C.L. Rev. 164; *Modder* v. *Peris* (1909) 2 Leader L.R. 115; *Police* v. *Kalu Banda* (1912) 6 Weerakoon Rep. 83.
15. See note 16, *infra*.
16. (1968) 71 N.L.R. 261.

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was a case where the Co-operative Wholesale Establishment was proved to have been the licensee of a stall in a Municipal Council Market. The accused persons were two employees of the Co-operative Wholesale Establishment. One of them was the salesman in charge of the stall, while the other assumed charge of it temporarily whenever the former was absent from the stall. The stall in question was under the supervision of a regional officer who was also an employee of the Co-operative Wholesale Establishment. When the false weights were discovered in the stall, the first accused was not present but the second accused was.

The basis of the finding by the Supreme Court that criminal liability could not be imposed justifiably on the accused persons in these circumstances, was that neither of them had possession of the false weights at the material time, in the sense required by law. De Kretser J. declared: "It appears to me that the possession referred to in the section is the possession which involves the idea of proprietorship, the right to exercise power and control over the thing possessed, in contradistinction to the mere physical possession by the officer in charge of the stall which is really the equivalent of custody".[17] In regard to the evidence led in the case, the observation was made: "In the instant case, the charge is not one of user but of possession, and the evidence makes it clear that, whether it was the first accused who was in charge of the stall or whether it was the second accused acting for the first accused, he had no more than the custody of everything including the scale and weights in the stall, and had not the power to deal with them as owner. He held them on account of the employer, the license holder, and any physical possession he had must be deemed to be that of the license holder".[18] On this ground, the *actus reus* of the offence not being complete, exoneration from liability was held to be inevitable.

The punishment prescribed for being in possession of false weights or measures is imprisonment of either description for a term which may extend to one year, or a fine, or both.[19]

IV. MAKING OR SELLING FALSE WEIGHTS OR MEASURES

The requirements of liability for this offence are that (i) the accused should have made, sold or disposed of any weighing or measuring instrument, or any weight, or any measure of length or capacity; (ii) he should have known the instrument to be false; (iii) the accused should have acted in order that the

17. At p. 263. 18. ibid.
19. Penal Code, section 259.

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instrument may be used as true, or knowing that it is likely to be used as true.[20] The words "weighing or measuring instrument" bear the same meaning in this context as in connection with the offences relating to fraudulent use of false weighing or measuring instruments[21] and possession of false weights or measures.[22] The penalty for making or selling false weights or measures is imprisonment of either description for a term which may extend to three years, or a fine, or both.[23]

V. CONCLUSION

The three bases of liability in regard to false weights and measures are (a) fraudulent use, (b) fraudulent possession and (c) the manufacture or sale of such instruments.

20. Section 260.
21. Section 257.
22. Section 259.
23. Section 260.

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CHAPTER 14

OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS

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I. PUBLIC NUISANCE

A private nuisance is actionable under the law of delict, but a public nuisance warrants the application of penal sanctions. A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.[1]

On the face of this provision, several principles are clear:

(i) A person may commit a public nuisance not only by doing an act but even by refraining from an act unlawfully;

(ii) Inconvenience must be caused not merely to an individual or to a narrow class of persons but to the public or to the people *in general* in that locality;

(iii) Proof of actual damage is not necessary in circumstances where the accused's conduct must of necessity adversely affect persons availing themselves of a public right.

It may be noted that no particular intention, apart from the intention of performing the act in question or abstaining from it illegally, is an essential ingredient of liability. Moreover, a balance of convenience does not represent an appropriate criterion for determining liability in this regard, since it is a principle of our law that "A public nuisance is not excused on the ground that it causes some convenience or advantage".[2]

Some points may here be made in regard to termination of a public nuisance:

(i) Where a business or activity is capable of being carried on without causing a public nuisance, but a public nuisance was caused on a particular occasion only because proper precautions had not been adopted, a court is not justified in ordering that the business or activity should be discontinued. Instead, the court should order the accused, in terms of section 105 of the Code of Criminal Procedure not to repeat the nuisance.[3] The accused may comply with such an order by continuing his

1. Penal Code, section 261. 2. ibid.
3. *Abdul Azees* v. *Arunasalam Pillai* (1917) 4 C.W.R. 4.

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business, but ensuring that no nuisance is caused in consequence of it.

(ii) Long use cannot be pleaded as a defence to a prosecution for creating a public nuisance. Persons who come to the locality to live or work after the nuisance had commenced, acquire the right to ask that the nuisance should be suppressed.[4]

The following are examples of situations in which a public nuisance may be held to have been committed:

(a) a prostitute entering a barrack square with intent to commit fornication in view of non-commissioned officers and soldiers living in the vicinity of the square;[5]

(b) the manufacture of manure in such a manner as to allow escape of odour offensive to persons in the locality;[6]

(c) the use of foul and abrasive language in a place which the public are legally entitled to frequent;[7]

(d) refusal to permit the drawing of water from a public well.[8]

As to the requirement of proof that injury, danger or annoyance had been caused to the public or to the people in general in that area, it is generally sufficient to establish that complaints had been made by three or four persons. The presumption would thereupon be entertained that the accused's behaviour was looked upon by others, too, as a nuisance.[9]

II. RASH OR NEGLIGENT CONDUCT

Rash or negligent conduct in several situations is made punishable as an offence:

(a) *Driving any vehicle, or riding on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person.*[10]

The judgment in *Macpherson* v. *Peiris*[11] contains some useful observations as to the meaning of "any public way". One of the questions which arose in this case was whether the accused was right in his contention that the Galle Face green was not a "public way", because this phrase was necessarily restricted to a highway or road open to the public. Holding that this contention by the defence was not entitled to succeed, Dalton

4. *Forest* v. *Leefe* (1910) 2 Current L.R. 164.
5. *Wilson* v. *Gault* (1898) 3 N.L.R. 211.
6. *Perera* v. *Wagner* (1909) 1 Cur. L.R. 9.
7. *Borham* v. *Hewavitarana* (1909) 1 Cur. L.R. 205.
8. *Muttaiah* v. *Meerameyedin* (1891) 1 S.C.R. 85.
9. (1909) 6 C.L. Rev. Notes 64.
10. Penal Code, section 272.
11. (1932) 34 N.L.R. 308.

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J. said: "The portion of the green, with which I am concerned in this case, has a roadway on three sides of it, from which people can and do cross and pass on to the green in all directions".[12] His Lordship adopted with approval a point of view expressed by Gour for Indian law: "The chief characteristic of a public way (is) that over it all persons have an equal right to pass. The way must, however, have physical limits to its width".[13]

"Rashness" and "negligence" denote juridically distinct conceptions. Their scope and content have been discussed exhaustively elsewhere.[14]

A point which has to be emphasized in connection with criminal negligence is that such negligence as may suffice for purposes of civil liability cannot constitute the basis of a criminal charge and that a significantly graver form of negligence is necessarily required. In *Lourensz* v. *Vyramuttu*[15] where the criminal charge was one of driving a motor car in a manner so rash or negligent as to endanger human life,[16] Howard C.J. quoted with approval a passage of the judgment in the English case of *Bateman*:[17] "In order to establish criminal liability, facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment".[18]

The following further points may be made:

(i) An accused person cannot plead, in answer to a charge of reckless or negligent driving, that he did not exceed the speed limit. It does not necessarily follow that a motorist who keeps to the speed limit imposed by the Vehicles Ordinance, cannot be in breach of his duty of care owed to other persons using a public way.[19]

(ii) Some tentative rules intended for application to cases involving collision between pedestrians and vehicles were laid down by Pereira J. in *Wettawe* v. *Wolf*.[20] The substance of these rules is that the driver of a vehicle has the obligation to give adequate warning of his approach to pedestrians but that, once this is done, the pedestrians must watch the movement of vehicular traffic and regulate their own course accordingly.

12. At p. 309. 13. ibid.
14. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pp. 38-48.
15. (1941) 42 N.L.R. 472. 16. Penal Code, section 272.
17. 94 L.J.K.B. 791.
18. (1941) 42 N.L.R. 472 at p. 474.
19. *de Mel* v. *Appasamy* (1909) 2 Leader L.R. 125.
20. (1913) 1 Bal. N. of C. 39.

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"This does not, of course, exempt the driver of a vehicle from liability. . . even to bring his vehicle to a standstill, in spite of negligence or callousness on the part of the pedestrain, when danger to life or limb is imminent, but the mere fact of the omission on the part of the driver of a vehicle to get out of the way of a pedestrian can hardly be said to amount to an act of negligence calculated to endanger human life".[21]

(iii) The bearing of voluntary intoxication on proof of negligence in this context was considered by the Supreme Court in *Selladorai*.[22] Sansoni J. (with H. N. G. Fernando J. agreeing) endorsed the following summary of the law formulated by a Bench of five judges in England in *Mc Bride's* case:

"(1) If a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously;

"(2) The mere fact that the driver has had drink is not of itself relevant;

"(3) Evidence as to the drink taken by the driver, to be admissible, must tend to show that the amount of drink taken was such as would adversely affect the driver or, alternatively, that the driver was in fact adversely affected;

"(4) The court has an overriding discretion to exclude such evidence if its prejudicial effect outweights its probative value. If such evidence is to be introduced, it should at least appear of substantial weight".[23]

(b) *Navigating any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person.*[24] The terms "rash", "negligent" and "so as to endanger human life" have the same meaning in this context as in relation to the offence of rash or negligent driving or riding on a public way.[25]

(c) *Doing, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person,*[26] *or knowingly or negligently omitting to take such order with any poisonous substance in one's possession as is sufficient to guard against any probable danger to human life from such poisonous substance.*[27]

(d) *Doing, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omitting to take such order with any fire or any combustible matter in one's*

21. At p. 41.
22. (1961) 63 N.L.R. 566.
23. At p. 568, *ad fin.*
24. Penal Code, section 273.
25. ibid.
26. Section 277.
27. ibid.

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possession as is sufficient to guard against any probable danger to human life or hurt or injury to any other person from such fire or combustible matter.[28]

In *Silva* v. *Peris*[29] the evidence indicated that the accused, on a dry and windy day, had set fire to some heaps of cut citronella near the fence which divided his plantation from that of the complainant. It was proved, moreover, that there had been similar behaviour on the part of the accused in the past. On these facts, Lascelles C.J. had no hesitation in concluding that negligence in the requisite degree was imputable to the accused. This case is also authority for the proposition that "The section clearly extends to acts which cause injury to the property of another, as well as to acts which endanger human persons".[30]

(e) *Doing, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omitting to take such order with any explosive substance in one's possession as is sufficient to guard against any probable danger to human life from that substance.*[31]

(f) *Doing, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omitting to take such order with any machinery in one's possession or under one's care as is sufficient to guard against any probable danger to human life from such machinery.*[32]

The following points may be made in regard to the conception of negligence which forms an alternative basis of liability in all these cases:

(i) The degree of negligence required to establish criminal liability is substantially similar in all these cases, and the differences pertain only to the context in which negligence is manifested. Thus, there is an uniform principle underlying liability, although the Penal Code recognizes a series of different offences involving, for example, poisons, machinery, explosives and fire.

(ii) There are marginal differences as to the scope of the offences founded on negligence. For instance, the offences relating to poisons, combustible matter and explosive substances require negligent conduct in respect of an object "in the possession" of the accused.[33] By contrast, so far as negligent conduct with respect to machinery is concerned, it is sufficient for the prosecution to establish that the machinery was "under

28. Section 278. 29. (1912) 5 Bal. N. of C. 56. 30 At p. 56.
31. Penal Code, section 279.
32. Section 280. 33. Sections 277, 278 and 279.

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the care" of the accused, even though it was not actually in his possession.[34] The latter offence is thus of wider scope, in this respect.

(iii) Where liability is sought to be based on a positive act indicating negligence, criminal liability is warranted only if human life is endangered or if hurt or injury is likely to be caused in consequence of the alleged negligence. The fact that any other interest is imperilled by a lapse on the accused's part, is not adequate to give rise to criminal liability. This represents a further point of distinction between the ambit of civil and of criminal liability for negligence.

(iv) Where the accused is sought to be burdened with criminal liability on account of an omission to take proper care, it is necessary that there should have been "a probable danger to human life".[35] Any lesser kind of danger is insufficient in this specific context. Moreover, there must have been clear proof of an antecedent risk which the accused culpably failed to envisage. The adoption of precautionary measures which may objectively be thought adequate, has the effect of exonerating the accused.

(v) Whether negligence should support criminal liability at all is a controversial question of criminal jurisprudence,[36] but the incorporation of these offences in our substantive criminal law leaves no room for doubt that the criminal law of Ceylon has answered this question in the affirmative.

III. ADULTERATION OF FOOD, DRINK OR DRUGS OR SALE OF NOXIOUS FOOD, DRINK OR DRUGS

Five offences may be classified as belonging to this category:

(a) *Adulteration of Food, Drink Intended for Sale.* The physical element of the offence consists of adulterating any article of food or drink so as to make such article noxious as food or drink.[37] The requisite mental ingredient is *either* intention to sell such article as food or drink, *or* knowledge that the article is likely to be sold as food or drink.[38]

(b) *Adulteration of Drugs.* The *actus reus* of the offence is satisfied by proof of adulteration of any medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious.[39] *Mens rea* resides in intention that it shall be sold or used for, or knowledge that it is likely to be sold or used for, any medical purpose as if it had not undergone such adulteration.[40]

34. Section 280.
35. Sections 277-280.
36. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pp, 41, 46-48.
37. Penal Code, section 265.
38. ibid.
39. Section 267.
40. ibid.

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(c) *Sale of Noxious Food or Drink.* The prohibited act is the sale, offer or exposure for sale, as food or drink, of any article which had been rendered or had become noxious, or was in a state unfit for food or drink.[41] However, the act, to be punishable as an offence, is required to be performed by a person who knew or had reason to believe that the article was noxious as food or drink.[42]

The following features of this offence may be briefly noticed:

(i) The actual or constructive state of knowledge envisaged is an essential precondition of liability. In *Nair* v. *Fernando*[43] two accused persons were charged with and convicted of having sold half a pound of beef suet in a condition unfit for use as food. The first accused, who was the employer of the second accused, was fined, while the second accused was discharged with a warning by the Magistrate. The evidence was to the effect that the suet was sold to a customer by the second accused, a salesman, who had himself obtained the suet from a third party a few days previously. The first accused appealed from the conviction on the ground that he lacked the knowledge that the suet was unsound. Upholding this contention, Schneider J. observed: "The evidence in this case altogether fails to prove any such knowledge or any ground for such belief on the part of the appellant".[44] Accordingly, the conviction was quashed.

In the case of this offence, the mental element required is incorporated as an integral element of the statutory definition, so that the offence cannot be construed as one involving strict liability.

(ii) Where the accused is charged with exposure of noxious food or drink for sale, loading of the goods into a cart for the purpose of being conveyed to the place where the sale was expected to take place, sufficiently establishes the *actus reus* of the offence.[45]

(iii) Problems of vicarious liability may arise in this context. Thus, where a servant, acting within the scope of his employment, commits the act in question with the required knowledge, the master may be held vicariously liable for the offence of selling noxious food.[46] In this situation, the master cannot be heard to plead that the sale was made not by him but by his servant. In *Ibrahim* v. *Jamaldeen Bai*[47] Lascelles A.C.J. declared "I cannot doubt that, upon a true construction of section 266, having regard to the scope and intention of the section, the

41. Section 266.
42. ibid.
43. (1924) 27 N.L.R. 56.
44. At p. 57.
45. *Anthonisz* v. *de Silva* (1915) 1 C.W.R. 102.
46. See note 47, *infra*.
47. (1906) 9 N.L.R. 335.

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master is criminally responsible for sales carried out by his salesman."[48]

Nevertheless, the employer is entitled to evade liability if he did not have the state of knowledge required for a conviction. Thus, in *Ibrahim's* case, the evidence indicated that, although the beef sold was unfit for consumption, the process of decomposition had begun only just before the sale was effected. As a ground for setting aside the conviction, the court stated: "Taking into consideration the absence of the (employer) from the market, it cannot be assumed that he knew or had reason to believe that the meat was in a bad condition."[49]

(d) *Sale of Adulterated Drugs.* The physical aspect of the offence is inherent in the requirement that the accused should have sold, offered, exposed for sale or issued from any dispensary for medicinal purposes as unadulterated, or caused to be used for medicinal purposes by any person not knowing of the adulteration, any drug or medical preparation which had been adulterated in such a manner as to lessen its efficacy, to change its operation or to render it noxious.[50] The mental element postulated to complete the offence resides in knowledge that the drug had been adulterated or interfered with in the manner indicated.[51]

(e) *Sale of Any Drug as a Different Drug or Preparation.* The prohibited act is the sale, offer, exposure for sale or issue from a dispensary for medicinal purposes of any drug or medicinal preparation as a different drug or medicinal preparation.[52] The mental requisite is embodied in the word "knowingly".[53]

IV. DELIBERATELY OR NEGLIGENTLY INTRODUCING A SOURCE OF DANGER IN OTHER WAYS

The following are examples of this category of offence:

(a) Unlawfully[54] or negligently doing any act which is, and which the accused knows or has reason to believe[55] to be, likely to spread the infection of any disease dangerous to life[56];

(b) Maliciously doing any act which is, and which the accused knows or has reason to believe[57] to be, likely to spread the infection of any disease dangerous to life;[58]

(c) Knowingly disobeying any rule made and promulgated by Government for putting any vessel into a state of quarantine or for regulating the intercourse of vessels in a state of quarantine

48. At p. 335.
49. At p. 336.
50. Penal Code, section 268.
51. ibid.
52. Section 269.
53. ibid.
54. Penal Code, section 41.
55. Section 24.
56. Section 262.
57. See note 55, *supra*.
58. Penal Code, section 263.

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with the shore or with other vessles, or for regulating the intercourse between places where an infectious disease prevails and other places;[59]

(d) Voluntarily[60] corrupting or fouling the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used;[61]

(e) Voluntarily[62] vitiating the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way;[63]

(f) Exhibiting any false light mark or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator;[64]

(g) Knowingly or negligently conveying or causing to be conveyed for hire any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person;[65]

(h) By doing any act, or by omitting to take order with any property in one's possession or under one's charge, causing danger, obstruction or injury to any person in any public way or public line of navigation.[66]

Several characteristics of this offence are at once apparent:

(1) The gist of the offence is the causing of danger, obstruction or injury. The mere likelihood or even certainty that any of these would be caused by the accused's act or unlawful omission is not sufficient. "It is essential that some particular individuals should have been obstructed; it is not enough to prove that the accused obstructed a public way with the result that the people generally were prevented from passing along it."[67]

(2) The complainant should have been in a public way or a public line of navigation at the time the danger was created or the obstruction offered. The *locus* at which the complainant sustained injury or was exposed to danger, is part of the definition of the offence.

(3) Stipulating for payment of money as a condition of permitting the public to have the advantage of a path which they are legally entitled to use, either on account of immemorial user or on some other ground, warrants imposition of liability on the accused.[68] The conduct of the accused in these cir-

59. Section 264.
60. Section 37.
61. Section 270.
62. See note 60, *supra*.
63. Section 271.
64. Section 274.
65. Section 275.
66. Section 276.
67. *Supramaniam* v. *Ayampillai* (1918) 5 C.W.R. 165.
68. *Mudiyanse* v. *Fraser* (1891) 9 S.C.C. 181.

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cumstances amounts to unjustifiable interference with a right of which the public may avail themselves unconditionally.

(4) A point concerning jurisdiction was determined by the Supreme Court of Ceylon in *Waas* v. *Perera*.[69] In this case, the accused was charged with obstructing a public cartway which went past the complainant's house from a high road. The proctor for the accused contended that, since the complainant admitted having brought a case against the accused in the rural court, the latter court should be held to have exclusive jurisdiction. It also appeared that there existed a rule made by the relevant village committee and published in the Government Gazette under the provisions of the Village Communities' Ordinance, to the effect that "It shall not be lawful for any person to obstruct any village path, road, river, water-course, lake or other property". In appeal, Lawrie A.C.J. held that the jurisdiction of the Magistrate's Court was not excluded by this provision, since the order by the Village Committee was confined in its operation to village roads and property—a category to which the road referred to in the plaint did not belong.[70]

(i) Knowingly or negligently omitting to take such order with any animal in one's possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal.[71]

There has been some doubt in regard to the scope of this offence. In *Gunasekera* v. *Christinahamy*[72] Grenier J. expressed the view that this provision of law applied to any kind of animal, but the need to construe this dictum restrictively has been pointed out in other cases. In *Salgado* v. *Rodrigo*[73] the defendant's dog had attacked and severely bitten a ten-year-old boy. Wood Renton J., setting aside the defendant's conviction in appeal, said: "We are dealing with a domestic animal. . . . It is not alleged by the complainant himself, or by any witness for the prosecution, that the appellant had any knowledge of the disposition of this dog, and there have not been proved against it such repeated exhibitions of bad temper as to show that it must have had a notorious reputation".[74]

Other cases have emphasized that, where the offending animal is a domestic animal, knowledge on the accused's part that it had a ferocious disposition, is indispensable to conviction of this offence. In *John* v. *Abeysekera*[75] it was said that a domestic

69. (1897) 3 N.L.R. 1.
70. At p. 2.
71. Penal Code, section 282.
72. (1908) 4 A.C.R. Suppl. ii.
73. (1911) 14 N.L.R. 273.
74. At pp. 274-275.
75. (1923) 1 Times of Cey. 216.

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animal like a dog does not ordinarily fall within the scope of this provision which is limited in its application to such classes of animals as are normally a source of danger to human life or have a propensity towards causing grievous hurt. In *Mudalihami* v. *Appuhami*[76] de Sampayo J. accepted the ruling in *Salgado* v. *Rodrigo*[77] as authority for the proposition that, before a conviction of this offence could be obtained, it must be established that the person charged knew as a matter of fact that the animal was savage. However, where the animal belongs to a genus or species which is generally savage, such knowledge on the part of the accused need not be proved affirmatively but may be presumed. Thus, in *Mudalihami* v. *Appuhami*, de Sampayo J. held that the same rules could not be applied legitimately to a dog and to a buffalo. On the other hand, the courts of Ceylon have asserted that a horse does not belong to the class of *ferae naturae*.[78]

V. OFFENCES INVOLVING OBSCENE BOOKS AND SONGS

Three offences of this kind are recognized by the Penal Code:

(a) the sale, distribution, import, printing for sale or hire or wilful exhibition to public view, of any obscene book, pamphlet, paper, drawing, painting, photograph, representation or figure, or the attempt or offer to do so;[79]

(b) having in one's possession any such obscene book or other thing as was mentioned in the preceding section for the purpose of sale, distribution or public exhibition;[80]

(c) singing, reciting or uttering in or near any public place any obscene song, ballad or words to the annoyance of others.[81]

(a) *Sale or Distribution of an Obscene Book*

The following points may be made in regard to this offence:

(i) The affixing of obscene papers to the pillars of a private house where they could be seen but not read by the public, does not satisfy the *actus reus* of the offence.[82] In *Siriwardene* v. *Sinnatamby*[83] Howard C.J. went further. His Lordship expressed the view that the writing of obscene expressions on the wall or other part of a building, where the writing was legible to the public, was not tantamount to an obscene representation, within the meaning of the relevant provision of law.

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76. (1913) 1 Bal. N. of C. 20. 77. See note 73, *supra*.
78. *Perera* v. *Baron* (1898) 3 L. Rev. No. 1. p. 77.
79. Penal Code, section 285. 80. Section 286.
81. Section 287.
82. *S. I. Police* v. *Endoris* (1934) 14 C.L. Rec. 59.
83. (1941) 43 N.L.R. 119.

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(ii) It is not necessary for the prosecution to establish that any particular words are obscene. What the court is required to consider is the general impression made by the work.[84]

(iii) Where the accused contends that the work does not corrupt the morals of persons who are cultured enough to understand it, this plea cannot be availed of as the basis of a valid defence, if the book is proved to have been offered to other persons as well. In *de Bruin* v. *Dharmabandu*[85] Lyall Grant J., holding that a conviction was justifiable, declared: "The book was on general sale at a low price. The pictures on its covers are an indication of the nature of its contents. There is evidence that the latter can be understood by a wide class of readers. I have no doubt that the book is calculated to have a harmful effect on many of the persons into whose hands it may fall."[86]

(iv) Several cases decided by our courts have dealt with the criterion of obscenity which is required to be applied in this context. The principle has been clearly laid down that the intention entertained by the accused is not conclusive.[87] The test of obscenity, formulated in the following terms,[88] has been endorsed unreservedly by the Ceylon courts in a series of cases: "The test of obscenity is this, whether the tendency of the matter charged . . . is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."[89] If this tendency to corrupt is established, the innocuous intention of the accused does not furnish a ground of exoneration.[90]

(v) However, the publication must have the potential for affecting morals, as opposed to mere conventional manners. As de Sampayo J. observed in *Collette* v. *Perera*,[91] "The matter charged must at least suggest impure thoughts and have a tendency to corrupt morals".[92]

(b) *Possession of an Obscene Book, Painting or Photograph*

The two elements of the offence are (i) possession of the book, painting or photograph, and (ii) the intention of the accused to sell, distribute or exhibit the same publicly.[93]

The nature of the obscene matter which the accused is alleged to have had in his possession, must be specified with

84. *De Bruin* v. *Dharmabandu, infra.*
85. (1930) 32 N.L.R. 88. 86. At p. 90.
87. *Siriwardene* v. *Sinnetamby* (1941) 43 N.L.R. 119.
88. *Hicklin* (1868) 3 Q.B. 360.
89. *Georges* v. *Velupillai* (1904) 8 N.L.R. 67; *Attygalle* v. *Shemsudeen* (1905) Leem. Rep. 47; *Sub-Inspector of Police, Tangalle* v. *Dharmabandu* (1931) 33 N.L.R. 114; *Perera* v. *Agalawatte* (1936) 39 N.L.R. 22.
90. *Bandaranayake* v. *Abubacker* (1932) 2 C.L.W. 120.
91. (1916) 3 C.W.R. 136. 92. At p. 138.
93. Penal Code, section 286.

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sufficient clarity in the indictment.[94] Where this is not done, a well founded objection to the indictment may be taken by the accused at his trial.[95]

It has been held, moreover, that a photograph cannot be characterized as obscene if it can be shown to have had artistic or cultural value.[96] This is a matter in regard to which expert testimony may be received and acted upon.

(c) *Uttering Obscene Words in a Public Place*

Several components of the offence warrant emphasis:

(i) It is necessary that the indictment should specify the words employed by the accused.[97] Where the words used are not indicated clearly by the evidence, a conviction cannot be sustained.[98] However, if the words appear sufficiently in the evidence, even though they are not specifically averred, a conviction may be upheld in appeal, subject to insertion of the offending words in the conviction.[99] While English was the language of the courts, an English translation of the words attributed to the accused has also been insisted upon.[100]

(ii) There must be clear proof that the language resorted to by the accused caused annoyance to some person.[101] Where the charge was that the accused sang obscene songs at midnight, the prosecution has been held under a duty to establish that other persons were disturbed in their rest in consequence of the accused's singing.[102] A conviction of this offence cannot be supported in circumstances where the aggrieved party states in his evidence that he was not annoyed by the use of the words in question.[103] In one case[104] a Ceylon judge has gone so far as to suggest that, inherent in the offence, is a threatened breach of the peace.

The view has prevailed, however, that the causing of annoyance to a single person is sufficient to sustain liability in this context.[105]

Furthermore, the court would examine the nature of the accused's words with a view to ascertaining whether they are

94. (1905) 5 C.L. Rev. Notes 78.
95. ibid.
96. (1905) 5 C.L. Rev. Notes 71.
97. *Haniffa* v. *Mala* (1908) 3 A.C.R. Suppl. xii; *Udayar, Point Pedro* v. *Alfred* (1929) 30 N.L.R. 454.
98. *Ratnayake* v. *Deonis Appu* (1916) 2 C.W.R. 21.
99. *Nell* v. *Muttu* (1897) 2 N.L.R. 321.
100. *Perera* v. *Veloe* (1953) 54 N.L.R. 551.
101. *Croos* v. *Shafi* (1926) 28 N.L.R. 233; *Appuhamy* v. *Ratnayake* (1953)3 C.L.W. 70.
102. *Anthonisz* v. *William Sinno* (1908) 1 Weer. Rep. 36.
103. *Eliyathamby* v. *Inspector of Police, Kalmunai* (1962) 64 N.L.R. 264.
104. *Rahim* v. *Nonahamy* (1916) 19 N.L.R. 169, *per* de Sampayo J.
105. *Tissera* v. *Fernando* (1911) 14 N.L.R. 424.

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likely to cause annoyance to bystanders. Considerations pertaining to local usage and special nuances which the words may have acquired, are relevant for this purpose.[106] Thus, it has been held that the words "son of a whore" do not possess the offensive character contemplated by the relevant provision of law. "It is a matter of common knowledge that these words are used by the natives apparently without any thought as to what the words actually mean."[107]

(iii) It is sufficient that the words were spoken near, although not actually in, a public place—for example, at the door of a boutique abutting a public road.[108]

VI. WILFUL OMISSION OF A STATUTORY DUTY

Whoever wilfully neglects or omits to perform any duty imposed upon him by, or wilfully disobeys or infringes any provision of, any enactment or statute passed before or after the Penal Code, for which neglect, omission, disobedience or infringement no punishment is or shall be specially provided by the Penal Code or by any other enactment or statute, is declared to commit an offence.[109]

A restrictive approach to the scope of this offence has been favoured judicially. In *Rambuppotte* v. *Silva*[110] a Ceylon court pointed out the danger of extending criminal liability to acts or omissions which had not been specifically characterized as offences by the legislature.

A conceptual difference between criminal and delictual liability for the violation of a statutory duty may be commented on at the outset. Civil liability in this context is not necessarily based on any blameworthy state of mind in the defendant. Thus, he need not have intended to transgress a statutory obligation, nor is it essential that he should have been remiss in failing to comply with the statutory duty. The objective failure to give effect to the duty imposed by statute is adequate to warrant recognition of delictual responsibility, without need of any culpable frame of mind. On the other hand, the ambit of criminal liability for the breach of a statutory duty is materially narrower, since wilful neglect or wilful disobedience is indispensable to criminal liability.[111] Insistence on *mens rea* in this form operates as a limitation on the scope of criminal liability, but this restriction is inapplicable to the corresponding area of civil liability.

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106. *Jayawardene* v. *Dionis Silva* (1937) 9 C.L.W. 102.
107. *Mohamed* v. *Bastian Appu* (1920) 2 C.L. Rec. 24 at p. 25 *per* Loos J; cf *Casipillai* v. *Elias Appu* (1927) 9 C.L. Rec. 36.
108. *Ukku Banda* v. *Gregoris* (1917) 4 C.W.R. 299.
109. Penal Code, section 289.
110. (1897) 4 Bal. Rep. 139.
111. See note 109, *supra*.

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Some features of the offence relating to wilful transgression of a statutory duty have been interpreted in the case law. These aspects may be surveyed briefly:

(i) Strict construction of this offence by the law is exemplified by the rule that the duty, of which the accused is alleged to be in breach, must have been one which the accused was compulsorily and unequivocally required to acknowledge. In *Rahim* v. *Salgado*[112] the duty was one which devolved on a superior officer who purported without proper legal authority to delegate the duty to a subordinate of his. The subordinate was held not to be burdened with a legal duty in this connection.

(ii) *Bucher* v. *Pusumba*[113] provides an example of a situation in which criminal liability for the wilful breach of a statutory duty was thought to be warranted. In this case, the accused had refrained from complying with a duty imposed by the Code of Criminal Procedure[114] to furnish information to the appropriate authorities in regard to the discovery of the body of any person whose death, there is reason to believe, had occurred under suspicious circumstances.[115] The wilful character of the omission was considered as vital to a conviction as proof of dereliction of a statutory duty by the accused.

112. (1890) 6 C.L. Rev. 28.
113. (1916) 3 C.W.R. 118
114. Section 21(b)
115. cf. *Ansalvarnar* (1922) 1 Times of Cey. 46.

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CHAPTER 15

OFFENCES RELATING TO RELIGION

I. RATIONALE OF THE OFFENCES

Although it may seem superficially that the object of these offences is to prevent affront to religious susceptibilities, the element which, in the final analysis, justifies recognition of criminal liability derives from the threat to peace and public order consequent on injury to religious feelings. The provision of remedies for violation of feelings is the concern of the law of delict, through the instrumentality of the *actio iniuriarum*, rather than of the criminal law. However, in a community where religion is a significant force, the wounding of religious feelings is fraught with the danger that the public tranquillity would be disturbed on account of the violent reactions of those who had been subjected to provocation. In these circumstances, the protection of a vital social interest is involved in the characterization as offences of acts which are intended to outrage religious susceptibilites or to insult religious beliefs.

The Penal Code of Ceylon contains six provisions dealing with offences against religion.[1] Each of these provisions has the effect of constituting a distinct offence, but these offences may be divided appropriately into several categories for the purpose of exposition.

II. OFFENCES IN CONNECTION WITH PLACES OF WORSHIP

The Penal Code recognizes two offences of this type:

(a) Destroying, damaging or defiling any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion.[2]

In *Sevvanthinathan* v. *Nagalingam*[3] T. S. Fernando J. held that the question whether there had been defilement of a place of worship within the meaning of this provision, represented a mixed issue of fact and law.[4] Arguments on this question may therefore, be properly addressed to a court of appeal.

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1. Penal Code, sections 290, 290A, 291, 291A, 291B, and 292.
2. Penal Code, section 290.
3. (1960) 69 N.L.R. 419.
4. At p. 421.

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In *Sevvanthinathan*'s case the primary issue was whether the accused, who was said to belong to an inferior caste, had defiled a Saivite temple by entering the flagstaff mandapam of the temple. Answering this question in the negative, T. S. Fernando J. observed: "Having listened to the exhaustive arguments of counsel for both parties before me and having examined with care the evidence adduced by the petitioner and an expert before the learned Magistrate, I find myself unable to say with any confidence that the latter's finding that the prosecution failed to establish a defilement of the temple is unsupportable."[5] The basis of this view, presumably, was that there was no evidence to suggest any intention on the part of the accused to insult the Saivite religion, or knowledge that his entry into the precincts of the temple would be construed by the Saivites as an insult to their religion.

The meaning of "defilement", in this context, was commented on by the Supreme Court in *Sri Mudali* v. *Sabastian*.[6] The question here was whether a person who secretly scribbled indecent and insulting pictures and words in charcoal on the outer wall of a mosque abutting a public street had committed an offence. Bonser C. J. said: "I feel some doubts whether writing in charcoal on the outside of a place of worship is a defilement. I am inclined to think defilement means more; it involves the doing of some acts which would impair the sacredness of the building".[7]

The phrase "any class of persons" which forms part of the definition of this offence, has received a liberal interpretation in the case law. It includes not only adherents of the major religions but sects within each religion. Thus, in *Sevvanthinathan* v. *Nagalingam*,[8] it was taken for granted that the Vellala community and other high castes among the Saivites came within the ambit of this phrase.[9]

(b) Doing any act in or upon, or in the vicinity of, any place of worship or any object which is held sacred or in veneration by any class of persons, with the intention of wounding the religious feelings of any class of persons or with the knowledge that any class of persons is likely to consider such act as an insult to their religion,[10] is declared to be a distinct offence.

This offence is of more extensive scope than the offence immediately preceding it, in two respects: (i) it is not restricted in its application to places of worship; and (ii) liability is not confined to acts involving destruction, damage or defilement. Thus, on the facts of *Sri Mudali* v. *Sabastian*, liability could

5. ibid. 6. (1898) 4 Bal. Rep. 133. 7. At p. 134.
8. (1960) 69 N.L.R. 419. 9. At p. 419.
10. Penal Code, section 290A. 11. See note 6, *supra*.

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have been imposed justifiably on the basis of section 290A of the Penal Code, although not under section 290.

III. DISTURBING A RELIGIOUS ASSEMBLY

Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies, is said to commit an offence.[12] A person is considered to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe[13] to be likely to cause it.[14]

It is essential for conviction of this offence that religious worship or a religious ceremony should have been in progress at the time of intervention by the accused. *Sub-Inspector of Police, Bentota* v. *Zoysa*[15] was a case where the complainant wishing to have a *pirith* ceremony at his house, sent some persons to escort the priests from their temple to his residence. While the procession was wending its way, the first accused struck some of the members and caused the procession to break up. The priests and some of the others proceeded to the complainant's house, but the *pirith* ceremony was not held because of threats which the accused continued to make in the vicinity of the complainant's residence.

In appeal, Schneider A. J. held that the offence of disturbing a religious assembly could not be established in these circumstances. His Lordship declared: "The language of the section under which the accused have been convicted, is clear that it is of the essence of the offence that the disturbance must take place while the assembly is actually engaged in the performance of the religious worship or ceremony".[16] It was held that an escort provided for the priests on their way from the temple to the complainant's house did not form part of religious worship or of any religious ceremony. The learned judge said: "Supposing the priests in this instance had proceeded in a motor car or in a horse and carriage from their temple to the house, would any obstruction to the progress of their vehicle be a disturbance of a religious ceremony? I cannot think it would be."[17]

The decision not to hold the *pirith* ceremony, too, did not involve the accused in criminal liability. Schneider A.J. observed: "The evidence is that threats (by the accused) prevented the religious ceremony from being performed at all. No attempt was made even to commence it. The threats of

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12. Penal Code, section 291.
13. Section 24.
14. Section 37.
15. (1921) 23 N.L.R. 125.
16. At p. 126.
17. ibid.

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the accused appear to have been taken so seriously that the ceremony, for which preparations had been made, was abandoned altogether that night".[18] The conclusion was therefore reached that "The acts of the accused may amount to other offences, but they are not guilty of having caused disturbance to an assembly engaged in the performance of a religious ceremony."[19]

In *Jayatilleke* v. *Fernando*[20] it was held that drumming and singing in a Salvation Army procession while it proceeded along a public street, afforded sufficient proof of participation in a religious ceremony, within the meaning of the relevant provision of law.

IV. UTTERING WORDS WITH INTENT TO WOUND RELIGIOUS FEELINGS

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, commits an offence.[21] So does any person who with the deliberate and malicious intention of outraging the religious feelings of any class of persons, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class.[22]

The second of these offences carries a heavier penalty than the first. This is accounted for by the fact that the feelings of an individual are injured in the first case, and those of a class of persons in the second. Barring this difference, the component elements of liability for the two offences are substantially similar.

V. TRESPASSING ON BURIAL PLACES AND OTHER OFFENCES

The *mens rea* of this offence inheres in (a) intention of wounding the feelings of any person, or (b) intention of insulting the religion of any person, or (c) knowledge that the feelings of any person are likely to be wounded, or (d) knowledge that the religion of any person is likely to be insulted thereby.[23] The *actus reus* consists of (a) committing any trespass in any place of worship or on any place of sepulture or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or (b) offering any indignity to any human corpse, or (c) causing disturbance to any persons assembled for the performance of funeral ceremonies.[24]

18. ibid.
19. At p. 127.
20. (1891) 6 C.L. Rev. 25.
21. Penal Code, section 291A.
22. Section 291 B.
23. Section 292.
24. ibid.

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The following principles in regard to this offence emerge from the case law:

(i) The relevant *mens rea* has to be averred specifically in the indictment and established by clear evidence. A series of Ceylon cases has insisted that there can be no conviction of this offence if existence of the required intention or knowledge in the accused remains a matter of doubt.[25] However, the intention or knowledge indispensable to a conviction may be inferred legitimately from the surrounding circumstances.[26]

(ii) It is not a precondition of liability that the feelings of a person or of a class of persons should be proved to have been actually injured. It is sufficient if the accused can be shown to have had the intention of causing this effect or knowledge that the effect would be brought about.[27] In other words, the desired object need not necessarily be attained before liability can be imposed, so long as there is clear evidence that the object was aimed at by the accused.

(iii) The commission of trespass is one of three ways in which the *actus reus* envisaged may be committed.

There is emphatic authority in our law that "trespass", in this context, is not synonymous with "criminal trespass" viewed as an offence in respect of property. In *Silva* v. *Fernando*[28] Jayawardene J. said: "I am not prepared to give the word 'trespass' such a restricted meaning. 'Trespass', as used in this section, has to be taken in its original meaning of any injury or offence done in the sense in which it is used in the Lord's Prayer in the passage: "Forgive us our trespasses as we forgive them that trespass against us". The trespass must, of course, be coupled with an entry into one of the places referred to in the section. The entry in itself may be innocent, but the entry might amount to a 'trespass' if an injurious, violent or wrongful act is committed thereafter, or the entry may itself amount to a 'trespass' if it be with the intention or knowledge, required by the section, as in the case of a low caste man entering a temple reserved for men of higher caste".[29]

It must be noted, however, that the example suggested by Jayawardene J. in the last sentence of the above quotation is now suspect, in view of the decision by T. S. Fernando J. in *Sevvanthinathan* v. *Nagalingam*[30] where the facts were similar.

In *Jaggirias* v. *Fernando*[31] the dichotomy between the notions

25. See for example, *Noordeen* v. *Arunasalam* (1911) 1 Bal. N. of C. 7; *Kanapathy* v. *Namasivayam* (1914) 1 Bal. N. of C. 61.
26. *Silva* v. *Fernando* (1925) 6 C.L. Rec. 71.
27. (1910) 7 C.L. Rev. App. Court Notes 203.
28. (1925) 6 C.L. Rec. 71.
29. At p. 72.
30. See note 8, *supra*.
31. (1924) 2 Times of Cey. 231.

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of trespass embodied in sections 292 and 427 of the Penal Code, was emphasized once again.

The decision in *Passmore* v. *Francisku Silva*[32] throws further light on the meaning of "trespass", in the sense in which the word is used in section 292 of the Penal Code. The accused was a Buddhist who had buried his wife, also a Buddhist, in a place allegedly reserved for the burial of members of the Weslyan Congregation. The evidence indicated that Buddhists, some of whom were relatives of the accused, had been buried in this spot previously, although the accused had been forewarned not to bury his wife there. The court held there was no evidence that the accused intended to insult the Weslyan Congregation, or had knowledge that they were likely to feel insulted. In these circumstances, no "trespass" on the accused's part was held to have been committed.

32. (1900) 1 Br. 94.

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CHAPTER 16

OFFENCES IN RESPECT OF PROPERTY

1. THEFT

(A) *Constituent Elements of the Offence*

The definition of theft is contained in section 366 of the Penal Code which declares that "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

The components of the offence are the following: (a) The property in question must be movable property; (b) There must be a moving of the property by the accused in order to the taking of such property; (c) The property should be moved out of the possession of another; (d) The moving of the property should have been done without the consent of the person possessing the property; and (e) The accused should have had the intention of taking the property dishonestly.

Each of these elements warrants separate analysis in the light of the case law.

(a) *'Movable Property'*

'Movable property', for the present purpose, is defined by section 20 of the Penal Code. The effect of this provision is that "The words 'movable property' are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth".

The distinction between corporeal and incorporeal property has to be understood in the light of the principles of Roman-Dutch civil law which govern the question. The essential characteristic of corporeal property is that it should be tangible.

In *Nagaiya* v. *Jayasekera*[1] three judges of the Supreme Court held that electric current could not be the subject of the offence of theft. Drieberg A.J. observed: "By incorporeal things the jurists did not mean such things as the soul, spirit and light. Incorporeal things were mere legal entities such as usufruct, inheritance and obligation which are not really things but aggregates of rights and duties. Corporeal things are things which are tangible and which, as the subject of theft, can be removed from the possession of a person. It is not easy to see

1. (1927) 28 N.L.R. 467

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how electricity can be regarded as a corporeal thing of this nature."[2]

The definition of 'movable property' contained in section 20 of the Penal Code has to be read with Explanation 1 attached to section 366. This Explanation embodies the principle that "A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth".

According to this definition, trees, shrubs and plants become movable property no sooner than they are separated from the earth.[3] Buildings cannot be stolen, but the materials of which they consist may form the subject of the offence of theft after detachment. In the law of Ceylon, the crucial issue in this regard is the degree of annexation.

It may be noted that there is no specific requirement in Ceylon that, before the offence of theft can be held to have been committed, the property must be proved to have some monetary value.

(b) *A 'Moving' of Property in Order to its Taking*

The essential principle here is that the accused need not have appropriated or taken the property for himself before he can be held liable for theft. It is sufficient that there has been some physical asportation of the property by the accused as a means of taking it subsequently, provided that the property has been taken out of the complainant's possession.

This is clearly indicated by illustration (h) to section 366. "A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft."

The following principles in regard to the requirement of "moving" the property receive statutory recognition:

(i) A moving effected by the same act which effects the severance, may be a theft.[4] Thus, the act of cutting down a tree may constitute a sufficient "moving" of the property, in the present context.

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2. At p. 471.
3. cf. Illustration (a) to section 366.
4. Penal Code, section 366, Explanation 2.

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(ii) A person is said to cause a thing to move by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it.[5]

(iii) A person who, by any means, causes an animal to move is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.[6]

(c) *Moving the Property 'Out of Another's Possession'*

A point of cardinal importance is that theft is an offence not against ownership but against possession.

While ownership connotes a legal relationship between a person and a thing, possession, in the present context, involves a question of degree. In represents a *de facto* concept which depends on the circumstances of each case. Thus, while a person may clearly be said to have possession of a ring lying on a table in his house,[7] it is plain that a ring lying on the road is not in the possession of its owner.[8] In the latter case, ownership may remain intact, but no one has possession of the property. Between these extreme cases there lies a peripheral area within which the issue of possession may assume greater complexity.

Once it is conceded that the concept of possession does not necessarily involve immediate physical control, the flexibility of the notion and its usefulness in widely divergent contexts become apparent. A notional control may sometimes be sufficient as the basis of possession. Questions of particular difficulty may arise in circumstances where a person claiming to have had possession of an object at a given time, is proved to have been unaware at that time that the property was subject to his control.

It is a valid generalization that the approach of the courts to problems in this area is empirical. Each case is decided in the light of its own special facts without the aid of a general theory, rigidly preconceived and mechanically applied. It is for the court to decide, by reference to such factors as the *animus* of the person claiming possession and the degree of actual or potential control exercised by him, whether the property which is alleged to form the subject-matter of the offence can be said to have been in the possession of any person at the time it was taken or moved by the accused.

In *Wanigatunga* v. *Sinno Appu*[9] the question was whether a person who removed coral from under the bed of a public

5. Penal Code, section 366, Explanation 3.
6. Penal Code, section 366, Explanation 4 cf. illustration (b) and (c).
7. Penal Code, section 366, illustration (f).
8. Penal Code, section 366, illustration (g).
9. (1925) 27 N.L.R. 50.

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stream, could be held guilty of theft. The evidence suggested that there was a stratum of coral two or three feet below the surface of the bed of the stream and that the accused had reached the coral by means of a tunnel running into the strata from a pit dug on the bank. Jayewardene A. J. had no hesitation in holding that the coral was the property of the Crown and, presumably, was subject to possession by the Crown.

On the other hand, in *Abeykongedera Appu*,[10] where the charge concerned the taking of treasure trove, it was held that treasure trove does not become the property of the Crown until after inquest found. On this basis the conclusion was supported that a person who appropriated treasure trove for his own benefit, could not be found guilty of theft of Crown property.

The cases of *Wanigatunga* v. *Sinno Appu* and *Abeykongedera Appu* can be reconciled satisfactorily on the ground that possession of the property by the Crown at the time of the alleged offence was established in the first case, but not in the second.

It has been explicitly asserted in several Ceylon decisions that the interest violated by the offence of theft is possession and not ownership. In *Karunaratne* v. *Jayanhamy*[11] Wood Renton J. said: "It is not necessary that a person losing the thing stolen should have had property in it. It is sufficient that it should have been in his possession."[12] In other judgments this principle has received emphasis in similar terms.[13]

Ekanayake v. *Silva*[14] was a case concerning property which was subject to no one's possession. A wreath had been placed at a War Memorial by a person who intended to divest himself of the ownership and possession of the wreath at the time of placing it. The accused was held not guilty of theft on the ground that the wreath was *res nullius*.

The principle involving possession as the interest contravened by theft is so vital to the conception of the offence that an owner, in some circumstances, may properly be convicted of theft of his own property. This is made clear by illustrations (i), (j) and (k) attached to section 366 of the Penal Code. Thus, where a person had handed his watch to a jeweller for repairs and incurred a debt on that account, removal of the watch from the jeweller's possession without the latter's consent would constitute theft, so long as the debt remains unpaid.[15] The reason is that, although the watch is the property of the person who takes it away, the jeweller has a legitimate interest in

10. (1887) 8 S.C.C. 51.
11. (1910) 2 Curr. L.R. 63. 12. At p. 64.
13. cf. (1910) 6 C.L. Rev. Notes 120.
14. (1933) 11 Times of Cey. 7.
15. Penal Code, section 366, illustration (j).

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retention of possession, in that the watch represents security for the debt.[16] However, once the debt is satisfied, the jeweller's right to possession is terminated, so that removal of the watch by the owner at this stage does not give rise to liability for theft.[17]

Several Ceylon cases have accepted unequivocally that a person may be convicted of theft of his own property. In *Mudianse* v. *Mohideen*[18] Middleton J. formulated the principle that, if property is in the possession of a complainant in such a way that he had the right to hold it against the accused—that is to say, that the accused could not obtain the property without the complainant's consent—it is theft on the part of the accused to take possession of the property with the intention of appropriating it. In these circumstances, Wood Renton J. held in *Wijesinghe* v. *de Saram*,[19] the legal right which the accused asserts in respect of the property, has no necessary bearing on the issue of liability for theft.[20]

The law of Ceylon contains explicit provision that "When property is in the possession of a person's wife, clerk or servant on account of that person, it is in that person's possession within the meaning of the Penal Code".[21] The explanation is added that "A person employed temporarily or on a particular occasion in the capacity of a clerk or servant is a clerk or servant within the meaning of this provision."[22]

The purpose of this provision is to obviate an anomaly which would otherwise have characterized the law governing theft. Where the master's property was in the keeping of his servant and the servant dishonestly converted the property to his own use, a conviction of theft would not be possible against the servant, if possession of the property was held to be with the servant. To eliminate this difficulty, the law construes the situation as involving merely custody in the servant, while the master retains possession of the property derivatively through his servant. This construction enables the imposition of liability for theft on the servant, since the latter may be held to have moved the property out of the master's possession. A similar rationale applies to the concept of a wife's custody of property which is subject to her husband's possession.

Moreover, where a servant or wife dishonestly gives away the property of the master or husband to a third party, the notion that "possession" continues to remain with the master or husband, makes it possible for the third party to incur liability

16. cf. illustration (k).
17. cf. illustration (i).
18. (1907) 1 A.C.R. Suppl. p. iv.
19. (1908) 4 A.C.R. Suppl. p. vi.
20. cf. *Janse* v. *Cader* (1907) 3 Bal. Rep. 169.
21. Penal Code, section 25.
22. Explanation to section 25.

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for theft in circumstances where a reciprocal dishonest intention is entertained by the third party.[23] In this situation, the third party's offence is directed against the master's or the husband's possession of the property.

By contrast, where the property is entrusted for safekeeping not to a servant, a clerk or a wife but to a bailee, such as the keeper of a warehouse, possession of the property during the period of bailment is with the bailee and not with the owner.[24] A dishonest bailee cannot be convicted of theft, since possession had vested in him at the inception of the contract of bailment. In these circumstances, the appropriate offence of which the bailee may be convicted is criminal breach of trust.[25]

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Finally, it may be noted that, since theft is conceived of as an offence against possession, the property which is alleged to constitute the subject-matter of a charge of theft must necessarily be capable of being possessed. *Res publicae* such as the atmosphere, the sea and flowing water are, by their very nature, incapable of being treated as the subject of the offence of theft. This is true also of wild animals and of things which had been abandoned.

(d) *Absence of Consent*

It is an essential element of theft that the property should have been moved out of a person's possession without the consent of that person.[26] This requirement, however, must be understood subject to the qualification that "The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession or by any person having for that purpose authority either express or implied".[27]

A problem arises in connection with simulated consent. Where the person having possession does not genuinely consent to the property being taken out of his possession but makes an appearance of doing so as a means of entrapping the offender and securing his conviction, can the complainant be considered to have consented to the taking of his property by the accused? This question was adverted to and answered in the negative by the Supreme Court in *Packeer Ally* v. *Savarimuttu*.[28] Ennis J. declared: "According to the working of section 366 of the Penal Code, the intention of the accused seems to be the predominant feature rather than the consent of the person from whom the property was taken. . . . The consent seems to have been

23. cf. illustrations (n) and (o) appended to section 366.
24. ibid., illustration (e). Contrast illustration (d).
25. See illustration (e).
26. Penal Code, section 366.
27. Penal Code, section 366, Explanation 5 cf. illustration (m).
28. (1916) 2 C.W.R. 216.

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mentioned as a condition which must be in the mind of the accused when he intends dishonestly to remove the property." The position would seem to be that, in a case of this kind, the complainant is entitled to deny that his apparent consent was a real or genuine consent.

(e) *The Requirement of a Dishonest Intention*

The mental requisite of theft consists of the intention to take the property dishonestly.[29] The term "dishonestly" is defined in a separate section of the Penal Code which declares that "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly".[30]

The words "wrongful gain" and "wrongful loss" which are incorporated in this definition, receive more detailed explanation. "Wrongful gain" is defined as "gain by unlawful means of property to which the person gaining is not legally entitled."[31] Moreover, "a person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully".[32] "Wrongful loss" is defined as "the loss by unlawful means of property to which the person losing it is legally entitled."[33] Furthermore, "a person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property".[34]

The following principles in regard to the scope and content of a dishonest intention emerge from the case law:

(i) The prosecution need only establish either wrongful gain by some person or wrongful loss to some person. Both wrongful gain and wrongful loss need not be proved.

The leading case is *Ramalingam* v. *Nair*.[35] The accused was a member of a Maha Jana Sabha, the object of which was to prevent members of his caste from working in the fields of persons belonging to the Vellala caste. The complainant, who was not a member of the Sabha, worked in the fields of a Vellala man. The accused and some others went to the complainant's house and ordered him to pay a fine of Rs 25/-. When the complainant refused to make the payment, the accused entered his house, took Rs 25/- from a box and went away.

It was contended in appeal that a conviction of theft could not be sustained in these circumstances, in the absence of a dishonest intention. Rejecting this contention, Wijeyewardene

29. Penal Code, section 366.
30. Penal Code, section 22.
31. Section 21(1).
32. Section 21(3).
33. Section 21(2).
34. Section 21(4).
35. (1944) 45 N.L.R. 515.

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J. said: "It follows from sections 21 and 22 that a person acts dishonestly, if he takes property by unlawful means with the intention of *retaining* it or with the intention of *keeping* the person entitled to it *out of its possession.* It is not necessary that such person should have had an intention of *acquiring* the property or of *depriving* the other person of it."[36] The substance of the learned judge's view is expressed in the following passage: "It does not matter even if the intention of the accused was not to derive some personal benefit from his act....Even if it be assumed that the accused did not intend to appropriate the money but only to retain it in order to compel (the complainant) to stand his trial before the Maha Jana Sabha, the accused had a dishonest intention in taking the money, according to the interpretation I place on section 21 and 22 of the Penal Code".[37]

Abdul v. *Dias*[38] was a case where a licensed cattle seizer untied a bull from the complainant's garden and took it to the police station, falsely alleging that he had found it loose and trespassing on the road. It was held in appeal that the dishonest intention necessary for conviction of theft, could be readily established in these circumstances. Hutchinson C.J. said: "This man moved the bull, intending to take it out of the owner's possession without his consent; the question is whether he did it 'dishonestly' within the meaning of the Code. He intended to cause loss to the owner who, if the accused could satisfy the Court or Village Tribunal that the bull was trespassing, would have to pay something under the Cattle Trespass Ordinance in order to get his bull back."[39] Inasmuch as an intention to cause wrongful loss to the complainant was demonstrable, the court held that a dishonest intention in the accused had been proved.

Similarly, in *Wijetunge* v. *Anthony Appuhamy*[40] it was held that a dishonest intention was proved by the accused's desire to deprive the complainant of his coconuts, even if the accused had no wish to appropriate the coconuts for himself.

These cases reflect the plainly correct view that a dishonest intention is not necessarily synonymous with an intention of enriching oneself wrongfully. An intention of causing wrongful loss to another enables proof of a dishonest intention, in the total absence of any intention of benefitting oneself. It is clear, therefore, that the accused need not have acted *lucri faciendi causa* before he can be convicted of theft in Ceylon.

(ii) Where the accused had acted with some other intention than that of causing either wrongful loss or wrongful gain, a

36. At p. 517.
37. ibid.
38. (1910) 14 N.L.R. 23.
39. At p. 24.
40. (1938) 16 Times of Cey. 32.

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dishonest intention will not be held to have been proved. Thus, the owner of an animal who snatched a bill-hook from a person engaged in preparing to ward off an attack by the animal, was acquitted of theft, although it was said that he may have been found guilty of some other offence.[41] In *Sinnan Nakandy* v. *Sultan*[42] the accused, who had given some clothes to a dhoby, found it difficult to get the clothes back. He thereupon seized some other clothes which the dhoby was drying and took them away, hoping that his action would induce the dhoby to return his own clothes. The accused was held not guilty of theft.

Thambirasa v. *Maniphan*[43] was a case where an Excise raid had been arranged by an Inspector who sent A and B ahead as decoys. X, the owner of the house, who had information regarding the raid, met A and B with a volley of stones as they approached the house. A took to his heels and B was compelled to cycle as fast as he could. In doing so, B fell off his cycle. He left his cycle behind and made good his escape. Thereupon X removed the bicycle to his house. There was evidence that X refused to hand over the bicycle to the Excise Inspector or to the Police Vidane who later asked for the bicycle. X was indicted for theft but the charge failed because the court was not satisfied that a dishonest intention on his part existed.

(iii) It is not essential to a conviction of theft that the accused should have intended to acquire the property permanently or to deprive the complainant of the latter's property permanently. A taking of the property for a limited period of time is sufficient to warrant imposition of liability. This has been asserted in several cases.[44] In *Leon*[45] the accused persons had taken a bull belonging to the complainant and used it in a cart which was the property of the first accused to go to another village where the second accused's sister lived. It appeared from the evidence that the accused persons intended to return the bull to the complainant after they had made use of it for the purpose of their journey and that they had no intention of taking the animal away from its owner permanently. Jayewardene A. J. held that a dishonest intention had been manifested in these circumstances. His Lordship stated: "Temporary deprivation, if dishonest, is sufficient. In this case the accused acted 'dishonestly', according to the definition of the term dishonestly' in the Penal Code, for they removed and retained the animal wrongfully, although it may be for a temporary purpose."[46]

41. *Kanacasabay* (1892) 1 S.C.R. 31.
42. (1880) 3 S.C.C. 131.
43. (1928) 5 Times of Cey. 133.
44. *Ponnuswamy* v. *Muttu velu* (1900) 1 Br. 57; *Peries* (1923) 5 C.L. Rec. 130.
45. (1923) 25 N.L.R. 138.
46. At p. 139.

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(iv) A taking or moving of property solely with the intention of causing annoyance to the complainant is not adequate to constitute the *mens rea* necessary to complete the offence of theft. In *Gunesekera* v. *Solomon*[47] Bertram C. J. said: "In this case the Magistrate says that there can be no doubt that the accused were not bent so much on stealing the bull and half cart as on causing annoyance or injury to the complainant by their driving away the cart and bull. The injury there referred to is not an injury in the nature of wrongful loss. It is clear that this was an act of trespass of a malicious nature done with the object of causing annoyance, and I do not think that it can be considered as theft within the meaning of our law."[48]

It is submitted that the cases of *Ponnuswamy* v. *Muttu Velu*,[49] *Peries*[50] and *Leon*[51] are reconcilable with the decision by Bertram C. J. in *Gunasekera* v. *Solomon.* In the former cases, although the property was taken temporarily, the taking was done with the intention of causing wrongful gain or wrongful loss—an element which was not established on the facts of *Gunesekera* v. *Solomon.*

(v) Imputability of bona fides to the accused negatives a dishonest intention on his part. An accused person who takes the property, believing in good faith that it belongs to him or that he has a limited right to it, cannot be said to have entertained a dishonest intention.[52]

Kadirawail v. *Kader Meedin*[53] was a case where the accused had taken some items of jewellery from the corpse of a woman who was his debtor at the time of her death. In the light of evidence that the accused had taken the jewellery quite openly in the presence of a neighbour and that he had declared his intention of retaining the jewellery as security for the debt, a dishonest intention was held not to have been proved.

The accused persons in *Ponnu* v. *Sinnatambi*[54] were renters of a grazing gound. They took away some goats belonging to the complainant who owed them money on account of animals tied in the pasture ground. The accused committed this act in the mistaken belief that they were entitled to do so as a means of securing payment. Schneider J., holding in appeal that the erroneous assumption made by the accused persons was inconsistent with a dishonest intention on their part, stated: "It cannot be said that the act of the accused in removing the animals was to cause wrongful loss to the complainant because, from the facts put before the Magistrate, the inference is

47. (1923) 25 N.L.R. 474.
48. At p. 475.
49. See note 44, *supra.*
50. ibid.
51. See note 45, *supra.*
52. Penal Code, section 366, illustration (p).
53. 1882 Wendt's Rep. 103.
54. (1922) 24 N.L.R. 248.

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obvious that the removal was due to a mistaken idea of their right to enforce payment".[55]

The intention of causing wrongful gain or wrongful loss involves knowledge in the accused (a) that the property is in the possession of another, and (b) that the person having possession had not consented to the removal of the property. Where either of these elements does not exist, a dishonest intention cannot be proved.

This is illustrated by the facts of *Gnanaprakasam* v. *Bulner*.[56] The accused was charged with having instructed her servant to bring her some coal from the railway premises. Her defence to the charge of abetment of theft was that she believed the cinders in the railway yard to be discarded property which could be appropriated by anyone. The accused's conviction was vitiated on the ground that her genuine belief that the property was *res derelictae* negatived a dishonest intention. In appeal, de Sampayo J. observed: "It is not necessary that the subject should, in fact, be a derelict; it is sufficient if the person charged bona fide believed it to be so .... There can be no intention to cause wrongful loss to (the owner) when it is in good faith believed that he has abandoned the property and no longer wishes to have it."[57]

The crucial issue in this regard is the subjective belief of the accused and not the adequacy of the grounds on which his belief is based. Thus, in *Saminaden Pulle* v. *Cornelis Appu*[58] Burnside C. J. expressed the view that a bona fide claim of right may be supported in circumstances where the accused was not able to assert even a "colourable title" to the property.

It is plain, however, that this doctrine requires cautious application. A distinction has to be made between mere pretence and genuine error.[59] It is for the court to decide, in the light of the circumstances of each case, whether a plea of bona fide claim of right is sufficiently borne out by the evidence. This plea, which had its origin in the English case law, has been accepted as applicable to Ceylon by a *cursus curiae*.[60]

Broome v. *Carolis*[61] was a case where the accused persons were able to demonstrate their bona fides conclusively by pointing out that the property in question was the subject of litigation. While a bona fide claim of right could be established quite easily in these circumstances, the Ceylon cases suggest that this

55. At p. 248.
56. (1916) 19 N.L.R. 190.
57. At p. 192.
58. (1892) 2 C.L. Rep. 22.
59. (1874) 1 Grenier 33. cf. *Wijesinghe* v. *de Saram* (1908) 2 Leader L.R. 40
60. See the cases cited at notes 53-61.
61. (1916) 19 N.L.R. 276.

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plea may be founded successfully on evidence which is much more slender in its effect.[62]

(vi) A state of intoxication, whether induced voluntarily or involuntarily, may be incompatible with a dishonest intention. In *Andris* v. *Don Charles*[63] it was held that the intoxicated condition of the accused militated against a conviction of theft. Pereira J. said: "Considering the condition of the accused at the time of the alleged offence, it is, to say the least, very doubtful that he intended to commit theft. He does not appear to have subsequently misappropriated the property. The string of beads was eventually found on the window of the complainant's own house."[64]

(f) *Ancillary Matters*

The following procedural and other points may be noted *en passant*:

(i) Our courts have insisted that a complete description of the goods in respect of which the offence of theft is alleged to have been committed,[65] together with the name of the person from whose possession they were taken,[66] should be clearly specified in the indictment. "Head of cattle described in the charge sheet"[67] has been held to be an insufficient description.

(ii) The law of procedure contains a provision that 'For every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately".[68] One of the exceptions to this principle is that three offences of the same kind, alleged to have been committed within a year, may be charged together.[69] It has been held that the combination of a charge of theft with an alternative charge of assisting in the concealment or disposal of stolen property, does not amount to a misjoinder of charges.[70]

(iii) In cases of doubt as to the identity of the offence which had been committed, the Code of Criminal Procedure provides that "If the accused is charged with one offence and it appears that he committed a different offence for which he might have been charged, he may be convicted of the offence which he is shown to have committed although he was not charged with it".[71]

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62. See, for example, note 58, *supra*.
63. (1913) 17 N.L.R. 95.
64. At p. 96.
65. *Dias* v. *Ferdinando* (1916) 3 C.W.R. 267.
66. *Laisahami* v. *Sahabanda* (1889) 8 S.C.C. 205.
67. *Babbu Singho* v. *Joseph* (1946) 33 C.L.W. 106.
68. Code of Criminal Procedure, section 173.
69. Section 174.
70. *Karunaratne* v. *Inspector of Police, Bambalapitiya* (1947) 34 C.L.W. 104.
71. Section 177.

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On the basis of this provision, it has been held[72] that a person charged with robbery under section 380 of the Penal Code may be convicted of theft under section 367. Similarly, a person charged with theft under section 367 may be convicted of assisting in the disposal of stolen property under section 369.[73] Where seven accused are charged with theft, three of them may be convicted of theft and the four others of dishonestly receiving or retaining stolen property.[74]

(iv) A principle governing the quantum of punishment is that "Where anything is 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 offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences".[75] In keeping with this provision, it has been held that, where theft and housebreaking by night were committed in the same dwelling house and during the same transaction, distinct sentences ought not to be imposed.[76] Likewise, where an accused person was proved to have committed theft of a hackery and a bull at the same time, it was held that conviction of only one offence was proper.[77]

(v) A presumption of fact on which convictions of theft are often based, may be succinctly discussed at this point. The Evidence Ordinance recognizes the principle that "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case".[78] A specific illustration of this principle is declared to be that "A man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen, unless he can account for his possession".[79]

A long line of Ceylon cases has given effect to this presumption of fact.[80] Thus, workmen employed at the railway workshop who were found the same evening with sixteen rods of soldering lead in their waist about one hundred fathoms from their place of work soon after the workshop was closed for the day,[81] a person who was found in possession of stolen goods

72. *Podi Sinno* (1908) 11 N.L.R. 235.
73. *Piyasena* (1942) 44 N.L.R. 58.
74. *Jayasena* (1947) 48 N.L.R. 241.
75. Penal Code, section 67.
76. *Cara* (1895) 4 N.L.R. 55. *Contra*: *Arnolis Appu* (1904) 2 Bal. Rep. 81.
77. *Abeywickrema* v. *Babunay* (1897) 2 N.L.R. 344.
78. Section 114. 79. Illustration (a)
80. See, for example, *Dissan* (1878) 1 S.C.C. 31 and *Woods* v. *Cader Ibrahim* (1884) 6 S.C.C. 36.
81. *Banda* v. *Andre Appu* (1923) 25 N.L.R. 218.

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immediately after the theft at a spot to which footsteps led from the house where the theft had taken place,[82] and a person who was found in possession of wire which had been stolen from an estate a fortnight earlier[83] have all been convicted of theft by the courts of Ceylon on the footing of the presumption of fact embodied in the Evidence Ordinance.

However, several inherent limitations operate to confine appropriately the area of this presumption of fact:

(1) The presumption applies only where the property is found in the accused's possession *soon after* the theft had taken place.[84] Possession of a cheque eight months after it had been stolen, has been held not to justify invocation of the presumption.[85] A similar view has been taken in regard to the possession of cattle one year after the theft.[86] In all these cases the interval between the theft and the accused's possession of the stolen property was considered too long to render the presumption applicable.

(2) It is a requirement that the accused should have had *exclusive* possession of the property. Where the stolen property is found in a room which the accused shares with others, *prima facie* the presumption does not apply, since the guilt of the others is no less probable than that of the accused.[87] A similar view has been adopted in regard to a boutique occupied by two brothers.[88] A car in which several persons were travelling, would be treated likewise.[89]

(3) Actual possession of the property by the accused is essential. It is not sufficient that the accused pointed out the place where the stolen property was later discovered.[90]

(4) Cogent evidence in regard to identification of the stolen property is indispensable.[91]

A point which requires emphasis is that the principle involved represents no more than a presumption which is necessarily tentative in its effect. In the first place, the court will not have recourse to the presumption in circumstances where the inference required by the presumption cannot be reasonably drawn—for example, where stolen money is found in the possession of a shopkeeper whose business makes it necessary

82. *Naggappa Chetty* v. *Silva* (1901) 5 N.L.R. 295.
83. *Elwell* v. *Siribarahamy* (1908) 3 A.C.R. Suppl. p. vi.
84. cf. *Wannihamy* v. *Mudalihamy* (1898) 3 Browne 139.
85. *Miskin* v. *Ramaiyah* (1898) 3 Browne 141.
86. *Perera* v. *Pemiyanu* (1905) 1 Leader L.R. 54.
87. *Punchi* v. *Baba Appu* (1898) 3 N.L.R. 170.
88. (1909) 6 C.L. Rev. Notes p. 64.
89. *Khan* v. *Kanapathy* (1937) 9 C.L.W. 21.
90. *Sumanasena* (1951) 52 N.L.R. 400.
91. *R. M. Matale South* v. *Goonesekera* (1905) Leem. Rep. 82; *Van Cuylenberg* v. *Duraisamy* (1937) 2 C.L.J. 187.

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for him to accept money from unknown persons.[92] Secondly, the presumption is rebutted no sooner than the accused is able to offer an innocent explanation of his possession.[93] Once this happens, the prosecution is bound to establish affirmatively the requisites of the offence without the aid of any presumption.

(B) *Aggravated Forms of the Offence*

The basic offence of theft is punishable with imprisonment of either description for a term which may extend to three years, or with a fine, or with both.[94]

However, an enhanced penalty applies in four distinct situations. The factor making for aggravation of liability may have reference to (i) the nature of the article stolen, or (ii) the place where the theft is committed, or (iii) the relationship between the owner of the property and the person responsible for the theft, or (iv) the nature of the preparation which preceded the commission of theft.

(i) Theft of two categories of things is specifically differentiated in regard to sentence, in that the punishment of whipping is available in this context, in addition to the other penalties prescribed by law.[95] The two categories of things differentiated in this manner are (a) particular kinds of animals—namely, any bull, cow, steer, buffalo, heifer or calf; and (b) any fruit, vegetable or other praedial production, or any cultivated root or plant used or capable of being used for the food of man or beast, or for medicine, distilling or dyeing, or in the course of any manufacture.[96]

In regard to category (a), it has been held that the list given is exhaustive and that no extension by analogy is permissible. Thus, a goat is not included.[97]

(ii) Where the theft takes place in any building, tent or vessel which is used as a human dwelling or for the custody of property, the punishment which may be inflicted is significantly increased.[98]

(iii) Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, is liable to be punished with greater severity.[99]

(iv) A person who commits theft, having made preparation for causing death or hurt or restraint, or fear of death or of

92. Evidence Ordinance, section 114, comment on illustration (a).
93. ibid.
94. Penal Code, section 367.
95. Penal Code, section 368.
96. ibid.
97. *Silva* v. *Sala Guru* (1935) 37 N.L.R. 335.
98. Penal Code, section 369.
99. Penal Code, section 370.

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hurt or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, incurs a heavier penalty than is ordinarily applicable to the offence of theft.[100]

II. EXTORTION

(A) *Essential Requisites of Liability*

The definition of extortion in our law is set out in section 372 of the Penal Code which declares that "Whoever intentionally puts any person in fear of any injury to that person or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion".

The components of the offence may be investigated in turn:

(a) There must be an intentional inducement of fear in the mind of some person. The offence is of extensive scope in this respect, as indicated by several factors:

(i) The word "injury" receives an extremely wide definition. It envelopes "any harm whatever, illegally caused to any person in body, mind, reputation or property"; [101]

(ii) The injury envisaged need not be to the person in whom fear was instilled, but may have been threatened to any other person.

(b) Implicit in the first requirement is the making or holding out of some threat. Here, again, since the threat may relate to harm in respect of any of the interests enumerated in the definition of "injury", it follows that a very extensive variety of threats is encompassed by the ambit of the offence. Thus, a threat to publish a defamatory statement is sufficient.[102] A threat may be implied from conduct.

(c) The element of dishonesty is a requirement of liability for extortion, in that the accused, by inculcating fear in another person, should dishonestly induce him to commit a particular act. The meaning of a "dishonest intention" is the same in this context as in that of theft.

(d) The person put in fear should be led to deliver any one of the things specified. In this respect, too, the wide scope of the offence is reflected in the feature that the property or valuable security need not necessarily be delivered to the person responsible for the instilling of fear. Handing over of the property or valuable security to *any person* is sufficient.

100. id. section 371. 101. Penal Code, section 43.
102. Penal Code, section 372, illustration (a).

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The following aspects of liability for extortion may be dealt with briefly:

(i) The offence of theft is restricted in terms to movable property, but no comparable limitation is directly postulated in regard to extortion. Can it be argued, then, that the offence of extortion may be committed in respect of both movable and immovable property? On a construction of the offence, the better view seems to be that only movables can form the subject of extortion. The context appears impliedly to contemplate this limitation, since only movable property is capable of delivery.

(ii) If there is no proof of intention to cause wrongful loss or wrongful gain, one of the essential requisites of liability—namely, the existence of a dishonest intention—is lacking, and a charge of extortion must inevitably fail in these circumstances. In other words, the situation must be such that the handing over of property or any valuable security by the person to whom the threat or menace is addressed, amounts to a delivery involving wrongful gain or wrongful loss.

This element was held not to have been established, and the accused was consequently exonerated from liability, in *Thorne* v. *Motor Trade Association*,[103] an English case. The defendant association had rules intended to prevent undercutting. The rules provided that any person, whether a member or not, who was guilty of undercutting, should be placed on a "stop list" which entailed that no member of the association could trade with the offender. Any member who disregarded this prohibition, was himself liable to be placed on the "stop list". However, the rules went on to provide that an offender could be given the option of paying a fine. The question for decision was whether the offence of blackmail—the equivalent in English law of the Ceylon offence of extortion—could be made out in these circumstances.

Lord Atkin's speech in the House of Lords contained the following vital passage; "To my mind, the key to the situation is to be found in the fact that to put a man's name on a 'stop list' in such circumstances as the present is not a wrongful act: does not infringe any right of the person so pilloried. . . . It is an act done in lawful furtherance of business interests, and though done in combination, is done without any express intent to injure the person whose name is published".[104] It was further stated: "It appears to me that if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business, he may also lawfully, if he is still acting in furtherance of his business interests, offer

103. (1937) A.C. 797.
104. cf. *Ware and de Freville* v. *Motor Trade Association* (1921) 3 K.B. 40.

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that other to accept a sum of money as an alternative to doing the injurious acts. He must no doubt be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money".[105]

In the circumstances envisaged in *Thorne*'s case, no liability for extortion would be recognized in Ceylon, since payment of the money does not result in wrongful loss to the payer or any other person, or wrongful gain to the payee or to someone else.

(iii) Does an honest belief in the accused that the money or property may be properly claimed from the complainant, exclude liability for extortion on the part of the accused? The answer would appear to be in the negative.

The problem is illustrated by the facts of the English case of *Dymond*.[106] D wrote to X threatening that if he did not pay her money, she would sue him for indecent assault and let the town know of his conduct. She contended that the indecent assault had in fact taken place and that she considered herself legally entitled to demand payment. The English Court of Criminal Appeal unhesitatingly rejected this argument. The Earl of Reading C. J. declared: "It is for the jury to decide whether there was reasonable or probable cause for making the demand, and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it. The belief of the accused may, of course, be taken into consideration by the judge in passing sentence but, in our view, it is not material in ascertaining whether the crime has been committed".

However, the generality of this view was subjected to criticism by Lord Atkin in *Thorne*'s case. His Lordship said: "Language was used in the judgment (in *Dymond*'s case) which seemed to indicate that, even if the mistake were as to a fact which would have constituted a reasonable cause, such a mistake would be irrelevant; in other words, there must be in fact a cause, not merely a genuine belief in a cause. This seems to me incautiously expressed: and I do not think that doubt should exist upon a well-established proposition in criminal law that normally a genuine belief in the existence of facts as apart from law, which if they existed would constitute a defence, is itself a sufficient defence."

The better view for the law of Ceylon, it may be submitted is that the concepts of "wrongful gain" and "wrongful loss" involve essentially objective criteria, in so far as the material question is whether the gain or the loss, as the case may be, is characterized by the law as wrongful rather than whether the

105. See also *Sorrell* v. *Smith* (1925) A.C. 700.
106. (1920) 2 K.B. 260.

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accused regarded the gain or the loss as wrongful. In these circumstances, a misconception under which the accused laboured would enable him to establish a ground of exculpation only if the requisites contemplated by the general exception which is incorporated in section 72 of the Penal Code, are shown to be satisfied.[107]

(B) *Allied and Aggravated Offences*

The punishment for extortion is imprisonment of either description for a term which may extend to three years, or a fine, or both.[108]

However, this punishment is appreciably enhanced in two situations:

(i) where extortion is committed by putting any person in fear of death or of grievous hurt to that person or to any other;[109] and

(ii) where extortion is committed by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence.[110]

In both these situations, the quality which operates to increase the quantum of punishment is the seriousness of the threat made by the accused as a means of inducing delivery of any property or valuable security. The essentials of liability are basically the same as those applicable to a typical case of extortion, but the menace involved is of a relatively graver character.

Apart from these aggravated forms of extortion, the Penal Code recognizes three offences which are allied to, but remain distinct from, the crime of extortion. These are:

(i) in order to the commission of extortion, putting any person in fear or attempting to put any person in fear of any injury.[111]

(ii) in order to the commission of extortion, putting or attempting to put any person in fear of death or of grievous hurt to that person or to any other;[112]

(iii) in order to the commission of extortion, putting or attempting to put any person in fear of any accusation against

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107. cf. G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.) pp. 48-58.
108. Penal Code, section 373.
109. Section 375.
110. Section 377.
111. Section 374.
112. Section 376.

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that person or any other of having committed or attempted to commit an offence punishable with death or with imprisonment for a term which may extend to ten years or more.[113]

Each of these offences derives from an act which is done as a means of committing extortion. This act is preliminary to the commission of extortion. The initial act, while not sufficient *per se* to warrant liability for extortion, is conceived of as a distinct offence and is punishable separately.

III. ROBBERY

(A) *Elements of Liability*

The definition of robbery is to be found in section 379 of the Penal Code. Every case of robbery involves either theft or extortion. These alternatives require separate treatment.

(a) *When Theft is Robbery*

Three requirements must be satisfied before theft can be treated as robbery: (a) The accused should voluntarily[114] cause or attempt to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint; (b) The accused should cause any one of these things (i) in order to the committing of the theft, or (ii) in carrying away or attempting to carry away property obtained by the theft, or (iii) in committing the theft; and (c) The accused should cause one of the things specified in (i) for any one of the ends referred to in (ii).

These elements, of course, are required to be proved in addition to the ingredients of the offence of theft. In this sense, then, robbery may be described as a composite offence, in that it comprises theft, with an additional element superimposed. This extra element, at bottom, consists of the use or attempted use of force or violence, in specified degrees and for particular purposes which are explicitly formulated.[115]

A crucial point, however, is that the mere application or attempted application of force by the accused does not suffice to convert the offence of theft into that of robbery. The use of force must be directed towards the commission or the objectives of the theft in one of the three ways described. Any use of force which is not involved in or is extraneous to these objects, is ineffective to enable theft to be treated as robbery. Force which is unrelated to the attainment of these objectives, cannot be said to have been availed of for the ends enumerated, and is hence extrinsic to the essential elements of the definition of robbery.

113. Section 378.
114. Penal Code, section 37.
115. Penal Code, section 379.

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The purpose for which force is resorted to by the accused is a consideration that has received emphasis in the case law. These cases demonstrate the scope of the offence and, in particular, enable demarcation of the limits of liability for robbery by reference to the objective underlying recourse to violence.[116]

The facts of *Saviel* v. *Juan Appu*[117] were that A, who had committed theft of a purse from B, was seized by C and attempted at this stage to stab C. The question was whether A had committed robbery. In answering this question in the affirmative, Wood Renton J. said: "The whole incident formed a single transaction, and the violence was offered by the accused in order to get away safely with stolen property. The accused committed the offence of robbery as against the complainant, in spite of the fact that the original taking of the purse took place under circumstances which, if they had stood alone, would only have amounted to theft".[118] In this case it was the fact that C attempted to recover the purse from A soon after the commission of the theft, that enabled the court to hold that the sequence of events could be viewed as a single transaction. The conclusion that the offence of robbery had been committed, was justified on the basis that force was applied for one of the purposes adverted to in the definition.

In *Sinnatamby* v. *Veerakatti*[119] Browne A. J. held in appeal that an accused person who, in order to enforce his claim against the complainant in respect of money owed by the latter to the accused, wrested the complainant's umbrella and so held the complainant's shawl either to take money from, or to cause money to fall from, a knot in the shawl, could be convicted of robbery. This was a situation in which force was used in the commission of the theft itself, so that the accused's liability for robbery cannot be disputed.

By contrast, the conclusion has been supported in several other cases that no liability for robbery could be recognized, since recourse was not had to violence, nor was the use of force attempted, for one of the purposes specified by the definition of the offence. The facts of *Suppiah Kankanama* v. *Martin*[120] may be briefly stated. The complainant, an estate labourer, was proceeding to his lines after receiving his salary when the first accused accosted him and demanded payment of a debt which the complainant was said to owe him. A disagreement ensued in regard to the amount of the debt. The complainant was then dragged into the first accused's garden where the complainant was forcibly held by the hair and by the waist by

116. cf. Penal Code, section 379, illustration (a).
117. (1910) 2 Cur. L.R. 114.
118. At p. 115.
119. (1901) 5 N.L.R. 14.
120. (1920) 8 C.W.R. 244.

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two persons. At this stage the second accused found some money in the complainant's waist. He took the money and handed it to the first accused who, in turn, entrusted it to the fourth accused. The latter immediately ran away with the money.

Schneider A. J. held that none of the accused persons could be convicted of robbery on these facts. His Lordship observed: "It seems to me that the inference to be drawn from his evidence is that the complainant had been dragged into the garden probably with the intention of compelling payment of the debt due to the first accused. The money, being discovered unexpectedly, was handed by the second accused to the first and was carried away by the fourth without thought as to what they were actually doing or that they were committing an offence. The facts, in my opinion, are not sufficient to sustain the charge of robbery. Theft is robbery only when the hurt or restraint caused to the complainant is shown to have been intended for, or made subservient to, any of the purposes mentioned in the definition. The words 'for that end' imply this".[121]

Perera v. *Fernando*[122] was a case which arose from an altercation between the complainant and the accused on the public highway. The accused, who was proved to have been at fault from the outset, assaulted the complainant. In the course of the ensuing scuffle, the accused seized the complainant by the hand. At this stage a ring which the complainant was wearing, slipped off his fingers. The accused took the ring. The Magistrate had held that the accused may have had no antecedent intention of taking the ring but that, when the ring came into his hands while he was engaged in bullying the complainant, the accused appropriated it and failed to return it. In appeal, the court stated: "Robbery is theft if, in order to commit theft or in order to take away the property, the offender voluntarily causes or attempts to cause hurt. In this case, the order of things is reversed. The assault and all the trouble were quite antecedent to the taking of the ring".[123] In the court's opinion, there was no justification for holding, on the facts of the case, that force had been used in order to remove the ring. It followed that a conviction of robbery could not be supported.

In *Seenitamby* v. *Inspector of Police, Batticaloa*[124] the accused was charged with robbery of a gun. According to the evidence presented by the prosecution, the complainant and two other persons met the accused at a time when the complainant was carrying a gun. The accused then asked the complainant to lend him the gun, as he wished to go shooting the following day. On the complainant's refusing to do so, there ensued a scuffle

121. At p. 245.
122. (1915) 1 C.W.R. 88.
123. At p. 88.
124. (1945) 46 N.L.R. 551.

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in the course of which the accused gained possession of the gun. He then took the gun back to his own house. The evidence suggested that relations between the accused and the complainant had been strained for some time. It was held in appeal that the conviction of robbery could not be allowed to stand. Rose J. said: "It seems to me that the learned Magistrate failed to appreciate that, on the facts narrated, there must be held to be—putting the matter at its lowest—a reasonable doubt as to whether the necessary elements of the offence of robbery are present"[125] The reason for disturbing the conviction was the uncertainty as to the purpose for which force had been employed.

(b) *When Extortion is Robbery*

Extortion is treated as robbery when, in addition to the ingredients of extortion, it is proved that the accused (i) at the time of committing the extortion, (ii) was in the presence of the person put in fear, and (iii) committed the extortion by putting that person in fear of instant death, of instant hurt or of instant wrongful restraint to that person or to some other person, and (iv) by so putting in fear, induced the person put in fear then and there to deliver up the thing extorted.[126]

The simple offence of extortion may be distinguished from robbery based on extortion, in the following respects:

(i) Extortion may be committed by means of a letter or a message, while robbery requires the physical presence at the same place of both the victim and the accused person. For the purpose of the definition of robbery based on extortion, the offender is said to be "present" if he is sufficiently near to put the other person in fear of instant death; of instant hurt or of instant wrongful restraint.[127]

(2) A threat to cause harm illegally to any person in body, mind, reputation or property[128] is a sufficient basis of liability for extortion. Robbery, however, involves a stricter definition of the effect of the accused's threat. The menace must relate to the causing of instant death, instant hurt or instant wrongful restraint.

(3) It is essential to conviction of robbery, but not of extortion, that the accused was in a position to carry out his threat instantaneously. This is made clear by a comparison of illustrations (c) and (d) attached to section 379. In the first case the accused, at the time of making the threat, has the ability to cause the death of the victim's child by flinging it down a precipice. In the second case, this element is not necessarily

125. At p. 552.
126. Penal Code, section 379.
127. Explanation to section 379.
128. Penal Code, section 43.

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satisfied, since it is contemplated that the child's death would be brought about not immediately but after an interval. The accused's words in the second case are: "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees."[129] This is declared to be extortion but not robbery unless the victim is put in fear of the *instant* death of his child.[130]

(4) It is an indispensable feature of robbery that the person in whom fear is instilled, is prevailed upon to deliver the property then and there. By contrast, the requisites of liability for extortion can be satisfied in circumstances where there is a time lag between the making of the threat and the delivery of money or property.

Although the elements of extortion are capable of being used as a foundation of liability for robbery, the latter offence involves additional characteristics which are reflected in the four differences between these offences.

The maximum punishment for robbery is the same, whether the charge of robbery is based on theft or on extortion.[131]

(B) *Procedural and Other Aspects*

(i) Several points pertaining to jurisdiction emerge from the case law. In a case where the accused, although charged with causing hurt and with robbery, was convicted only of the former offence, and where the evidence suggested that the complainant had tacked on the charge of robbery solely with a view to evading the jurisdiction of the Village Tribunal, it was held that the Magistrate lacked jurisdiction to try the case.[132] Where the evidence is sufficient to establish a charge of robbery, a Magistrate acts improperly in splitting up the indictment into separate charge of theft and assault and trying the accused for theft.[133]

(ii) In circumstances where hurt is an integral part of the offence of robbery, an accused person who is convicted of robbery should not receive a separate sentence on the charge of voluntarily causing hurt.[134] In an early anonymous case[135] Koch J. declared that, when no more hurt has been caused than is inherent in robbery, a separate sentence for the infliction of hurt is not justified, since this element is subsumed in the offence of robbery.

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129. Penal Code, illustration (d) to section 379.
130. ibid.
131. Penal Code, section 380.
132. *James* v. *Silva* (1943) 44 N.L.R. 300.
133. *Abdul Gafoor* v. *Carolis* (1900) 1 Browne 108.
134. *Alwis Appu* v. *Bansagayah* (1947) 49 N.L.R. 66.
135. (1899) Koch's Rep. 1.

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(iii) Where an accused person is charged with assault and robbery and the Magistrate forms the opinion that the charge of robbery is unfounded, he is not entitled to refuse to proceed with the inquiry into the other charge on the basis that he does not wish to act on the complainant's evidence.[136] The fact that the complainant embellishes his case by falsely introducing a charge of robbery is not a sufficient reason for declining to investigate the allegation of assault.[137] Moreover, in a situation where the accused is indicted for both robbery and voluntarily causing hurt, a Magistrate who disbelieves the charge of robbery but has not formally disposed of the charge of robbery, cannot proceed to try the accused summarily for causing hurt. The principle involved is that a lesser offence cannot be selected for trial if the evidence may support liability for a graver offence.[138]

(iv) The Code of Criminal Procedure, in certain specified circumstances,[139] permits a person to be convicted of an offence different from that with which he was charged. In keeping with this provision, it has been held that a person indicted for voluntarily causing hurt in committing robbery may be convicted, where this charge fails, of the simple offence of voluntarily causing hurt.[140]

(v) It has been held that the offence of robbery, when it is committed on a highway between sunset and sunrise, is not triable summarily by a Magistrate's Court even if the value of the property in respect of which the offence is committed does not exceed two hundred rupees. The only Court other than the Supreme Court which has jurisdiction to try the offence, is the District Court.[141]

(vi) An interesting point arose for decision in *Podi Sinno*.[142] The accused was charged with robbery but was convicted by the District Judge only of the lesser offence of theft. The District Court purported to act on the basis of the provision contained in the Criminal Procedure Code that "When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it".[143]

136. *Gunawardene* v. *Samarakoon* (1920) 21 N.L.R. 411.
137. ibid.
138. *Sirineris* v. *James* (1901) 5 N.L.R. 93.
139. Section 177.
140. *Juan* (1894) 3 S.C.R. 22; *Amadoris* v. *Rajasin* (1935) 4 C.L.W. 19.
141. *Sumathipala* v. *Inspector of Police, Crimes* (1969) 72 N.L.R. 378.
142. (1908) 2 Leader L.R. 15.
143. Section 183(1). See section 178 (1) Code of Criminal Procedure No. 15 of 1979

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In appeal, it was contended on behalf of the accused that this provision was not applicable to the facts of the case, since theft was not necessarily the minor offence on which the graver charge of robbery could be founded. The offence of extortion was available as an alternative base of liability for robbery. This contention was not successful, however. The Supreme Court expressed the view that this objection could be sustained only if the accused had been prejudiced in the conduct of his defence as a result of being taken by surprise. Wendt J. was satisfied that this had not happened in this particular case, since the evidence offered by the prosecution gave the accused ample notice of the form of robbery which was sought to be proved against him.

(C) *Allied Offences*

The perpetration of other acts by an accused person while he is engaged in committing robbery may involve liability for graver substantive offences such as (a) voluntarily causing hurt in committing robbery[144] and (b) robbery with attempt to cause death or grievous hurt.[145] *Hinniya*[146] was a case where the second of these offences was held to have been established. An accused person who, in attempting to commit robbery, had drawn a knife and tried to stab the complainant, was held liable for the more serious offence.

Other allied offences constituted by the Penal Code are (a) attempt to commit robbery,[147] (b) attempt to commit robbery when armed with a deadly weapon[148] and (c) belonging to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery.[149] Each of these represents a distinct offence for which a separate penalty is prescribed by law.[150]

IV. CRIMINAL MISAPPROPRIATION OF PROPERTY

(A) *Components of Liability*

This offence is declared to consist of dishonestly misappropriating or converting to one's own use any movable property.[151] The *actus reus* and *mens rea* of the offence may be investigated separately.

(a) *The Actus Reus*

The central idea involved in the concepts of 'misappropriation' and 'conversion' is the setting apart of property for the

144. Penal Code, section 382. 145. Section 383.
146. (1896) 2 N.L.R. 241.
147. Penal Code, section 381.
148. Section 384. 149. Section 385.
150. For a discussion of problems concerning attempts, see G. L. Peiris, *General Principles of Criminal Liability in Ceylon* (1980, 2nd ed.), Chapter 10.
151. Penal Code, section 386.

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wrong person or for the wrong purpose. The *actus reus* of the offence requires that the property should be used or exploited for the benefit of some person who is not legally entitled to the property.

What constitutes 'misappropriation' or 'conversion' in the context of this offence was considered by the Supreme Court in *Attorney-General* v. *Menthis*.[152] In this case, two bulls belonging to S were let loose by his herdsman for grazing on a pasture land. The accused was subsequently found at 10.45 in the night driving the bulls away from the pasture land at a distance of 1¼ miles in circumstances showing that the accused intended to take the animals for his own use. The effect of the evidence was that the accused was driving the bulls to a place where he ordinarily kept his own animals. One of the issues was whether the *actus reus* of criminal misapproriation was established in this situation.

The Magistrate had expressed the view that there was no proof of any overt act indicative of misappropriation or conversion of the animals by the accused. Disagreeing with this view, Sinnetamby J. said in appeal: "I think it must be conceded that the nature of the overt act required to constitute conversion depends on the article converted. If one finds an article which is in common daily use, has no identifying marks, can easily be carried on one's person, and takes it, then, in the absence of other evidence, the mere taking is not sufficient to indicate a conversion because it may be a neutral act consistent with an innocent taking with a view to returning it to the lawful owner".[153] However, the facts of *Menthis*' case were held to be different, and a sufficient misappropriation or conversion was considered to have been proved. It is a question of fact to be determined in relation to the circumstances of each case whether an adequate conversion of the property to the accused's use has been established or not. In *Menthis*' case the time of night when the accused drove the cattle and the distance at which they were found, were among the factors that the court construed as significant.

The offence of criminal misappropriation of property can be committed only in respect of *res mobiles*. This is an inherent limitation embodied in the definition of the offence. The interpretation of 'movable property' is the same in this context as it is in relation to theft.[154]

It is not an essential requirement that the prosecution should point out the person to whom the property belongs. What is necessary is that the accused should not be entitled to the use

152. (1960) 61 N.L.R. 561. 153. At p. 562.
154. See the discussion of theft at notes 1-3, *supra*.

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and enjoyment of the property. In *Barber* v. *Abdulla*[155] the Supreme Court held that, in order to maintain a charge of criminal misappropriation, the prosecution need show only that the property belonged to some person other than the accused. De Sampayo J. said: "The offence of criminal misappropriation consists in the dishonest conversion to the use of the party charged of the property of another...I do not think it is absolutely necessary that the actual owner should be disclosed in all cases. It may be sufficient if there is some person entitled to the possession of the goods misappropriated".[156]

The *actus reus* of this offence, then, comprises three facets: (i) There should be misappropriation or conversion of the property by the accused; (ii) The property in respect of which the offence is alleged to have been committed, must be movable property; and (iii) The property should belong to some person other than the accused.

(b) *The Mens Rea*

The requisite *mens rea* derives from the element of dishonesty. The content of a dishonest intention in this area is indistinguishable from that required to complete the offence of theft.[157]

A controversial issue concerns the time when a dishonest intention is entertained by the accused. The question is whether a charge of criminal misappropriation of property can be supported only in circumstances which disclose an initial innocent taking of the property followed by a guilty state of mind at a later stage or whether the ambit of the offence extends to cases where the initial acquisition of the property is itself dishonest.

A series of Ceylon cases has held that an initial innocent taking represents an indispensable feature of criminal misappropriation of property. In *Georgesy* v. *Seyadu Saibo*[158] the accused had dishonestly obtained possession of a cheque which he cashed and appropriated to his own use. It was held in appeal that liability for criminal misappropriation of property could not be imposed. Middleton J. said: "Now, all the cases which have been decided by the Indian Courts point to the conclusion that, in order to constitute the offence of criminal misappropriation, there must be first an innocent possession...and then a subsequent change of intention. If I find that the man dishonestly came by the cheque, as I do, although that would put him in a worse position morally than if he had come by it in a way such as would make him amenable under section 386,

155. (1920) 7 C.W.R. 144. 156. At p. 145.
157. cf. the discussion at notes 29-64 of this Chapter.
158. (1902) 3 Browne's Rep. 88.

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yet I am bound to confess that it is impossible to meet the weight of authority that has been put before me and to say that the original misappropriation constitutes an offence under section 386".[159]

Kanavadipillai v. *Koswatte*[160] was a case where there was in fact an innocent taking, but the court observed emphatically that there could be no criminal misappropriation unless possession of the property alleged to have been misappropriated was come by innocently and retained by a subsequent change of intention. However, the evidence in this case was insufficient to indicate a subsequent dishonest conversion at all, so that the point of time at which the dishonest intention was required to be entertained, was not a matter that was strictly relevant to the decision. Pereira J. stated: "Could it be safely said on the facts proved that the accused appropriated or converted to his own use the box of matches at all? I do not think so. He merely held it until the complainant accepted the price in the form in which the accused tendered it, believing apparently that the complainant was bound to accept the price in that form, or until he could get change for his note elsewhere".[161] It is clear, therefore, that the proposition contained in the judgment in regard to the necessity of an initial innocent taking was not part of the *ratio decidendi* of the case.

In *Peries* v. *Anderson*[162] Y went to a boutique and, placing a twenty-five cents coin on a table, asked for some cigarettes. According to Y, the coin rolled into the drawer of the table. X, the boutique-keeper, denied receipt of the money and refused to give Y any cigarettes. Y complained to his master, A, who went to the boutique and asked X where the coin given by Y was. X pointed to a twenty-five cents coin on the floor saying "Here is your twenty-five cents". Not satisfied, A searched X's drawer where, according to A, he found the identcial coin given by Y. Drieberg J., holding that criminal misappropriation had been committed, placed stress on the fact that the original receipt of the coin by X was innocent.

In *Stickney* v. *Sinnatamby*[163] the accused borrowed a gun from the complainant and afterwards ran away with it. It was held that the accused's subsequent act amounted to criminal misappropriation, since he intended to return the gun to the complainant when he first took possession of it.

The view that an initial innocent taking is an ingredient of criminal misappropriation of property was expressed by the Supreme Court of Ceylon as recently as 1960. In *Gratiaen*

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159. At p. 90.
160. (1914) 4 Bal. Notes 74.
161. At p. 74.
162. (1928) 6 Times of Cey. 49.
163. (1886) 5 C.L. Rev. 112.

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Perera[164] Sinnetamby J. (with whom Weerasooriya J. agreed) observed: "To constitute misappropriation, the authorities seem to suggest that there must be an initial honest possession followed by a dishonest conversion".[165]

However, the principle emerging from this long line of decisions which go back to 1902, was questioned in *Attorney-General* v. *Menthis*[166]—a case decided a week after the judgment in *Gratiaen Perera*. In *Menthis*' case Sinnetamby J. examined the matter in greater detail than he had done in *Gratiaen Perera*, and reached the conclusion that, in order to constitute criminal misappropriation of property, it was not necessary that there should be an initial innocent taking followed by a subsequent dishonest change of intention. His Lordship said: "If the initial taking of the property not in the possession of anyone is dishonest, then, too, the offence is made out".[167] This view represents a clear departure from the effect of a *cursus curiae*.

The proposition formulated by Sinnetamby J. in *Menthis*' case derives slender support from the judgment in *Salgado* v. *Mudali Pulle*.[168] This was a case where the accused was charged with the theft of two buffaloes or, in the alternative, with dishonestly receiving or retaining the animals, knowing or having reason to believe that they were stolen. The cattle had disappeared from an estate on which they were tethered. The watcher had tied them up with strong rope, but it was possible that they strayed of their own accord from the estate which was unfenced on one side. The accused's version was that he found the buffaloes on the road and took them in the belief that they were animals which he himself had lost at some time previously. In appeal, Mosely S. P. J. declared: "It is clear, I think, that the conviction for theft cannot be sustained. The charge of retention stands on the same footing. Crown Counsel, however, contends that, since the defence has been disbelieved, the accused could have been convicted of criminal misappropriation. I think that the contention is sound".[169] It must be noted that this was a case where a dishonest intention was entertained by the accused contemporaneously with the acquisition of possession.

It is seen, therefore, that the cases of *Salgado* v. *Mudali Pulle* and *Attorney-General* v. *Menthis*, alone, are at variance with the generally held view that criminal misappropriation requires the effluxion of an interval of time between the gaining of physical possession and the formation of a dishonest intention. The view reflected in these two cases was disapproved, and the *cursus curiae* endorsed, by Weeramantry J., sitting alone, in

164. (1960) 61 N.L.R. 522.
165. At p. 525.
166. (1960) 61 N.L.R. 561.
167. At p. 565.
168. (1941) 43 N.L.R. 94.
169. At p. 95.

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Ranasinghe v. *Wijendra.*[170] The conclusion arrived at in this case is set out in the following passage: "It is my view upon a review of all the authorities that in the case of a charge of criminal misappropriation where the property is taken from the possession of another, such initial taking must be innocent, for this is the feature which marks out this offence from the offence of theft and other offences which may be committed. To view this matter otherwise may result in obscuring the line of demarcation between criminal misappropriation and such offences as theft and cheating".[171]

Weeramantry J. purported to distinguish the decision by Sinnetamby J. in *Menthis'* case on the basis that while, in *Menthis* the property was not in the possession of any person at the time it was taken by the accused, this could not be asserted in relation to the facts of *Ranasinghe* v. *Wijendra.* In the former case, the cattle had already left the possession of the owner or of the herdsman at the time they were taken by the accused. Sinnetamby J. stated: "They may well, as I have said, have strayed and then been taken possession of by the accused. In the alternative, the accused may have taken possession of the animals in the pasture land itself. Even in that case, in my opinion, they cannot be said to have been in the possession of the herdsman. There is nothing to show that the pasture land was enclosed or was under the control of the herdsman or was even the private property of the owner or the herdsman".[172]

This situation was quite different from that contemplated in *Ranasinghe* v. *Wijendra.* The complainant's version was that, on the day in question, a person whom he had known earlier told him that he could buy cigarettes at a reduced rate through the account of a person who was running a canteen and suggested that the complainant should give him some money with which cigarettes could be so purchased for the complainant. Acting on this representation, the complainant borrowed Rs. 20/- and took it to the Ceylinco building where that person brought the accused to him. The accused at that time had a parcel in his hand. The accused gave him the parcel and the complainant, in turn, gave the accused the sum of Rs. 20/-. The complainant took the parcel away and, on opening it, found that it contained cardboard boxes filled with paper. On these facts Weeramantry J. made the comment that "The present case is not a case where the sum of Rs. 20/- was not in the possession of anyone at the time it was taken".[173]

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170. (1970) 74 N.L.R. 38.
171. At p. 43.
172. (1960) 61 N.L.R. 561 at p. 563.
173. (1970) 74 N.L.R. 38 at p. 40.

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In view of this material difference between the factual contexts envisaged in the two cases Weeramantry J., in *Ranasinghe* v. *Wijendra*, was able to distinguish the decision in *Attorney-General* v. *Menthis*. Thus, *Menthis*' case was construed as authority only for the proposition that "If the initial taking of the property *not in the possession of anyone* is dishonest, then, too, the offence of criminal misappropriation is made out".[174] Since the requirement embodied in the italicized words was not satisfied in *Ranasinghe*'s case, it was technically possible to prevent the validity of the earlier decision from being vitiated by the ruling in the later case. Nevertheless, it seems undeniable that the general approach to the problem which Sinnetamby J. was inclined to favour, is considerably weakened by the tenor of the subsequent judgment in *Ranasinghe* v. *Wijendra*.

It is apparent, however, that the reasons for accepting the need for the effluxion of an interval of time between acquisition of the property and the formation of a dishonest intention as an integral characteristic of the offence of criminal misappropriation, are infinitely stronger in cases where the property was in the possession of some person at the time it was taken by the accused than in cases where the property was subject to no one's possession. This point may be illustrated by contrasting the facts of *Menthis*' case with those of *Ranasinghe* v. *Wijendra*. In the former case, the cattle were not in the complainant's possession at the time of their acquisition by the accused, so that a conviction of theft was necessarily excluded, it being an essential element of liability for theft that the property was taken out of the possession of some person. In these circumstances, if the court were to have held that a conviction of criminal misappropriation, too, could not be sustained, since the initial taking was itself dishonest, no means whatever would have been available for imposing punishment on the accused, and a lacuna in the law would be obvious. In this type of context, a cogent object of policy is attained by dispensing with the requirement in regard to an initial honest taking of the property. On the other hand, in a case like *Ranasinghe* v. *Wijendra*, conviction of other offences like cheating is possible despite the failure of the charge of criminal misappropriation, in that the property can be shown to have been in the complainant's possession at the material time. In this case, therefore, unlike in a situation such as that envisaged in *Menthis*, the morally unsatisfactory result that the accused is entirely exonerated from criminal liability if the charge of criminal misappropriation proves abortive, does not appear inevitable. Consequently, in *Ranasinghe* v. *Wijendra*, unlike in *Menthis*' case, the court is able to preserve the line of demarcation between

174. At p. 40.

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criminal misappropriation and some other offences against property *while convicting the accused of a different offence.* This consideration, it is submitted, largely accounts for the different reasoning emerging from the judgments in *Attorney-General* v. *Menthis* and *Ranasinghe* v. *Wijendra.*

In evaluating the significance of the decision by Weeramantry J. in *Ranasinghe*'s case, it may be said that the ultimate effect of the decision was to restore confidence in the correctness of the view established by the previous *cursus curiae* before it was disturbed by Sinnetamby J. 's judgment in *Menthis.* The law may now be regarded as settled that, in all cases where the property alleged to have been misappropriated is taken out of someone's possession, an initial taking bereft of a dishonest intention is indispensable to conviction of criminal misappropriation.

Some final remarks may be made as to the content and scope of the *mens rea* envisaged by the offence of criminal misappropriation. In *Fernando* v. *Charles*[175] it was said that, although the mere fact of a servant not paying over promptly to his master money received by him on account of the master does not establish this offence, a fraudulent failure to account for such money is tantamount to criminal misappropriation of it. Moncreiff J. held that the Magistrate was wrong in refusing to issue process in these circumstances.

In *Silva* v. *Banda*[176] A sold a bull to B who, in turn, sold it to C. No cattle voucher was executed in favour of B or C. A thereafter purported to sell the bull to D on a cattle voucher, duly executed. The offence of criminal misappropriation of property was held not to have been made out. In appeal, De Sampayo J. said: "The gist of the offence of criminal misappropriation is taking or converting to one's own use some movable property belonging to another person. In this case, whether D was the owner of the bull or not on the day in question, the accused did not take the bull out of D's possession, or in any way convert it to his own use. His acts may be described as a fraudulent attempt to claim property which he had already transferred to another person; but this is wholly insufficient to satisfy the definition of the offence of criminal misappropriation".[177] The physical requirement of misappropriation or conversion of property must be combined with the mental ingredient of dishonesty.

It may be noted that the law of Ceylon explicitly lays down, in regard to the offence of criminal misappropriation, the

175. (1900) 4 N.L.R. 215.
176. (1919) 21 N.L.R. 207.
177. At p. 208.

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principle that "A dishonest misappropriation for a time only is misappropriation within the meaning of this section".[178]

(c) *Principles Governing Lost Property*

The principal provision in this regard is that "A person who finds property not in the possession of any other person and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it".[179] What are reasonable means, and what constitutes a reasonable time in such a case, is declared to be a question of fact.[180]

A finder of lost property commits criminal misappropriation if the owner's name is indicated but the property is not returned to the owner. However, even where there is no indication as to the identity of the owner, the finder is not justified in converting the property to his own use. This would apply, for instance, to property found at a bus halt or a cinema. In such cases the finder is legally obliged to use reasonable means to ascertain the owner and to restore the property to him.

Furthermore, it is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it. It is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.[181]

These provisions were applied in *Jayeman* v. *Palaniandy*.[182] A lost a coat at or near a store. B, a labourer employed on a neighbouring estate, found the coat, converted it to his own use and told no one that he had found it. The conviction of criminal misappropriation was sustained in appeal. Clarence J. said: "In this case the defendant, according to his own account, did keep the coat a considerable time before he finally sold it, but used no means whatever to discover and give notice to the owner, and I agree with the Magistrate that there were reasonable means within his reach, viz., the simple act of informing his master which probably would have led to the discovery of the owner of the coat".[183]

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178. Penal Code, section 386, Explanation 1.
179. Penal Code, section 386, Explanation 2(i).
180. id., Explanation 2(ii).
181. id., Explanation 2(iii)
182. (1887) 8 S.C.C. 83.
183. At p. 83.

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The principles contained in the Penal Code in regard to appropriation of lost property are supplemented by the Lost Property Ordinance.[184] The latter Ordinance contains provision that "Any person throughout Ceylon who may find any money or goods, of whatsoever description the same may be, do and shall bring the same forthwith to the constable or the police station of the division or village in which the same may be found, which said constable or police headman shall forthwith report the circumstance to the nearest Magistrate, who shall cause public notice to be given of the same; and the finder shall, if no fraud appear to have been by him committed in the matter, receive from the person who may substantiate, within six months, a right to the property so found, one-tenth of the value thereof; and if no claimant shall appear or prove his right to the property within the period of six months, then the Magistrate shall cause the same to be sold, if the same be not money and shall pay one-half of the proceeds, or of the money, to the finder, and the remainder into the Treasury to the credit of the Consolidated Fund".[185] However, the penalty applicable to breach of this provision is one imposed by the Lost Property Ordinance itself.[186]

(d) *Rationale of the Offence*

Prior to the enactment of the Theft Act in 1967, the English law in this area was in an unsatisfactory condition. The chief reason for the anomalies which beset the pre-existing English law was the insistence that a dishonest intention had to be entertained by the accused at the time the property was taken if a conviction of larceny was to be obtained. It was a conceptual limitation of the offence of larceny at English common law that a dishonest intention formed after acquisition of possession, was not included in the ambit of liability.[187]

Anomalous results followed in the wake of the doctrine that *animus furandi* must exist at the time of initial taking of the property. In order to avoid the acquittal of dishonest persons, the English courts were compelled to place a strained construction on concepts and on terminology. A clear example is provided by the case of a bailee. Possession of the property would ordinarily be regarded as having passed to the bailee, but in order to secure the conviction of a bailee who dishonestly misappropriated the property after obtaining lawful possession of

184. Legislative Enactments (1956 ed.) Volume 3, Cap. 76.
185. Section 2. 186. Section 3.
187. See, for example, *Thurborn* (1849) 1 Den. 387; *Thristle* (1849) 1 Den. 502; *Moore* (1861) L. & C. 1; *Flowers* (1886) 16 Q.B.D. 643; *Matthews* (1950) 1 All E.R. 137; *Moynes* v. *Coopper* (1956) 1 Q.B. 439. But see *Ruse* v. *Read* (1949) 1 All E.R. 398; *Kindon* (1957) 41 Cr. App. R. 208.

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it, English courts evolved the doctrine of "breaking the bulk".[188] The effect of this doctrine was that, if a bailee should "break bulk", in the sense of breaking into the unit of property entrusted to him,[189] possession in him is considered to have come to an end and to have re-vested in the owner. Hence, by a tortuous process of reasoning, the bailee was treated as obtaining fresh possession of the property at the time of "breaking the bulk", at which moment a dishonest intention in the bailee is demonstrable so as to support conviction of larceny. The law of Ceylon encounters no corresponding difficulty in this situation where it is frankly conceded by our law that possession is in the bailee, so that no liability for theft can be imposed.[190] However, the distinct offence of criminal breach of trust constituted by the Penal Code may be committed in these circumstances.[191]

The tendency of the Penal Code to particularize offences in respect of property instead of recognizing a single offence of amorphous scope has effectively obviated the necessity for strained and artificial reasoning. Thus, situations where the dishonest intention is formed contemporaneously with and subsequently to the taking of the property are clearly distinguished by our law and catered for by the different offences of theft and criminal misappropriation. For this reason it is unnecessary in our law, as it was under English law before it was statutorily modified in 1967, to show, as a prerequisite of liability for an offence against property, that formation of the *animus furandi* and the physical moving of the property coincided in point of time.

The reasons underlying the deviation of our law from rudimentary premises of the previous English law were briefly commented upon by Weeramantry J. in *Ranasinghe* v. *Wijendra*.[192] His Lordship said: "The English law ran into a degree of confusion in consequence of the fact that 'taking' meant the acquisition of possession, for it became entangled in the complex question of what constitutes legal possession".[193] In a later passage of the judgment it was observed: "It is not unreasonable to infer that the deliberate departure from the principles of English law, represented by the creation of this offence of criminal misappropriation, was the result of a consciousness of the inadequacy of the existing English law and the existence of a lacuna in regard to cases of innocent taking followed by a subsequent dishonest intention".[194] This deficiency has been satisfactorily supplied by the provisions of our law.

188. See the *Carrier's Case* (1473) Y.B. 13 Edw. IV, fo. 9, pl. 5.
189. Kenny, *Outlines of Criminal Law* (18th ed., 1962), p. 261.
190. Penal Code, section 366, illustration (e).
191. Penal Code, section 388.
192. (1970) 74 N.L.R. 38.
193. At p. 41.
194. At p. 42.

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(B) *Aggravating Circumstances*

The penalty applicable to this offence is increased in circumstances where a person dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease and has not since been in the possession of any person legally entitled to such possession.[195] The punishment which may be imposed is still more severe if the offender, at the time of such person's decease, was employed by him as a clerk or servant.[196]

V. CRIMINAL BREACH OF TRUST

(A) *Elements of Liability*

The definition of the offence of criminal breach of trust, embodied in section 388 of the Penal Code, requires proof of the following elements: (a) the accused was in any manner entrusted with property or with any dominion over property; (b) the accused committed one of the following acts: (i) he misappropriated or converted to his use that property, or (ii) he used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or (iii) he used or disposed of that property in violation of any legal contract, express or implied, which he had made touching the discharge of such trust, or (iv) he suffered any other person to do so; and (c) the accused committed one of the first three acts dishonestly or the fourth act wilfully.

(a) *Entrustment with Property or with Dominion over Property*

The characteristic which distinguishes criminal misappropriation from criminal breach of trust is that, in the latter case, the property in respect of which the offence is committed, had been entrusted to the accused at an earlier stage. This element is peculiar to the conception of the offence described in our law as criminal breach of trust.

In *Basnayake* v. *Inspector of Police*[197] the Supreme Court laid emphasis on the principle that, in the absence of entrustment, the offence of criminal breach of trust cannot be made out. Weerasooriya S.P.J. declared: "The accused was the Post-Mistress at a Sub-Post Office where she had employed Rodrigo as a 'substitute'. In connection with his employment Rodrigo paid the accused a sum of two thousand rupees as security. The conditions subject to which the security was paid are set out in the document P3 signed by the accused...It would seem that,

195. Penal Code, section 387. 196. ibid.
197. (1961) 66 N.L.R. 379.

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subject to these conditions, the accused was free to utilize the money. The fact that she delayed to return the money ... did not have the effect of converting what was a purely civil liability into one of a criminal nature."[198]

The need for proof of entrustment as an indispensable ingredient of criminal breach of trust is illustrated by the decision in *Kabeer*.[199] The accused, a jail guard, was entrusted with a railway warrant (that is to say, an order upon the proper office of the railway to issue a ticket in exchange for the warrant) and was asked to accompany a prisoner who had served his sentence, to the railway station and to give him a railway ticket. The accused obtained the ticket in exchange for the warrant but, instead of handing it over to the prisoner, sold it to a third party. It was held that the offence of criminal breach of trust had not been committed. De Sampayo J. said: "I agree with the District Judge in thinking that the trust, so far as the railway warrant was concerned, was that the accused should deliver it to the proper officer at the railway station and receive a ticket in exchange. It is true that he failed to perform the further duty of handing the ticket to the prisoner. But that had no immediate connection with the trust in respect of the railway warrant".[200] The proper offence with which the accused should have been charged, it was suggested, was criminal misappropriation of the ticket.[201]

Cooray[202] was a case where the accused, who was the President of the Salpiti Korale Union, was charged with having committed criminal breach of trust in respect of a sum of money entrusted to him by the Managers of certain Co-operative Wholesale Depots of the Union, in the way of his business as an agent. X, the Manager of the Moratuwa Union, acting on instructions from the accused, transferred the cash which he had collected from the retail stores to the accused for deposit with the Co-operative Central Bank. The accused, instead of paying it over appropriated the cash and substituted for it his own cheques for the amount due. However, the accused, as Vice-president of the Bank, ensured that in many instances his cheques were not presented for collection. The requirement in regard to entrustment of the money to the accused being clearly satisfied in these circumstances, the privy Council held that liability før criminal breach of trust may properly be imposed.

In *Silva* v. *Cooray*[203] a canvasser who was employed to purchase rubber for a principal, absconded with the money given him by the principal. The money was held to have been "entrusted"

198. At pp. 379-380.
199. (1920) 22 N.L.R. 105.
200. At p. 106.
201. ibid.
202. (1953) 54 N.L.R. 409.
203. (1935) 3 C.L.W. 109.

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to the canvasser, within the meaning of the relevant provision of law, and a conviction of criminal breach of trust was upheld.

Entrustment with dominion over property is a possible alternative to entrustment with the property itself, as a component element of the offence of criminal breach of trust.

In *Sub-Inspector of Police, Anuradhapura* v. *Charles Appuhamy*[204] the accused, having been entrusted by the complainant with two bulls to be trained, sold one of them to a third party. The accused was held to have been entrusted with dominion over the animal at the time he disposed of it. *Perera*[205] was a similar case. A mercantile firm was the employer of the accused, part of whose duties was to negotiate the sale of fibre. The accused was permitted to do this in his own name and to receive cheques in his own name in payment for the fibre. He was required to endorse the cheques over to the firm subsequently. The accused appropriated for himself the proceeds of a cheque which he had received. Although the cheque was made out in the accused's favour, he was considered to have been entrusted with "dominion" over property belonging to the firm.

The requirement relating to entrustment envisages an element of the pre-existing situation against the background of which the *actus reus* of the offence is committed by the accused. This requirement, then, contemplates a preliminary matter as to the responsibilities of the accused and the position in which he is situated *vis-a-vis* the property and its owner. The physical and mental elements of this offence call for consideration only after this initial condition of liability is shown to have been satisfied.

(b) *Misappropriation, Conversion, Improper Use or Disposal*

The *actus reus* of the offence is capable of being established in one of four ways:

(i) misappropriation or conversion of the property to his own use by the accused;

(ii) use or disposal of the property in violation of any direction of law prescribing the mode in which the trust is to be discharged;

(iii) use or disposal of the property in violation of any legal contract, express or implied, which the accused had made touching the discharge of the trust;

(iv) suffering any other person to do any of these acts.

(i) *Misappropriation or Conversion of the Property*

The concepts of "misappropriation" and "conversion" are given the same meaning in this context as they bear in relation

204. (1919) 6 C.W.R. 181.
205. (1923) 2 Times of Cey. 72. cf. Illustrations (a) and (b) to section 388.

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to the offence of criminal misappropriation of property.[206] The analysis offered in that connection may therefore be used for the present purpose.[207]

Senaviratne[208] is a case where the scope of the requirement of "misappropriation" or "conversion" was examined specifically within the framework of criminal breach of trust. In this case the accused had been entrusted with a sum of money which came into a petty cash account. However, he had the right to spend this money as occasion demanded. The accused's case was that he used this money to buy brass taps for his employers. This position taken up by the accused was not borne out by the evidence. The Supreme Court held in appeal that, in a case of this nature, it was sufficient for the prosecution to establish that the sum in question had been entrusted to the accused. If it transpires that the sum is short when an account is subsequently taken, the responsibility of offering an explanation supported by evidence devolves on the accused.

(ii) *Use or Disposal of the Property in Violation of Any Direction of Law*

The relevant elements here are (a) that some provision of law should govern the mode in which the trust is to be discharged, and (b) that the use or disposal of the property by the accused should contravene the applicable provision of law.

These requirements were held to have been satisfied in several cases.

In *Vallayan Sittambaram*[209] Bertram C. J. held that, if a person collects an aggregate sum from various sources under a trust to pay the total sum, when collected, to a particular person or for a particular object, this total or such proportion of it as the accused may have succeeded in collecting, constitutes a trust fund in his hands. Any use or disposal of such a fund otherwise than for the purpose for which it was collected, represents an use or disposal of the property in violation of a direction of law. In *Kalyanaratne* v. *Gunadasa*[210] a promissory note was made in favour of the accused for the convenience of his employer who lent the money. The money paid to the accused by the maker of the note to liquidate the debt, was considered to be held in trust by the accused for the benefit of his employer. In *Emmanuel*[211] it was held that the administrator of a deceased person's estate could be convicted of criminal breach of trust of money belonging to the estate even before accounts were judicially settled.

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206. See the discussion at notes 152-156, *supra*, of this Chapter.
207. ibid.
208. (1935) 15 C.L. Rec. 57.
209. (1918) 5 C.W.R. 287.
210. (1937) 40 N.L.R. 44.
211. (1934) 36 N.L.R. 80.

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It may be noted that, in all these cases, the word "trust" is not necessarily used to connote an express trust but merely indicates the existence of an obligation in respect of the property, which is accepted by or devolves on the accused.

The words "dispose of" do not presuppose a conveyance of good title. This principle emerges from the decision in *Sub-Inspector of Police, Anuradhapura* v. *Charles Appuhamy.*[212] It appeared that the accused had purported to sell an animal which he had received from the owner for the purpose of training. It was contended in appeal on the accused's behalf that, since he had not executed a voucher, he could not be held to have "disposed of" the animal, in the sense required by the definition of criminal breach of trust. This contention did not prevail. The court expressed the view that the absence of a cattle voucher represented no more than a defect in the purchaser's title and made no difference to the fact of misappropriation or conversion of the animals by the accused.

(iii) *Use or Disposal of the Property in Violation of a Legal Contract*

This context is distinguishable from that contemplated in (ii). In both situations, the original possession of the property by the accused was subject to an obligation, but there is a difference in regard to the source of the obligation. In (ii) the obligation stems from a general provision of law, but (iii) envisages a special contract or agreement as the genesis of the obligation. Moreover, the contract is not necessarily required to be express but may be implied from the surrounding circumstances.[213]

In *Walter Don*[214] the accused verbally agreed to purchase a piece of land on the complainant's behalf and to convey the land to her in due course. The Crown grant was made out in the accused's name. The accused later declined to convey the land to the complainant and transferred a porton of it instead to a third party. The transfer to the third party was held to have been made in breach of the accused's contract with the complainant.

The facts of *Rowlands*[215] were similar. The accused collected sums of money from several persons on the understanding that a syndicate was to be formed consisting of a specified number of subscribers for the purchase of tickets in a lottery and that the winning, if any, would be divided among the subscribers. However, the accused failed to divide the amount won by the syndicate among all its members, but appropriated a portion of this amount for himself. The court held that the contract to divide and hand over the profits secured by the syndicate was a

212. (1919) 6 C.W.R. 181.
213. cf. illustration (c) to section 388 of the Penal Code.
214. (1902) 3 Browne 16. 215. (1906) 1 A.C.R. 34.

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valid contract and that the accused's violation of this contract rendered him liable for criminal breach of trust.

(iv) *Suffering Any other Person to Misappropriate, Convert or Improperly use or Dispose of the Property*

The accused is liable for criminal breach of trust not only in circumstances where he himself is responsible for misappropriation, conversion or improper use of the property committed to his charge but in cases where the accused allows the property to be misappropriated or wrongfully disposed of by any other person. The obligation devolving on the accused in respect of the property is not confined to abstention from improper use of the property by the accused himself but extends to refraining from permitting others to misappropriate or convert it to their own use.

(c) *The Mental Element*

In all cases where the misappropriation, conversion or improper disposal has been done by the accused himself, the mental requisite involved is that of dishonesty.[216] The meaning of dishonesty has been fully investigated.[217] The idea contains the same connotation in this context as it does in relation to theft[218] and criminal misappropriation of property.[219]

As to the scope of the requirement of dishonesty as an ingredient of criminal breach of trust, the following points may be made in correspondence with the case law:

(i) Mere failure to account for money which constitutes a trust fund in the hands of the accused, is not tantamount to proof of dishonesty. Such failure may be entirely consistent with an innocent explanation and hence does not absolve the prosecution from its obligation to establish the element of dishonesty affirmatively.[220] Thus, failure by the accused to pay an instalment at the time payment is legally due, does not, in itself, constitute proof of dishonesty.[221]

If a conviction is to be sustained, the court should be able to conclude, on a survey of the evidence as a whole, that dishonesty has been established unequivocally. In *Kanapathipillai* v. *Fernando*[222] Thamotheram J. observed: "When one looks at all the facts proved in the instant case, there can be no doubt that the inference of dishonest misappropriation or conversion can be reasonably drawn. They are not capable of any innocent

216. Penal Code, section 288.
217. cf. the discussion at notes 29-64, *supra*.
218. ibid.
219. cf. the discussion at notes 157-178, *supra*.
220. *Pulle* (1909) 2 Weerakoon's Rep. 57.
221. *Somanader* v. *Uduma Lebbe* (1922) 24 N.L.R. 146.
222. (1970) 73 N.L.R. 524.

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explanation, nor has the accused at any stage attempted an explanation. His conduct on being informed of the shortage tells against him."[223]

However, the explanation of the discrepancy which the accused is able to offer, need only concern the specific charge made against him. In *Attorney-General* v. *Dheen*[224] Gunasekera J. said: "In order to defend himself against the charge that he was called upon to answer, it was sufficient for the accused to show that there was no evidence that he misappropriated any money on the day in question. It was not necessary for him to give or adduce evidence contradicting or explaining other items of incriminating conduct imputed to him by the prosecution, such as was imputed in the evidence that he claimed to have deposited the money to the credit of a civil case .... Under these circumstances, an inference that he misappropriated the money at some other time, though he may not have done so at the time in question, cannot be drawn from the fact that he has not chosen to refute any particular allegation".[225] This view was endorsed by Tennekoon J. in *Rohana* v. *Senaratne*.[226] His Lordship said: "In a case where a date of offence is alleged relating to temporary misappropriation, the accused is under no duty, and it would be irrelevant for him to show that he had not misappropriated the money on a subsequent date or that he had properly applied it on such subsequent date".[227]

(ii) The bona fide assertion of a claim by the accused militates against proof of dishonesty. This principle is clearly established by the cases.

In *Siriwardene* v. *Ukkuwa*[228] the accused was a sawyer employed by the complainant. He was charged with criminal breach of trust in respect of certain tools and implements which had been entrusted to him and his co-accused. Two of the articles were found in the possession of the accused who had retained them because the complainant was unwilling to pay wages due to the accused. It was held that the accused's mistaken belief in his right to retain the complainant's property as security for his wages was inconsistent with the element of dishonesty.

Chellappah v. *Chelliah*[229] was a similar case. The accused, who had been president of a Co-operative Stores Society, was not re-elected at the last meeting. The accused and others disputed the validity of the new president's election, and refused to hand over to him the key of the premises belonging to the Co-operative Society. It was held in appeal that the accused's

223. At p. 528.
224. (1961) 61 C.L.W. 74.
225. At p. 76.
226. (1967) 72 N.L.R. 370.
227. At p. 376.
228. (1916) 2 C.W.R. 157.
229. (1948) 49 N.L.R. 191.

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conviction of criminal breach of trust could not be sustained, since the ingredient of dishonesty had not been sufficiently established. Basnayake J. declared: "The retention of property in the bona fide assertion of a claim to retain it, as in this case, does not in my opinion bring a person within the ambit of section 388 of the Penal Code".[230]

(iii) The scope of the requirement of dishonesty was explained by Drieberg J. in *Muttucumaru* v. *Amirthalingam*.[231] The accused was a Sub-Post Master who was charged with criminal breach of trust of a sum of Rs. 200/-. It appeared that the accused, soon after tendering his resignation, addressed a letter to the Post Master General, stating that the death of his mother had compelled him to take Rs. 200/- out of the Post Office cash to meet necessary expenses, that he had no other means of obtaining the money and that he had no objection to the amount being deducted from his security. The Department then had in hand his cash security of Rs. 540/-. The court held that the element of dishonesty had not been proved in these circumstances. Drieberg J. said: "The accused does not appear to have had the intention of wrongfully keeping the Government out of any property; in fact, he does not appear to have realized that this was a possible result of his conduct".[232] The basis of this ruling is the lack of awareness in the accused that his conduct involved any impropriety or the opportunity of wrongful loss to the Government.

(iv) However, once it is shown that the accused had the intention of causing wrongful gain to himself or wrongful loss to another,[233] an innocuous motive does not have the effect of exonerating him from liability. *Caspersz*[234] was a case where the accused was an executive engineer. He was placed in charge of work on a road, in regard to the construction of which speed was of greater importance than cost. Complaints were made by the overseers that they were losing money on the work because they had to pay their labourers more than they were able to recover from the Public Works Department. In order to placate the overseers, the accused instructed them to insert items in their bills for work which had not been done. He subsequently made payment for these fictitious items of work.

Both the Supreme Court of Ceylon and the Privy Council held that dishonesty in the accused was adequately proved in these circumstances. In the Supreme Court Cannon J. (with whom Canekeratne J. agreed) said: 'It seems to me that there

230. At p. 192.
231. (1927) 9 C.L. Rec. 35.
232. At p. 35.
233. Penal Code, sections 21 and 22.
234. (1948) 50 N.L.R. 258 (P.C.).

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can be no doubt that the accused knew quite well that, by so acting, he was causing wrongful gain to the overseers and wrongful loss to the Government"[235] In similar vein Lord Oaksey, delivering the opinion of the Judicial Committee, observed: "There was unchallenged evidence to show that the accused intended to cause wrongful gain to the overseers and wrongful loss to the Government within the meaning of the Code. The means adopted by the accused were undoubtedly unlawful. . . .The fact that the accused may have thought that he was acting in the interests of the country in getting the work done has been properly taken into account by the Supreme Court of Ceylon in reducing the sentence."[236] The principle deducible from this decision is that motive is relevant not to liability but only to the quantum of punishment.

It is not entirely clear that the decision in *Arwandy Kangany*[237] is convincingly reconcilable with *Caspersz's* case. In the former case, the accused was a kangany in charge of a rice store. The rice was intended for distribution among the labourers on the estate. However, the Superintendent had issued instructions that the rice should not be made available to labourers who failed to report for work. The accused, acting contrary to these instructions, issued rice to the latter category of labourers merely to keep them on the estate. The accused was relieved of liability on the ground that he had not acted dishonestly. But the better view, perhaps, is that dishonesty, in the relevant sense, was established, although the motive was not an improper one. In this event, the refusal to recognize liability cannot be supported.

(v) A false denial that the money or property was received in the first instance by the accused, may be treated as tentative proof of dishonesty. In *Suppaiya*[238] a servant had received money on his master's behalf, entered the amount received in his master's book and later denied receipt of the money. In appeal Lawrie A. C. J., upholding the conviction of criminal breach of trust, said: "It is good law that, when it is proved that an article or a sum of money has been placed in a man's hands in trust for another, with a duty to hand it over or to pay it, the false denial that there was a placing or paying is *prima facie* evidence that the article or money, proved to have reached the accused in trust, was applied by him to his own use"[239] However, the qualification was added that "It is not quite so clear that the same rule applies when the payment is part of a series of continued and complicated transactions, when

235. (1946) 47 N.L.R. 165 at p. 167.
236. (1948) 50 N.L.R. 258 at p. 262.
237. (1910) 7 C.L. Rev. 134.
238. (1901) 5 N.L.R. 119.
239. At p. 122.

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the actual sum of money was not to be paid in the same cash but was to be applied for the purpose of a business which needed ready money for payments and purchases".[240]

(vi) In *Sinnathamby* v. *Kandiah*[241] it was said that where, in a prosecution for criminal breach of trust, a *prima facie* case is made out against the accused person, a court may be justified in drawing an unfavourable inference from the accused's failure to give evidence on his own behalf at the trial. Nevertheless, the caution must be administered that this is only a tentative inference the strength of which depends on an appraisal of the surrounding circumstances as a whole.

(vii) The principle was laid down in *Buchanan v. Conrad*[242] that, in a charge of criminal breach of trust against a clerk or servant, it is not sufficient to prove a general deficiency in accounts. There must be a clear averment, and affirmative evidence, in respect of a specific sum which had been misappropriated or converted to the defendant's use. This degree of specificity is indispensable to proof of dishonesty.

(viii) The principle emerges from a series of cases that a mere discrepancy as to the number or quantity of the goods entrusted to the accused is insufficient, without more, to indicate a dishonest intention. The latter element must be established by further evidence.[243] The application of this principle is exemplified by the facts of *Foenander*.[244] A number of parcels was entrusted at the Fort Station to the accused, a railway guard, to be delivered at Rambukkana. On delivery some parcels were found to be missing. The accused admitted receipt of the parcels but could not account for the deficiency. His explanation was that someone had probably stolen them while he was attending to his work. There was evidence that two railway porters travelled in the van between these two stations. It was held that the requirement of dishonesty could not be considered to have been adequately established against the accused in this situation. Jayatileke J. (with whom Keuneman A. C. J. agreed) said: "It must be shown that the accused disposed of the property in some way other than that in which he was bound to apply it and that, in so disposing of it, he did so dishonestly".[245] In *Sumanadasa* v. *The State*[246] the appellant the manager of a wholesale Co-operative Store, was charged with and convicted of criminal breach of trust of goods entrusted with the co-operative Society. The Court held that

240. ibid.
241. (1912) 6 Leader L.R. 61. 242. (1892) 2 C.L. Rep. 135.
243. *Koch* v. *Nicholas Pulle* (1898) 3 N.L.R. 198; *Laxana* v. *Muhandirama* (1922) 24 N.L.R. 251.
244. (1947) 48 N.L.R. 327.
245. At p. 330. 246. (1975) 78 N.L.R. 31

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in a prosecution for criminal breach of trust, the fact that a shortage of goods has occurred is by itself not evidence from which a dishonest misappropriation can be inferred. The prosecution must eliminate the possibility that the shortage could have occurred by any other means except dishonest misappropriation.

(d) *Other Features of the Offence*

Incidental reference may be made to some final points in regard to the offence of criminal breach of trust:

(i) Is the subject-matter of the offence of criminal breach of trust restricted to movable property, or can the offence be committed in respect of immovable property as well? The decision in *Walter Don*[247] suggests that the word "property" which occurs in the definition of criminal breach of trust, encompasses both movable and immovable property. If this view is accepted as sound, a point of contrast at once becomes discernible between theft and criminal breach of trust, since the scope of the former offence is expressly limited to movable property.[248]

A Ceylon court has held that criminal breach of trust can be committed only in respect of property which has some value. If the article in question has been rejected by its owner as useless, the accused cannot be said to have acted dishonestly in appropriating it or converting it to his use.[249]

(ii) In *Loudon v. Endoris Silva*[250] the rule was acted upon by Wood Renton C.J. that a contractor who receives from the person with whom he had contracted a sum of money for a specific purpose and who dishonestly misappropriates that money, cannot be convicted of criminal breach of trust. Referring to Indian decisions on the point, Wood Renton C. J. said: "The principle of these decisions is that a transaction of this chraacter is a loan and not a trust".[251]

It would seem, then, that where the money is given to the accused by way of a loan, the money, in the accused's hands, is not treated as being subject to an obligation which operates to satisfy the concept of "entrustment" embodied in the definition of criminal breach of trust. This is made clear by taking an example. Let us suppose that X wishes to have his house painted by Y, a contractor. If X makes available to Y a quantity of paint for the specific purpose of having it applied to his house and Y, having taken delivery of the paint for this purpose, sells it, may be convicted of criminal breach of trust. On the other hand, where X gives a sum of money which he asks Y to utilize for the purpose of buying paint for

247. (1902) 3 Browne 16.
248. Penal Code, section 366.
249. *Jayawardene* v. *Dharmaratna* (1951) 54 N.L.R. 524.
250. (1916) 3 C.W.R. 245.
251. At p. 246.

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X's house and Y spends the money for some other purpose, Y cannot be found guilty of criminal breach of trust, although he may be convicted of some other offence like cheating. The difference between the two cases, apparently, is that the former involves a trust, and the latter a loan.

(iii) Can the legal owner of property commit criminal breach of trust in respect of it? The answer is clearly in the affirmative. A person who, albeit having legal title to the property, holds it in trust for another, may be found guilty of this offence. The conception of the offence is such that the accused's act is treated as criminal because it transgresses not the right of ownership in the property but an equitable right subject to which ownership or custody is enjoyed by the accused. In *Perera*[252] Jayawardene A.J. upheld the conviction of a salesman who misappropriated cheques *made out in his own name* by purchasers of his employer's goods. The basis of the accused's liability was his obligation to account to his employer for the proceeds of the cheques. In *Kalyanaratne* v. *Gunadasa*[253] Abrahams C.J. said: "I think the terms of section 388 of the Penal Code are sufficiently wide to cover a case of this kind; and illustration (a) to that section certainly indicates one instance where the legal owner of property can commit criminal breach of trust in respect of it."[254] This illustration envisages the case of an executor of the estate of a deceased person. The executor is the legal owner for the time being of assets belonging to the deceased's estate, and yet the executor may incur liability for criminal breach of trust if he misappropriates the property in fraud of the legitimate claims of the heirs.[255]

(iv) The courts of Cylon have held that, in a prosecution for criminal breach of trust, a judge has no power to order that goods in respect of which the offence has been committed, should be restored to the owner.[256]

(B) *Aggravation of the Offence*

The maximum penalty for criminal breach of trust in ordinary circumstances is imprisonment of either description for a term which may extend to three years, or a fine, or both.[257] However, the identity of the person convicted of the offence may have the effect of increasing the penalty applicable. Thus, punishment of exceptional severity is attendant on the commission of criminal breach of trust by (a) a carrier, whar-

252. (1923) 2 Times of Cey. 72.
253. (1937) 15 Times of Cey. 39. 254. At p. 39.
255. Penal Code, section 288, Illustration (a).
256. *Thambipillai* v. *Ramaswamy Sivakadachampillai* (1909) 4 Bal. Rep. 89; *Martin Singho* v. *Thambiah* (1946) 33 C.L.W. 27.
257. Penal Code, section 389.

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finger or warehouse-keeper;[258] (b) a clerk or servant;[259] (c) a public servant, a banker, merchant, factor, broker, attorney or agent;[260] (d) a public servant failing forthwith to pay over or produce money when required to do so by the head of his department or by the Secretary or Deputy Secretary to the Treasury, the Auditor-General, Assistant Auditor-General, or any officer specially appointed;[261] and (e) an agent in respect of postal articles.[262] In these cases, the severity of the offence is enhanced by the relationship which prevails between the complainant and the accused.

The following points in regard to these circumstances of aggravation emerge from the case law:

(i) The word "agent", in this context,[263] refers specifically to a person who comes on an agency business and does not include a man who is casually entrusted with money on an isolated occasion or even on a series of occasions, provided that the evidence does not show he is carrying on an agency business.[264] In *Cooray*[265] Loard Porter, expressing the opinion of the Judicial Committee, observed: "In the present case, the appellant clearly was not carrying on the business of an agent and was in no sense entitled to receive the money entrusted to him in any capacity, nor indeed had (the manager of a branch depot) authority to make him agent to hand it over to the bank.[266]"

(ii) The phrase "clerk or servant"[267] was construed in *Burrah* v. *Suwaris*.[268] The view was there expressed that for a sentence to be enhanced on the ground that the accused was a clerk or servant employed by the complainant, three requirements must be satisfied: (i) the accused's functions and responsibilities should have been those of a clerk or servant; (2) the accused should have been entrusted with property in that capacity; and (3) the offence must be proved to have been committed in respect of that property.

(iii) In a prosecution for criminal breach of trust by a public servant,[269] an essential ingredient of the offence is failure by the accused to pay money or to account for money when required to do so by an officer mentioned in the relevant provision.[270] In *Ariyaratnam* v. *S. I. Police*[274] H. N. G. Fernando

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258. Section 390.
259. Section 391.
260. Section 392.
261. Section 392A.
262. Section 392B.
263. Section 392.
264. See note 265, *infra*.
265. (1952) 49 C.L.W. 13.
266. At p. 16.
267. Penal Code, section 391.
268. (1905) 4 C.L.W. Rev. 71.
269. Penal Code, section 392A.
270. See note 267, *supra*.
271. (1960) 62 N.L.R. 451.

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J. quashed the conviction of the accused. His Lordship said: "In this case the officer who addressed a requirement to the accused was not a person holding a special appointment made by the Secretary to the Treasury. His authority... purports to appoint him a deputy to the Auditor-General for the purpose of examining the relevant accounts, but that authority has been granted by the Auditor-General and not by the Secretary to the Treasury. The provision in section 392A as to the officer by whom a requirement mentioned in the section should be given, is manifestly an imperative provision, and it would not be open to me to take notice of the fact that, virtually speaking, an authority granted by the Auditor-General should be regarded as being as good as one granted by the Secretary to the Treasury."[272] This statement indicates the strictness with which the relevant provision is interpreted by the courts.

IV. RECEIVING STOLEN PROPERTY

The definition of "stolen property" is contained in section 393 of the Penal Code, while the offence of dishonestly receiving stolen property is constituted by section 394. Section 393 declares that "Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, or by forgery, or by cheating, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as 'stolen property', whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without Ceylon". The proviso is added that "if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property". Section 394 provides that "Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe[273] the same to be stolen property" shall be guilty of an offence.

The following points may be noted in regard to the offence of dishonestly receiving stolen property:

(a) It must be established *in limine* that one of the offences enumerated in section 393 of the Penal Code, had been committed in respect of the property in question.[274] Where this requirement is not satisfied, liability for the offence of dishonestly receiving stolen property cannot arise. The question whether one of the offences referred to has been committed or not is a question of fact which has to be determined objectively irrespective of the accused's state of mind.

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272. At pp. 451-452.
273. Penal Code, section 24.
274. *Saibo* (1907) 3 A.C.R. Suppl. iii; *Kekula* v. *Kapuruhamy* (1915) 1 C.W.R. 104; *Banda* v. *Davie Pillai* (1932) 12 C.L. Rec. 78.

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(b) The word "dishonestly" bears the same meaning in this context as it does in relation to other offences against property.[275]

(c) The burden of proving guilty knowledge in the accused remains throughout the trial with the prosecution.[276] This element is indispensable to a conviction.[277] The circumstances are required to be such that the accused was convinced, or should have been convinced, that the property was stolen.[278] The presumption of innocence remains a fundamental principle in this area, so that the accused cannot be convicted if the prosecution fails to exclude the possibility that some person other than the accused is responsible for receiving the property.[279]

However, the prosecution may discharge its burden by establishing facts which give rise to the legitimate inference that the accused had received the property with the requisite intention.[280] Mere carelessness or lack of prudence on the accused's part does not enable proof of the mental element,[281] nor is a mere suspicion in his mind sufficient to warrant liability.[282]

Receipt or retention of the property by the accused must be proved *after* he acquired knowledge, actual or constructive, that the property was stolen.[283]

(d) Where the accused is shown to have been in possession of goods recently stolen, the burden is on the accused to offer an explanation. Consistent with his innocence.[284] The accused's explanation cannot be considered reasonable if there are circumstances which lead the court to believe that the explanation is false.[285] But once a reasonable (in the sense of a plausible) explanation is given, the prosecution must accept the responsibility of proving affirmatively, without the aid of any presumption, the accused's guilt.[286] If the explanation is one which may well be true, it is entitled to prevail.[287] It is not a necessary condition of acceptance of the accused's explanation that the court should be absolutely convinced of its truth.[288] The

275. Penal Code, sections 21 and 22.
276. *Fernando* v. *Heiler* (1945) 46 N.L.R. 406.
277. *Nambiar* v. *Fernando* (1925) 27 N.L.R. 404.
278. *Kartigesu* v. *Alwis* (1929) 30 N.L.R. 507.
279. *Perera* v. *Marthelis Appu* (1919) 21 N.L.R. 312.
280. *Perera* v. *Haramanis* (1893) 2 S.C.R. 33.
281. *Police Constable* v. *Alwis* (1929) 10 C.L. Rec. 61.
282. *Inspector of Police* v. *Podi Singho* (1930) 3 C.A.R. of Cey., 40; *Banda* v. *Davie Pillai* (1932) 12 C.L. Rec. 78.
283. *Brabazon* v. *Heen Appu* (1899) Koch's Rep. 31; *Allis* v. *Samel Appu* (1899) Koch's Rep. 28.
284. *Jayasena* (1947) 48 N.L.R. 241.
285. *Moosin* v. *Galle Police* (1946) 47 N.L.R. 208.
286. *Kandiah* v. *Podisingho* (1921) 23 N.L.R. 337; *Thomas Appu* (1929) 30 N.L.R. 431.
287. *Perera* (1925) 7 C.L. Rec. 33.
288. *Van Rooyen* v. *Bardoordeen* (1940) 4 C.L.J. 270.

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reasonableness or otherwise of the explanation has to be judged in the light of all the circumstances of the cases.[289] Moreover, if the explanation as a whole is convincing, the fact that one or two statements are open to suspicion will not prevent the explanation from being treated as displacing the tentative effect of the adverse presumption.[290] In any event, the presumption of guilt arising from possession of property recently stolen has to be considered in the light of an overriding counter-presumption—namely, the presumption of the accused's innocence.[291]

(e) Several cases have investigated the meaning of "recent possession" for purposes of the rebuttable presumption of guilt. The basic principle is that what is or is not recent possession depends largely on the nature of the stolen property.[292] Possession of cattle eigth months after the theft has been considered sufficiently recent.[293] But a different view may be taken of other forms of property. "The presumption gets weaker as time goes by, till the point is reached where no presumption can be drawn. . . .That point of time will vary according to the nature of the article. If it be a common thing readily passing from hand to hand in the everyday business of human life without much thought such as a pair of scissors, the point would soon be reached."[294]

Possession of a typewriter belonging to a special class thirteen months after the date of the theft has been held recent enough to justify invocation of the presumption of guilt.[295] A similar view has been taken in regard to possession of a watch three months after it was stolen.[296] In the case of cattle, an interval of four months is not too long.[297]

On the other hand, where the property in question were buffaloes, three years has been considered too long an interval.[298]

The applicability of the presumption has to be determined by the judge who is expected to base his decision on a detailed consideration of the peculiar facts of each case.

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289. *Perera* v. *Karunaratne* (1927) 9 C.L. Rec. 49.
290. *Meedin* v. *Kiri Appu* (1918) 5 C.W.R. 236; *Fernando* v. *William Singho* (1935) 37 N.L.R. 278.
291. *Attorney-General* v. *Rawther* (1924) 25 N.L.R. 385.
292. *Siriwardene* v. *Dionis* (1925) 27 N.L.R. 358.
293. ibid.
294. *Attorney-General* v. *Rawther* (1924) 25 N.L.R. 385; cf. *Perera* v. *Marthelis Appu* (1919) 21 N.L.R. 312. See also *Coorey* v. *Allis Appu* (1904) 7 N.L.R. 327; *Muhamadu Hanifa* v. *Bandirala* (1899) 3 N.L.R. 267; *Gunasekera* v. *Andris* (1919) 7 C.W.R. 114; *William Perera* (1944) 28 C.L.W. 43.
295. *Hodson* v. *George* (1909) 12 N.L.R. 273.
296. *Fernando* v. *Punchi Sinno* (1908) 1 Leader L.R. 8.
297. *Fernando* (1905) 4 C.L. Rev. 127; cf. *Spurway* v. *Wickramaratna* (1906) 2 Leem. Rep. 1.
298. *Don Pablis* v. *Gunatilake* (1902) 3 Browne 138.

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(f) The presumption of guilt arising from recent possession may be resorted to, only if the accused is shown to have had *exclusive* possession. If persons other than the accused had access to the place where the stolen property was found, the presumption may not be applied against the accused.[299]

(g) A conviction of dishonestly receiving stolen property is necessarily vitiated in circumstances where identification of the property alleged to have been stolen is not founded on reliable evidence.[300]

(h) Where there is some doubt as to the question whether the accused's intention is dishonest or not, evidence of similar conduct by the accused in the past is properly admissible as a means of demonstrating the guilt of the accused.[301]

(i) In a prosecution for dishonestly receiving stolen property, it is not necessary to aver or to prove that some definite person has been convicted of the theft or other offence which had been committed initially in respect of the property.[302]

(j) Where the criteria governing jurisdiction are based on monetary value, the test of jurisdiction has to be formulated in relation to the value of the property received and not of the property stolen, in the event of any disparity between the two amounts.[303]

(k) While some cases reflect the view that the offence of dishonest retention of stolen property implies an innocent receipt in the first instance,[304] the contrary view seems to be preferred in other decisions.[305] In *Banda* v. *Henaya*[306] it was said that the offence of dishonestly retaining stolen property under section 394 of the Penal Code should be distinguished from that of dishonest receipt with guilty knowledge under the same section. The guilty receiver, when he receives property, knows it to be stolen, but guilty retention presupposes innocent receipt in the first instance.[307]

(l) The *factum* of receiving was discussed by Pereira J. in *Pedric* v. *Nadar*.[308] "To receive a thing in the sense in which the term is used in the Penal Code is clearly to reduce it into possession, actual or constructive. To handle a thing or merely to take it into one's hand without the mental operation of intending to

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299. *Inspector of Police* v. *Cassim Bawa* (1909) 2 Leader L.R. 107; *Attorney-General* v. *Rawther* (1924) 25 N.L.R. 385.
300. *Reid* v. *Kiriwanti* (1903) 7 N.L.R. 383.
301. *Wijeratne* (1919) 6 C.W.R. 314; *Arnolis* (1921) 23 N.L.R. 225.
302. *Fonseka* v. *Fernando* (1897) 2 N.L.R. 345.
303. *Wickramasinghe* v. *Mohammadu* (1909) 2 Leader L.R. 114.
304. *Hanifa* v. *Bandirala* (1899) 3 N.L.R. 267.
305. *Perera* v. *Silva* (1904) 7 N.L.R. 222.
306. (1896) 2 N.L.R. 4. cf. *Abdul Cader* (1921) 23 N.L.R. 190.
307. See *Banda* v. *Henaya, supra.* 308. (1915) 3 Bal. N. of C. 52.

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reduce it into one's possession is hardly tantamount to the act of receiving it."[309]

Several allied offences, too, are recognized by the Penal Code. Habitually receiving or dealing in property which the accused knows or has reason to believe[310] to be stolen property, involves a relatively rigorous sanction.[311] Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe[312] to be stolen property commits a distinct offence.[313] However, it has been held that a person who merely assists in securing the return of stolen property, even with a view to protecting the thief, cannot be considered guilty of this offence.[314] In *Stephen* v. *Inspector of Police*[315] Sansoni C. J. observed: "Since the offence consists in assisting somebody else in concealing or disposing of property, there must be evidence that there was another whom the accused assisted; an accused cannot assist himself, so far as this offence is concerned. Hence it has been held that neither the thief nor the receiver of stolen property can be charged under section 396."[316] If the stolen property belongs to the category of praedial products, as defined in a previous section,[317] the offender is liable to additional punishment.[318]

VII. CHEATING

(A) *Elements of the Offence*

Section 398 of the Penal Code declares that "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, or damage or loss to the Government, is said to cheat".

The component elements of the offence are the following:

(a) the deception of any person by the accused;

(b) the carrying out of the deception fraudulently or dishonestly;

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309. At p. 53.
310. Penal Code, section 24.
311. Section 395.
312. See note 308, *supra*.
313. Penal Code, section 396.
314. *Lanerolle* v. *Perera* (1953) 55 N.L.R. 357.
315. (1966) 69 N.L.R. 42.
316. At p. 43.
317. Penal Code, section 368.
318. Penal Code, section 397.

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(c) by means of the deception, inducing the person deceived (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property, or (iii) to do or omit to do anything which he would not otherwise do or omit;

(d) the causing of loss or damage, or the likelihood of causing loss or damage, of the kind envisaged, to the person deceived or to the Government by reason of the act or omission contemplated by element (c) (iii).

(a) *The Requirement of Deception*

The distinguishing characteristic of the offence of cheating resides in the element of depriving a person of his property by means of deception. The essence of deception, in this context, was explained in *Wijerama*[319] where Hearne J. declared: "To deceive is to cause to believe what is false. This may be done by a dishonest concealment of facts . . . or by representing as a fact that which is not a fact."[320]

Several features of the requirement of deception warrant analysis:

(i) Is it an indispensable element of the offence that the complainant should have been actually deceived? The question here is whether a conviction of cheating can be sustained in circumstances where the complainant, although not taken in by the accused's representation, pretends to be deceived and hands over property to the accused with the object of laying a trap for him and securing his conviction of the offence. The better view, probably, is that the offence of cheating is not complete in the absence of actual deception.

This conclusion is supported by the decision in *Pascoe* v. *Weerasingha*.[321] A asked B whether he had Blackstone tea for sale. On B replying in the affirmative, A bought a quantity of it. At the time of the transaction A was aware that the commodity bought was not what he asked for. It was held that B could not be convicted of cheating, since A was not deceived by B's description of the tea.

Abeyewardene v. *Muttunayagam*[322] is to the same effect. In this case Jayatileke J. quoted with approval a dictum by Rowlatt J. in the English case of *Light*.[323] "It is quite clear that, on a charge of obtaining goods or money by false pretences, no conviction is possible unless it is shown that the mind of the prosecutor was misled by the false pretence and that he was thereby induced to part with his money or goods."[324]

319. (1937) 17 C.L. Rec. 160.
320. At p. 161.
321. (1892) 1 S.C.R. 305.
322. (1945) 47 N.L.R. 12.
323. (1913-1915) 24 Cox 718.
324. (1945) 47 N.L.R. 12 at p. 13.

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The contrary view on this point was taken in an anonymous Ratnapura case decided during the first decade of the present century. The accused made an entry in the checkroll that a labourer had worked for nineteen days instead of eight, and the superintendent made payment on this basis with knowledge that the entry was incorrect. This was held to be a case of cheating.[325] The appropriate conviction in these circumstances should have been not of cheating but of attempt to cheat.[326]

(ii) Is a conviction of cheating necessarily vitiated if the complainant is shown to have had an independent opportunity of verifying the truth of the accused's representation? The issue is whether, in a situation of this kind, the complainant should be treated as having accepted the risk that the accused's representation turns out to be false.

The attitude reflected in the Ceylon cases is that this question must be answered in the negative, so long as the complainant was entitled to rely on the good faith of the accused. In *Ramanathan Pulle* v. *Ramanathan Pulle*[327] the accused, a vendor of land, falsely represented to the purchasers that the land was free from encumbrances. The Magistrate's view that the elements of cheating were not made out because a duty devolved on the purchasers to satisfy themselves that the land was unencumbered, was held to be erroneous. A purchaser has generally been considered entitled to repose confidence in a representation addressed to him by his vendor.[328]

(iii) By what means must the accused induce a mistaken belief or impression in the complainant's mind? This pertains to the mode of deception employed.

Our law contains no restriction in this regard, any form of visible representation being sufficient. The deception may have been practised by spoken or written words or even by conduct. Thus, the tender of a cheque may be construed *prima facie* as a representation that funds are available out of which the cheque could be honoured.[329]

Deception may be established not only by a positive act of commission but even by an omission on the part of the accused. Non-disclosure may be tantamount to deception in some circumstances. Our law contains an explicit provision that "A

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325. (1909) 6 C.L. Rev. Notes 67.
326. For examples of cases involving attempted cheating, see *Bastian* (1902) 2 Bal. Rep. 93; *Jeeris Appu* (1918) 5 C.W.R. 271; *Silva* (1923) 24 N.L.R 493 (a case of preparation only).
327. (1909) 3 Weerakoon's Rep. 10.
328. 2 Leader L.R. 172.
329. *Chandrasekera* (1921) 23 N.L.R. 286.

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dishonest concealment of facts is a deception within the meaning of this section".[330]

In *Lavona Marikar*[331] Middletion J. held that this provision was applicable to a mortgagor of property who suppressed the fact that the property had been seized in execution of a writ and induced the mortgagee to advance money on the basis of the mortgage. His Lordship stated: "I think it was the duty of the accused under the circumstances to disclose the fact of the seizure. He does not disclose it, and he must have known he was not entitled to charge the property. . . .The fair inference is that he fraudulently and dishonestly suppressed the fact of the seizure."[332]

However, the confines within which this principle should be applied are usefully illustrated by the decision in *Silva.*[333] The accused borrowed a sum of money from a money-lender without disclosing to him that the accused was at the time an uncertified insolvent. The certificate had not been refused at the relevant time, but it was subsequently refused. It was held that the accused could not be convicted of cheating. Bertram C. J. said: "I am not prepared to assent to the proposition that any person who, in the course of a transaction with another, fails to disclose any circumstance which might, if known, have an effect on the conduct of the other party to the transaction, is guilty of cheating".[334] His Lordship further explained the principles applicable in the following terms: "If a man goes into a restaurant and orders a dinner, or takes his place in a tram car or stage coach, and is given the dinner or is conveyed part of his journey, his conduct is in effect a representation that he has with him money to pay the bill or pay his fare, and if he has not money with him and knows it, may be guilty of cheating. But it cannot be said in this case that, when the borrower applied for the loan, his application was in effect a representation of anything except perhaps a representation of an intention to repay the loan in due course. There is nothing to show that the accused did not so intend."[335]

The principle deducible from this decision is that concealment of facts does not amount to deception unless there is a duty to disclose.

While deception may take one of these various forms, the courts of Ceylon have insisted that a charge of cheating should contain a specific averment as to the means whereby the deception was achieved.[336] Failure on the part of the prosecution to comply with this requirement entails the consequence that the

330. Penal Code, section 398, Explanation.
331. (1907) 10 N.L.R. 369.
332. At p. 370.
333. (1918) 20 N.L.R. 349.
334. At p. 350.
335. At p. 351.
336. *Carey* v. *de Silva* (1887) 1 C.L. Rep. 49.

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accused is gravely prejudiced in the preparation of his defence and may therefore warrant quashing of the conviction in appeal.[337]

(iv) Where the accused makes a false promise in regard to future conduct and property is delivered to him in consequence of his promise, can liability for cheating be imposed?

The answer to this question, so far as the law of Ceylon is concerned, emerges from a comparison of lillustrations (f) and (g) attached to section 398 of the Penal Code. Illustration (f) declares: "A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats." Illustration (g) is to the following effect: "A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of copra, which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the copra, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

The governing principle, then, is that the accused is liable for cheating only if, *at the time of making the promise*, he does not intend to keep it. This principle receives expression in a long line of cases.[338]

(b) *The Mental Element*

The mental ingredient inherent in the definition of cheating is contained in the words "fraudulently or dishonestly".[339] Proof of this element is indispensable to a conviction of cheating. In *Smith* v. *Jayasuriya*[340] Withers J. said: "Supposing the representation was false and the complainant was deceived by it, that is not enough. It must be proved that the accused deceived the complainant fraudulently or dishonestly."[341]

A significant aspect of the *mens rea* of cheating is that the prosecution may establish *either* a fraudulent intention *or* a dishonest intention in the accused. This feature serves to distinguish cheating from other offences against property like theft,[342] extortion,[343] criminal misappropriation,[344] criminal breach of

337. *Welakka* v. *Deyonis Appuhamy* (1887) 8 S.C.C. 56; *Zahir* v. *Cooray* (1941) 42 N.L.R. 263.
338. See, for example, *Fraser* v. *Muttukankani* (1885) 1 S.C.R. 90; *Perera* v. *Fernando* (1910) 4 Weerakoon's Rep. 89; *Sheriffdeen* v. *Ponnasamy* (1932) 12 C.L. Rec. 121.
339. Penal Code, section 398.
340. (1899) Koch's Rep. 42.
341. At p. 43.
342. Penal Code, section 366.
343. Section 372.
344. Section 386.

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trust[345] and receiving stolen property,[346] all of which require exclusively a dishonest intention. In the result, the scope of the offence of cheating is appreciably wider, in that a fraudulent intention covers a more extensive area than a dishonest intention.

The scope and content of a dishonest intention have already been investigated.[347] The analysis of this element, offered in other contexts, holds good in relation to cheating as well.

Two points only need be specifically noted here as to the requirement of a dishonest intention, in its bearing on liability for cheating:

(i) Bona fides in the accused militate against imputation of a dishonest intention to him. A good example of this rule is provided by the case of *Ahmed* v. *Howth*.[348] The accused was a trader in Colombo. On a visit to Jaffna he asked an acquaintance to assist him in having a cheque drawn on a Colombo bank cashed. The acquaintance instructed his brother to cash the cheque which was dishonoured when it was later presented for payment in Colombo. The accused's defence was that he had offered the cheque in the honest belief that, on presentation, it would be met. In appeal Gratiaen J., following English authority,[349] set out the law applicable as follows: "If a person gives a cheque for a sum of money, knowing that he has no money in his bank to meet it, but believing on reasonable grounds that somebody is going to pay in a further amount to his credit so that, at the time the cheque is presented, it will be met, then he has not the requisite intent".[350] However, the qualification was added that "The position would be different if, at the time when the cheque is given, the accused has nothing but a hope (as opposed to a genuine and reasonable belief) that sufficient money would be paid into his bank to meet the cheque."[351]

(ii) In *Dias* v. *Wijetunge*[352] it was held that, where dishonesty in the accused appears at first sight, to be in doubt, evidence of previous transactions is admissible to establish a systematic design from which dishonesty could be inferred.

The concept of a fraudulent intention envelopes situations which fall outside the ambit of dishonesty. The difference between the two concepts is commented on in *Fernando*.[353] The accused, by producing a prescription bearing the forged signa-

345. Section 388.
346. Section 394.
347. See the text at notes 29-64, *supra* of this chapter.
348. (1951) 45 C.L.W. 62.
349. *Oster-Ritter* 32 C.A.R. 191.
350. (1951) 45 C.L.W. at p. 63.
351. ibid.
352. (1946) 32 C.L.W. 86.
353. (1945) 46 N.L.R. 321.

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ture of a doctor, attempted to buy Sanatogen, a price-controlled article, from Cargills Ltd. whose practice was to supply it only on doctors' prescriptions although they would have incurred a penalty under the Control of Prices Ordinance by refusing to sell except on a prescription. A conviction of cheating was upheld. Soertsz A.C.J. (with whom Keuneman S.P.J. agreed) said: "Section 22 of the Penal Code defines 'dishonestly' thus: 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'. Section 23 less helpfully defines 'fraudulently' as follows: 'a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise'. The view that 'dishonestly' in section 22 is equivalent to 'fraudulently' in section 23 is... quite untenable... 'Fraudulently' is wider than 'dishonestly', for it is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth, but embraces injury to mind or reputation, to take two instances."[354]

In *Fernando's* case Soertsz A.C.J. and Keuneman S.P.J. expressed their agreement with Gour's statement that "Three essential ingredients must be present to constitute dishonesty in law, namely (a) intention, (b) employment of unlawful means, (c) acquisition of property to which one has no right whereas, according to Sir James Stephen,[355] whenever the words "fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements, at least, are essential to the commission of a crime, namely (a) deceit or an intention to deceive or, in some cases, mere secrecy and (b) either actual injury or possible injury, or a risk of possible injury by means of that deceit or secrecy".[356] Clearly, the latter definition is of more extended scope than the former.

The quantum of proof in regard to the mental element of cheating was dealt with by de Kretser J. in *Jayamanne* v. *Sivasubramaniam.*[357] The principle established by this decision is that, where the accused accepts a sum of money in consideration of using his good offices to prevail on a third party to grant the payer a favour, a conviction of cheating can be sustained only if the accused refrains from getting in touch with the third party and not if he is unsuccessful in his efforts to convince the third party. In this case A obtained a sum of money from B on an undertaking that he would use that money for the purpose of securing for B, by bribing a Corporation official, a job which was vacant in the Corporation. De Kretser J., acquitting the accused in appeal, said: "It appears

354. At p. 323. 355. 2 *History of Criminal Law,* p. 121.
356. (1945) 46 N.L.R. 321 at p. 323.
357. (1969) 73 N.L.R. 118.

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to me that there was no deception practised, in that each of the alleged victims knew why the money had to be provided. There is no evidence to show that the accused made no attempt to bribe in connection with the jobs mentioned. . . . The fact that the jobs did not materialize may only mean that the accused was unsuccessful in his efforts."[358] In these circumstances the conviction could not be allowed to stand.

(c) The Complainant's Conduct

This aspect of the offence relates to the *effect* of the deception practised by the accused. In consequence of the deception, the complainant should have been induced to do one of four things: (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property, or (iii) to do anything which he would not otherwise do, or (iv) to omit to do anything which he would not otherwise refrain from doing.

In regard to the first of these possibilities, the scope of the word "property" is important. The following submissions may be made:

(i) Unlike theft or criminal misappropriation of property, the offence of cheating is not restricted in scope to movable property. Clearly, movable property and immovable property alike can form the subject-matter of cheating.

(2) There is no requirement that the property should have a value assessable in monetary or commercial terms. This is borne out by the case law. In *Kanagaratnam* v. *Bartholomeusz*[359] it was held that a permit for foreign exchange to travel outside Ceylon may be treated as "property", for the present purpose. Swan J. quoted with approval the statement in an Indian text-book[360] that "Whether an article is or is not property does not depend on its possessing a money or market value. If it has some special value for the person or persons concerned, it is property even though its value cannot be measured in money".[361] The decision in *Manickam* v. *Inspector of Police*[362] is to a similar effect. It was proved that the accused, by producing another person's birth certificate as his own, obtained an Emergency Certificate from the Government of Ceylon to enable him to travel to India. Sri Skanda Rajah J. held that the Emergency Certificate constituted "property", within the meaning of section 398 of the Penal Code.[363]

However, where the charge is based on limb (i), actual delivery of the property is essential. In *Silva*[364] the accused tendered a ten-rupee note to each of three persons and asked

358. At p. 120.
359. (1954) 50 C.L.W. 112.
360. Ratanlal and Thakore, *Law of Crimes* (18th ed.) p. 1058.
361. (1954) 50 C.L.W. at p. 112.
362. (1962) 64 N.L.R. 286.
363. At p. 288.
364. (1933) 1d Times of Cey. 57.

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for change. In each case, the accused protested that he had received only seven rupees. It was held that actual delivery of three rupees to the accused by each of the complainants in the belief that the accused's representation was true, amounted to an indispensable part of the prosecution's case. Nevertheless, in circumstances where delivery of property to the accused does not actually take place, or where the person making delivery is not deceived by the accused's representation, a conviction of attempt to cheat may be upheld. Moreover, the requisites contemplated by limbs (i), (iii) and (iv) of the definition of cheating, in so far as it relates to the complainant's conduct, may be established in the absence of actual delivery of property to the accused.

The final element which has to be noted in this connection is that there must be a clear causal nexus between the deception practised by the accused and the complainant's being induced to do one of the four things required by the definition of the offence. In other words, the complainant should have delivered property or done or refrained from some act because he was taken in by the accused's false representation and not for some other reason. The deception for which the accused was responsible, should have been the effective reason for the complainant's acting as he did.

The importance of this requirement is illustrated by the facts of *Clucas*,[365] an English case. The accused induced a bookmaker to bet with him by falsely representing that he was acting as agent for many people at his place of work. The bet was successful and the accused was paid the winnings. The English Court of Criminal Appeal held that the accused could not be convicted of obtaining money by false pretences. Lord Goddard C.J. said: "In the opinion of the court, it is impossible to say that there was an obtaining of the money by the false pretences which were alleged, because the money was obtained not by reason of the fact that the people falsely pretended that they were somebody else or acting in some capacity which they were not; it was obtained because they backed a winning horse, and the bookmaker paid because the horse had won. No doubt the bookmaker might never have opened an account with these men if he had known the true facts, but we must distinguish in this case between one contributing cause and the effective cause which led the bookmaker to pay the money."[366]

The issue of causation is involved in the *ratio decidendi* of the Ceylon case of *Van Cuylenberg*.[367] The accused deceived B by producing some forged certificates of character and thereby

365. (1949) 2 K.B. 226.
366. At p. 228.
367. (1908) 11 N.L.R. 240.

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induced him to employ the accused and to pay a salary. B stated in evidence that he would not have employed the accused if he had not been deceived in this manner and that the accused was altogether incompetent. The accused, it was held, could rightly be convicted of cheating. This decision may be supported on the ground that the evidence left no room for doubt that B had suffered loss on account of the accused's bad work. This enables the case to be distinguished from the factual situation envisaged in *Clucas*. It is submitted, however, that Grenier A.J. went too far when he observed *obiter*: "I do not see what difference it would make, as argued by the appellant's counsel, if the accused had proved a competent conductor and had thus earned his salary."[368] In this event, the effective cause of the payment of wages would be the work done by the accused and not the fraud resorted to by him in securing employment initially. Accordingly, an adequate causal connection between the deception practised by the accused and the payment made by the complainant would not be established.

(d) *The Sustaining of Loss or Damage*

A difficulty of construction may be considered at this point. The definition of cheating is seen on analysis to be divided into two parts. The first part comprises the words "fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property". The second part of the definition consists of the words "intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived". The ambiguity in this regard is whether the phrase "which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, or damage or loss to the Government" (which occurs at the end of the definition) is intended to apply to the second part only or to the first part as well as the second.

The first part of the definition contemplates delivery of property, while the second part refers to an act or omission by the victim of the deception. Where the charge is brought under the second part of the definition, there is no doubt that the element of loss or damage constitutes an integral aspect of the case for the prosecution. The difficult question is whether the requirement of loss or damage to the person deceived or to the Government has to be established even in circumstances where the indictment is founded on the first part of the definition and refers to delivery of property by the complainant.

368. At p. 241.

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The early cases appear tacitly to assume that the element of detriment applies without discrimination to both limbs of the definition. A case in point is *Eliyatamby* v. *Kathiravel*.[369] The accused redeemed an article he had pawned by making a false statement in a declaration made under the Pawnbrokers' Ordinance.[370] In appeal, Drieberg J. said: "The conviction on the charge of cheating is wrong. Under section 19(2) of the Pawnbrokers' Ordinance, the pawnbroker was indemnified when he gave the accused the attiyal on his giving him the declaration. He suffered no damage or harm by acting on the false representation in the declaration and he could not therefore have been cheated."[371] In *Silva* v. *Kangany*[372] Akbar J. expressed a similar point of view. In both these cases, the respective complainants had delivered property in consequence of the deception, so that the first limb of the definition was manifestly applicable. Yet the conclusion was reached that the prosecution was not entitled to succeed without proof of detriment sustained by the complainant or by the Government.

This approach to the construction of the definition of cheating has been reversed by subsequent decisions. In *Haniffa* v. *Salim*[373] the accused was entrusted with some jewellery by H to be pawned. The accused pawned the jewellery and delivered the pawn ticket to H after endorsing it. The accused later represented to the pawnbroker that he had lost the pawn ticket, made the statutory declaration required under the Pawnbrokers' Ordinance and redeemed the jewellery. It was held in this case that a conviction of cheating could be sustained. Abrahams C. J. declared: "An analytical examination of section 398 will disclose that the two portions of the section are not to be read together beyond the words indicating deception. Provided only that the deception is practised dishonestly. I do not think that it matters whether the person who is deceived and so delivers the property suffers any harm or damage, in fact suffers anything beyond the technical loss of the possession of the property."[374] This position was reasserted by Howard C. J. in *Christinahamy* v. *Conderlag*[375] where it was said that "The section contemplates two types of offence".[376] The view emerging from *Haniffa* v. *Salim* and *Christinahamy* v. *Conderlag* is that, where delivery of property by the person deceived can be established, proof of loss or damage is not indispensable to recognition of liability for cheating.

In *Christinahamy* v. *Conderlag* the first accused was charged with having cheated by personation a Magistrate by pretending

369. (1935) 37 N.L.R. 16.
370. Section 19(1).
371. At p. 17.
372. (1929) 10 C.L.R. 32.
373. (1938) 39 N.L.R. 348.
374. At pp. 349-350.
375. (1946) 47 N.L.R. 382.
376. At p. 384.

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to him that she was the lawful mother of a girl and thereby having induced the Magistrate to deliver the girl to her. The Magistrate, acting on the accused's statement that she was the mother of the girl, made an order that the accused should be given a letter of authority to remove the girl from a remand home where she had been ordered to be kept until her parents called over to take charge of her. The accused subsequently appeared at the remand home with the Magistrate's order and removed the girl. Howard C. J. held that the accused could not be convicted, in these circumstances, under either the first part or the second part of the definition of cheating. The first part was inapplicable, since the charge against the accused had been framed on the basis of the delivery not of the Magistrate's order but of the girl, and there could hence be no delivery of property, as contemplated by the first part of the definition. Equally, the second part could not be availed of as the basis of a conviction, since no loss or damage to the Magistrate was established. Howard C. J. observed: "I am of opinion that damage to the reputation of the Magistrate is not the necessary consequence of his act."[377] In the result, acquittal of the accused was unavoidable.

In the present state of the authorities, the conclusion may safely be accepted for the law of Ceylon that the requisite of loss or detriment is conjoined solely with the second part of the definition of cheating, and does not form an essential element of the first part. This construction is defensible in terms of policy and is consistent with the grammatical structure of the statutory provision.

A point that warrants emphasis in this connection is that the ensuing of loss must be a *necessary* or *probable* consequence of the complainant's act or omission induced by the accused's deception. A vague or hypothetical possibility of loss is not sufficient. The leading case on this point is *de Alwis* v. *Selvaratnam*.[378] The accused had deceived M, a proctor and notary, by falsely representing to him that certain premises which the accused hypothecated under a bond attested by M as notary, were unencumbered. In fact the accused, by a prior mortgage bond, had hypothecated the same premises with another. The evidence indicated that M had taken every step which a prudent notary would deem necessary to protect his clients' interests in spite of the representations by the accused. As the earlier bond had not been registered, its existence could not be discovered. It was held that there was no evidence of any damage or harm to the notary. Howard C. J. declared: "The posssibilities of damage or harm to mind or reputation were, in my

377. At p. 384.

378. (1947) 34 C.L.W. 33.

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opinion, too remote."[379] Sufficiency of the likelihood of harm is a question of fact which has to be determined in the light of the circumstances of each case.

Where damage to body or property is demonstrable, no difficulty arises. Damage to mind or reputation, however, is a more tenuous concept. *Fernando*[380] was a case where the accused produced X before a notary and, pretending that X was Y, endeavoured to have a deed of mortgage executed by the notary. Middleton J. had no doubt that this deception, if it had proved successful, was bound to affect the notary's reputation adversely. A similar conclusion was arrived at in *Surabial Perera*[381] where the accused, falsely representing himself to be another, gave instructions to a notary to prepare a deed of transfer. In *Bastian*[382] where the accused was charged with attempting to cheat a notary by personation, it was held that the question whether the act would cause damage to the notary's mind or reputation or not, was properly left to the jury. On the other hand, in *Attorney-General* v. *Romel Fernando*[383] there was held to be no evidence that the deception was likely to injure the notary's reputation. The cases suggest that the requirement relating to impairment of reputation, in this context, represents a flexible concept which enables the court to arrive at a desirable result.

(B) *Aggravated Forms of the Offence*

The punishment for cheating is imprisonment of either description for a term which may extend to one year, or a fine, or both.[384] However, a more exacting penalty attaches to the offences of cheating in specific contexts. Three situations of this kind are dealt with by the Penal Code.

(i) "A person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is."[385] The explanation is added that "The offence is committed whether the individual personated is a real or imaginary person."[386]

The offence of cheating by personation requires the establishment of all the ingredients of liability for cheating and, in addition, the element of personation, in the sense defined.[387] A heavier penalty applies to this offence.[388]

379. At p. 34.
380. (1912) 15 N.L.R. 106.
381. (1914) 1 C.A.R. of Cey. 41.
382. (1902) 2 Bal. Rep. 93.
383. (1912) 1 C.A.C. 69.
384. Penal Code, section 400.
385. Penal Code, section 399.
386. Penal Code, Explanation to section 399.
387. For Examples of cases involving cheating by personation, see the cases cited at notes 378-381 *supra*
388. Penal Code, section 402.

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(ii) Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect, constitutes, an aggravated form of the offence of cheating.[389] Here, again, an additional element is superimposed on the essential elements of liability for cheating. In *Kandirama Tamby* v. *Venasitamby*[390] it was stated that this offence envisages the existence of a fiduciary relationship between the accused and the person deceived. Examples are provided by the relationship between guardian and ward, solicitor and client, and principal and agent. However, the view has been expressed that a mortgagee is not a person whose interest in the transaction relating to the mortgage the mortgagor is bound by law to protect.

(iii) A distinct offence is committed by any person who cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security.[391] A false representation that land is unencumbered when it is subject to a mortgage, warrants imposition of liability for this offence if the representation is made dishonestly and the result contemplated by the section is achieved as a result of the deception.[392]

VIII. FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY

Four offences under this head are constituted by the Penal Code:

(a) Dishonestly[393] or fraudulently[394] removing, concealing or delivering to any person or transferring or causing to be transferred to any person, without adequate consideration, any property, intending thereby to prevent or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person.[395]

(b) Dishonestly[396] or fraudulently[397] preventing any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person,[398]

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389. Penal Code, section 401.
390. (1908) 1 Weerakoon Rep. 5. 391. Penal Code, section 403.
392. *Lavena Maricar* (1907) 10 N.L.R. 369; *Edoris Appu* (1916) 2 C.W.R.183.
393. Penal Code, sections 21 and 22.
394. Section 23.
395. Section 404.
396. See note 393, *supra*. 397. See note 394, *supra*
398. Penal Code, section 405.

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(c) Dishonestly[399] or fraudulently[400] signing, executing or becoming a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate.[401]

(d) Dishonestly[402] or fraudulently[403] concealing or removing any property of himself or any other person, or dishonestly or fraudulently assisting in the concealment or removal thereof, or dishonestly releasing any demand or claim to which he is entitled.[404]

In several Ceylon cases the accused was exonerated from liability for this offence on the ground that wrongful loss or wrongful gain had not been established.[405] Moreover, good faith in the accused is inconsistent with proof of dishonesty or fraud.[406]

IX. MISCHIEF AND THE ILLEGAL REMOVAL OF WRECKS

(A) *Requisites of Liability*

Mischief is defined in section 408 of the Penal Code which declares that "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits mischief".

The different elements of the definition are best analyzed separately.

(a) *The Nature of the Act*

The *actus reus* of mischief consists of causing "the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously".

"Destruction" of the subject-matter represents a comparatively simple concept. In *Nagaraja* v. *Canapathipillai*[407] the accused entered a field in the complainant's possession and reaped the paddy which, but for intervention by the vidane,

399. See note 393, *supra*.
400. See note 393, *supra*.
401. Penal Code, section 406.
402. See note 393, *supra*.
403. See note 392, *supra*.
404. Penal Code, section 407.
405. *Fernando* (1934) 36 N.L.R. 216; *Silva* (1936) 13 Times of Cey. 109.
406. *Sheriff* v. *Karunaratne* (1937) I.C.L.J. 198.
407. (1944) 45 N.L.R. 421.

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the accused persons would have carried away. It was held that the reaping of the crop amounted to mischief. Keuneman J. said: "The reaping of the crop, in my opinion, caused a change in the property—there was not only a physical change but even a legal change. There has also been a change in the situation of the property. There must have been at least inconvenience caused to the complainant. No doubt the property was not destroyed, but I think it follows that there was a diminution of its value or utility to the complainant."[408]

Daniel Silva v. *Vanden Driesen*[409] was a case where damage was caused to a car as a result of its being driven by a person in a state of intoxication. Nagalingam J. observed: "The term 'destruction' in this section involves more than the bare idea of damage or destruction to property. It involves the idea of destruction of property out of a sense of malice, ill-will or spite, or even wantonly, but where the damage to property is caused as a result of negligence or recklessness in driving a vehicle, the elements of malice, ill-will, spite or wantonness are negatived. ...It is essential that the destruction of property must be the primary motive in doing the act which causes the damage to property."[410] In this case, the accused's conduct was held not to be tantamount to the *actus reus* of mischief, since damage to or destruction of the property was not intended to result from the act itself but was only a remote consequence.

Daniel Silva v. *Vanden Driesen* was a case in which destruction of the property was alleged, while *Nagaraja* v. *Canapathipillai* concerned only a change in the situation of property. In this respect, *Perera* v. *Perera*[411] falls on the same side of the line as *Nagaraja* v. *Canapathipillai*. In *Perera*'s case the complainant cast his net into the sea for the purpose of drawing it to the shore and catching fish that might be enclosed. The accused persons, who disputed the complainant's right to cast his net at this time, threw their own net inside the complainant's net. The complainant was thereby prevented from catching and bringing ashore the fish he had enclosed. The act by the accused was held to warrant imposition of liability for mischief.

The notion of diminishing value is illustrated by the facts of *Meera Saibo* v. *Duraya*.[412] This was a case where a mortgagor who damaged mortgaged property and reduced its value, was convicted of mischief. However, in *Andree* v. *Cooray*[413] it was held that the plucking of coconuts, mature or immature, or of jak fruit was not tantamount to mischief. Similarly in *Pereira* v. *Agie Nona*[414] the court held that the placing of flower pots across

408. At p. 423.
409. (1948) 50 N.L.R. 550.
410. At p. 551.
411. (1920) 21 N.L.R. 508.
412. (1905) 4 C.L. Rec. 89.
413. (1893) 2 S.C.R. 49.
414. (1940) 17 Times of Cey. 79.

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a path over which the complainant had a right of way, did not amount to mischief, since the act did not result in destruction of property or reduction of its value.

The view has prevailed in Ceylon that some element of permanence inheres in the definition of the *actus reus* of mischief. The question for decision in *Rockwood* v. *de Silva*[415] was whether a person who throws human excreta into the examination room of a surgeon is guilty of mischief. Soertsz J. declared: "It remains to consider whether there has been 'any such change' in the examination room itself as has resulted in "diminishing its value or utility' or in 'affecting it injuriously'. In my opinion, these words, read in the light afforded by the illustrations appended to section 408 contemplate a change of some permanence in the composition, texture or form of the thing in respect of which the charge is laid, and not such trivial and temporary change as results from an act such as that complained against in this case."[416] Soertsz J. quoted with approval a passage from Maine to the effect that "The change referred to must be a physical change in internal composition or externa l form".[417]

A further point which may be noted in connection with the *actus reus* of mischief is that a legal right in the accused to interfere with the property vitiates the wrongful character of his act. In *Fernando* v. *Fonseka*[418] a person who had demolished a latrine on his own property, was exonerated from liability. The complainant in *Christogu Pulle* v. *Nikulan Pulle*[419] was the caretaker of a coconut plantation who had been allowed by the owners of the land to cultivate with yams a portion of the property. After a dispute with the complainant, the owners turned him out of the land and destroyed the yams. They were held not guilty of mischief on the ground that the complainant was not entitled to remain on the property and that the owners had a legal right to destroy the produce. In *Moses* v. *Vallipilla*[420] the accused had removed a well-sweep and well-posts from his own garden. He was acquitted of a charge of mischief. A similar conclusion was reached in *Lewis Singho* v. *William*[421] where a landowner exercised his lawful rights in chasing away a buffalo from his land. This principle was unreservedly endorsed in *Lowe* v. *Wasilino*[422] and in *Edirisinghe* v. *Nanayakkara*.[423] On the other hand, the basis of the decision in *Perampalam* v.

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415. (1940) 42 N.L.R. 141.
416. At p. 142.
417. Maine, *Indian Criminal Law* (8th ed.) p. 616.
418. (1921) 23 N.L.R. 7.
419. (1916) 3 C.W.R. 182.
420. (1887) 8 S.C.C. 52.
421. (1937) 2 C.L.J. 168.
422. (1890) 9 S.C.C. 109.
423. (1952) 55 N.L.R. 160.

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Ragunather[424] was that the accused was not legally entitled to act as he did.

Our law contains an explict statement of the principle that "Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly".[425] A co-owner, then, may, be adjudged guilty of mischief in respect of the property subject to co-ownership. This principle has received expression in the case law. In *Hapuwa* v. *Peiya*[426] a co-owner had caused wanton destruction of fences and trees on the common property. In *Swaminathar* v. *Arumukam*[427] the accused had a joint right of property in the water-course in respect of which an act amounting to mischief was alleged.

The following principles may be formulated in regard to the *actus reus* of mischief:

(i) Destruction of property, causing any change in property and dealing with property may all satisfy the *actus reus* of mischief, but in every case the governing criterion is that the owner of the property should sustain some loss.

(ii) The damage caused to the property must be of a permanent and substantial character.

(iii) If the accused's act is legally justifiable, notwithstanding that detriment of some kind is suffered by the complainant, an essential element of the *actus reus* would be held to be lacking.

(b) *The Mental Element*

The mental element of the offence is contained in the requirement that the accused should act "with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person".[428]

The requisite intention or knowledge as an indispensable ingredient of liability has received emphasis in the case law. In *Ponnambalam* v. *Karunatilleke*[429] the accused was a policeman who, on the orders of a sub-Inspector, tore off a poster placed on the complainant's wall. The fact that the accused was merely obeying the instructions of his superior officer, it was held, negatived the idea that he intended to cause, or knew that he was likely to cause, wrongful loss to the complainant. A similar result was reached in *Ranhotiya* v. *Liyanna*.[430] Here a landowner, in the course of driving away a trespassing animal from his land, caused the animal an injury which turned out to be fatal.

424. (1932) 2 Times of Cey. 48.
425. Penal Code, section 408, Explanation 2.
426. (1932) 1 C.L.W. 212.
427. (1908) 3 A.C.R. Suppl. xiv.
428. Penal Code, section 408.
429. (1926) 8 C.L. Rec. 86.
430. (1937) 9 C.L.W. 85.

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It was held that, in the absence of proof of intention or knowledge, a conviction could not be sustained.

Several Ceylon cases introduce the notion of a specific motive into the *mens rea* of mischief. In *Daniel Silva* v. *Vanden Driesen*[431] Nagalingam J. held that "a sense of malice, ill-will, spite or even wantonness"[432] was involved in the mental element of the definition of mischief. A comparable approach had been adopted in previous decisions,[433] but at least one case[434] represents a dissent from the view that a particular motive is essential.

As a precondition of liability for mischief, it should be clearly established that the damage or destruction which was caused to the complainant's property was a necessary or, at least, a probable consequence of the act performed by the accused. In *Fox* v. *Weerasami*[435] the accused, who had no right to do so, drove his master's horse and trap. The horse took fright and injured itself and the trap. It was held that no liability for mischief could be imposed on the accused, since there was proof neither of intent nor of an adequate causal nexus.

Bona fides in the accused have been held to exclude the required intention or knowledge. In *Thambyah* v. *Vanderput*[436] a genuine belief entertained by the accused that he was exercising a legal right to shoot trespassing animals on a license issued by the Government Agent, saved him from liability. In *Balappu* v. *Perera*[437] Middleton J. held that a purchaser of property who acted bona fide in cutting down some trees on the property purchased, could not be convicted of mischief. *Yoosoof* v. *Haniffa*[438] was a case where the accused, acting on legal advice, cut down the caves of the complainant's roof which overhung his own premises. The accused was exonerated from liability. In *Fernando* v. *Fonseka*[439] a bona fide belief in the accused that he was entitled to a right of way over the land in question was held to be an exculpatory circumstance. *Fernando* v. *Bemappu*[440] and *Magan Kavasan* v. *Lebbe*[441] are cases where accused persons who had cut down a fence in the genuine belief that they were legally entitled to do so, were acquitted of a charge of mischief.[442] In *Ibrahim Lebbe* v. *Saibo*[443] the court acted on the principle that

431. (1948) 50 N.L.R. 550.
432. At P. 551.
433. *Porolis* v. *Romanis* (1913) 2 C.A.C. 163; *Abeygunawardene* v. *Rajapakse* (1926) 7 C.L. Rec. 157; *Fonseka* v. *Chandrasekera* (1953) 49 C.L.W. 97.
434. *Siriwardene* v. *Punchihamy* (1939) 16 Times of Cey. 80.
435. (1900) 1 Browne 332.
436. (1929) 31 N.L.R. 420
437. (1907) 2 A.C.R. Suppl. xiii.
438. (1921) 3 C. L. Rec. 18.
439. (1900) 1 Browne 172.
440. (1893) 2 S.C.R. 66.
441. (1910) 4 Leader L.R. 46.
442. See also *Perera* v. *Fernando* (1928) 6 Times of Cey. 9; *Mohideen* v. *Supramaniam Chettiar* (1937) 17 C.L. Rec. 56
443. (1904) 4 Leader L.R. 163.

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where the accused's act was done in the assertion of a right to prevent adverse prescription, a conviction of mischief could not be sustained.

The principle may generally be accepted that the notion of bona fides, in this context, includes the vindication of a right which is the subject-matter of a dispute.[444] However, a reckless opinion held by the accused is inconsistent with imputation of bona fides to him.[445] Particularly where the accused is out of possession of the property in question, the use of force to regain possession cannot as a rule be justified on the ground of good faith.[446]

The law of Ceylon contains the principle that "It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not".[447] This principle was given effect in *Dissan* v. *Subehamy*[448] where the court held that a wilful act committed in respect of property of which there would naturally be some owner, was adequate to warrant liability for mischief.

It is not only the owner of property who is entitled to institute a prosecution for mischief. In *Jayasinghe* v. *Miguel Appu*[449] the prosecutor was the purchaser at a sale in execution of a decree entered against the respondents. His complaint was that, prior to confirmation of the sale, the respondents committed mischief by cutting down trees on the land sold. It was held that the prosecutor had *locus standi in iudicio* to institute criminal proceedings for mischief, notwithstanding that he was not strictly owner of the land. Lesser interests in property than ownership—for example, rights under a mortgage or a contract of hire—would be sufficient for this purpose, provided that the element of wrongful loss is established.

(c) *Principles Governing Trespassing Animals*

The basic rule here is that the requisite intention or knowledge must be strictly proved.[450] Liability for mischief can be imposed only if the circumstances exclude a reasonable inference that the accused's act is imputable to some other state of mind like accident, carelessness, negligence or bona fide belief in one's right.[451]

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444. *Hendris Sinno* v. *Engo Nona* (1914) 1 C.A.R. of Cey. 21.
445. *Kanapathipillai* v. *Nagarajah* (1944) 22 C.L. Rec. 4.
446. *Fonseka* v. *Sardial* (1916) 3 C.W.R. 292.
447. Penal Code, section 408. Explanation 1.
448. (1892) 2 C.L. Rep. 142. 449. (1937) 17 C.L. Rec. 15.
450. *Saibo* v. *Perera* (1922) 24 N.L.R. 65. 451. ibid.

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A person is not entitled to injure a trespassing animal without making a reasonable attempt to drive it away by less violent means.[452] In some cases, depending on the nature of the animal and the type of damage envisaged, capture of the trespassing animal may have to be attempted before the animal is wounded or shot at.[453] Thus, the mere fact that the animal was trespassing, does not necessarily justify injury to, or destruction of, the animal.[454] It is a question of fact, to be determined in the light of the circumstances of each case, whether the injury or destruction was wanton or not.[455] It may be asserted, however, that an accused person who has tried other reasonable methods of protecting his property and wounds or kills the animal only as a last resort, cannot be held liable for mischief.[456]

The fact that the accused's land was not fenced and that animals could come on the property easily, is treated as enhancing the accused's duty of resorting to other methods of getting rid of the animal before having recourse to violent means.[457]

The question whether the value of the animal, as compared with the value of the crop which the accused attempted to save, is a relevant factor in regard to liability, has given rise to a conflict of opinion in the cases. In *Saibo* v. *Perera*[458] Schneider J. said: "In judging a man's state of mind in killing or injuring an animal, the valuable nature of the animal cannot be lost sight of. A person could hardly justify the destruction of an elephant, a horse or a valuable cow, on the ground that he had done the act to protect a field under paddy, even if he has made an effort to drive it away. But, on the other hand, it is not as easy to keep pigeons or fowls from a plantation as other animals such as cattle, and if an accused person pleads that he had killed pigeons or fowls because he could not prevent them from damaging his crop of grain or other produce, it is obvious that he is not guilty of mischief, for the intention of the act seems clear that it was the protection of his property."[459]

In *Edirisinghe* v. *Nanayakkara*[460] Swan J. dissented from this view. His Lordship declared: "I do not think that the relative values of the cow and the damage done have any bearing on the matter in issue, namely, whether the accused had killed the cow with intent to cause, or knowing that he was likely to cause, wrongful loss or damage to the complainant."[461] Further, it was said: "Each case will depend on its merits. The wounding

452. *Menchohami* (1905) 8 N.L.R. 309.
453. *Carohami* v. *Haramanis* (1901) 1 Browne 427.
454. Anonymous case reported at (1903) 5 N.L.R. 23.
455. *Rosairo* v. *Dias* (1898) 3 Browne 101.
456. *Sultan* (1896) 2 N.L.R. 162.
457. *Rosairo* v. *Dias* (1898) 3 Browne 101.
458. (1922) 24 N.L.R. 65.
459. At pages 72-73.
460. (1952) 55 N.L.R. 160.
461. At p. 161.

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or destruction of an animal would be *prima facie* evidence of that intention or knowledge which is an essential ingredient of the offence of mischief. If the evidence as a whole negatives that intention or knowledge, the accused is entitled to an acquittal."[462] It is submitted that the view adopted in *Edirisinghe* v. *Nanayakkara* is the better view on this point.

(B) *Allied and Aggravated Offences*

Several factors may have the result that the punishment for mischief is substantially increased.

(a) The extent of the damage caused is a relevant consideration. Thus, the punishment for mischief is enhanced in circumstances where the damage caused is to the amount of fifty rupees or upwards.[463] Moreover, mischief by killing or maiming any animal of the value of ten rupees and any animal of the value of fifty rupees are differently treated in regard to the quantum of the penalty applicable.[464] Mischief by fire or an explosive substance with intent to cause damage to the amount of one hundred rupees involves the imposition of a more exacting penalty.[465] Mischief with intent to destroy or make unsafe a decked vessel or a vessel of a burden of ten tons or upwards is likewise treated as a distinct offence punishable with particular severity.[466]

(b) The offence of "maiming"[467] an animal has given rise to some difficulty of interpretation. The case law provides some guidance in this regard. The element of *permanent diminution* of the value of the animal has been insisted on as a feature of this offence.[468] Cutting the teat of a cow[469] and cutting off the end of a cow's tail[470] have been held not to be cases of "maiming". A different view has been taken in regard to cutting off the whole of a cow's tail.[471]

(c) The identity of the property damaged or destroyed may aggravate the offence. This is illustrated by mischief caused by injury to works of irrigation,[472] a public road, bridge or river,[473] a public drainage system.[474] a lighthouse or seamark,[475] and a landmark fixed by the authority of a public servant.[476]

462. At p. 162.
463. Penal Code, sections 409 and 410.
464. Penal Code, sections 411 and 412.
465. Penal Code, section 418.
466. Section 420.
467. Sections 411 and 412.
468. *Zoysa* v. *Edoris Appu* (1907) 11 N.L.R. 66.
469. *Anthoni Muttu* v. *Samuel* (1907) 11 N.L.R. 65.
470. *Hudly* v. *Apoohamy* (1908) 3 A.C.R. 58.
471. *Sanchi Nona* v. *Davit Sinno* (1914) 17 N.L.R. 252.
472. Penal Code, section 413.
473. Section 414.
474. Section 415.
475. Section 416.
476. Section 417.

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(d) The means employed in committing mischief may amount to a circumstance of aggravation. A heavier penalty is attendant on mischief by fire or by an explosive substance.[477]

(e) Mischief committed after preparation is made for causing to any person death or hurt or wrongful restraint, or fear of death or of hurt or of wrongful restraint, constitutes a separate offence.[478]

(f) Several offences in respect of illegal removal of wrecks are recognized by the Penal Code. Examples are impending the saving of a vessel.[479] removing or secreting a wreck[480] and taking a wreck into a foreign port.[481]

X. CRIMINAL TRESPASS

(A) *Essential Elements of Liability*

Section 427 of the Penal Code defines the offence of "criminal trespass". "Whoever enters into or upon property in the occupation of another with intent to commit an offence or to intimidate, insult or annoy any person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass".

(I) *The Actus Reus*

The *actus reus* of criminal trespass consists of entering into or upon property in the occupation of another or remaining unlawfully on such property. This requirement involves proof of several elements.

(a) *The Concept of 'Occupation'*

The relevant requirement in this context is that the land should be in the occupation, and not in the possession, of the complainant. The difference between these concepts is of practical importance, in that occupation is a matter of fact, while possession may be actual or constructive and may therefore depend on matters of law. The concept of 'occupation' presupposes a greater degree of physical control.[482]

In *Chitravelu* v. *S. I. Police, Kantalai*[483] Weerasooriya J. said: "In dealing with a charge of criminal trespass, it is necessary for the court to bear in mind the distinction between occupation and possession. This the learned Magistrate seems to have failed to do. His finding is that 'On the evidence there is no

477. Sections 418 and 419.
478. Section 426.
479. Section 423.
480. Section 424.
481. Section 425.
482. *Selvanayagam* (1950) 51 N.L.R. 470 at p. 474.
483. (1958) 61 N.L.R. 39.

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doubt at all that the Colonization Officer was in lawful possession of the colony cottage'. The learned Magistrate has misdirected himself as to a particular ingredient of the offence of criminal trespass".[484] The conviction was set aside in appeal primarily on the basis that a person in lawful possession of property need not necessarily be in occupation of the property.

The element of immediate physical control implicit in the idea of "occupation' emerges from the opinion of the Privy Council in *Selvanayagam*.[485] R the superintendent of an estate which had recently been purchased by the Crown, was instructed by the Assistant Government Agent to give notice to quit to all the labourers on the estate. In accordance with these instructions R gave notice to the accused terminating his employment. On the date of termination of employment, however, the accused declined to leave the two rooms in which he was living in the lines on the estate. Sir John Beaumont, delivering the opinion of the Privy Council, said: "There must be an occupier whose occupation is interfered with....The section has no application where the fact of occupation is constant, the only change being in its character, as where a tenant holds over after the expiration of his tenancy. In the present case, according to the uncontradicted evidence, the only person in physical occupation of the two rooms at the material dates was the accused who cannot have intended to annoy himself."[486]

In *Fernando* v. *Holloway*[487] it was held that a conviction of criminal trespass could not be upheld in circumstances where the complainant who claims to have been in occupation of the property was not in Ceylon at the time of the alleged offence. Sinnetamby J. said: "In the present case the Superintendent had been away in Europe for about six months prior to the entry, it was not a temporary absence of short duration to a quickly accessible place close by; there was an acting Superintendent who functioned in his stead and who certainly was not in a position analogous to that of an agent".[488] It was therefore held that the person in occupation of the estate at the material time was the acting Superintendent.

In *Selvanayakam Kangany* v. *Henderson*[489] it was argued on behalf of the accused that it was not the superintendent of the estate but the accused himself who was in occupation of his room in the lines. The Supreme Court rejected this argument. Jayatileke J. said: "The Superintendent reserved to himself the right to allocate the rooms as he wished. The reservation of

484. At p. 40.
485. (1950) 51 N.L.R. 470.
486. At p. 474.
487. (1958) 60 N.L.R. 90.
488. At p. 92.
489. (1946) 47 N.L.R. 337.

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such a predominating right must necessarily prevent the occupation of the rooms by the labourers from being exclusive. The only reasonable inference to be drawn from these facts is that the Superintendent was in paramount occupation not only of the estate within whose confines the line rooms are situate but also of the line rooms."[490] This view, however, proved unacceptable to the Privy Council who also held that the relationship between master and servant between the complainant and the accused had not been established sufficiently.[491]

The basis of the approach by the Privy Council in *Selvanayagam*'s case is that 'occupation', in this context, is tantamount to physical occupation. In the light of this ruling, some earlier decision may need re-examination. Thus, in *Rawther* v. *Mohideen*[492] Wood Renton J. said that the owner of a house could be said to occupy his property through a tenant or a caretaker and that constructive occupation of this kind was sufficient to establish a charge of criminal trespass. In *Fernando* v. *Holloway*[493] Sinnetamby J. made the following comment on this case: "How can it be contended that an accused person who knew very well that the owner or tenant is and was never physically present in the premises trespassed upon, intended by his entry to insult or intimidate such an absent owner or tenant? Would it not be more correct to assume that the entry was intended to insult the caretaker who was in actual physical occupation? There may, however, be cases in which both the principal and the servant or agent are in occupation of the premises when different considerations would apply."[494] In *Nallan Chetty* v. *Mustapha*[495] de Sampayo J. observed that the occupation contemplated by the definition of criminal trespass was "actual physical possession by oneself or by an agent".

In *Abraham* v. *Hume*[496] the Supreme Court had taken the view that, while a labourer on an estate is in occupation of his line-room, the superintendent who resides on the estate is in occupation of the entire estate including the line-rooms. This may seem to reflect a slight departure from the view adopted by the Privy Council in *Selvanayagam*'s case. However, as Sinnetamby J. aptly declared in *Fernando* v. *Holloway*, "It is difficult, nay impossible, to lay down any hard and fast rules by which the question (of occupation) can be decided. Each case must be decided on the facts and circumstances established".[497] Thus it was held in *Attorney-General* v. *Deonis*[498] that actual residence was not invariably implied in the concept of 'occupation'.

490. At p. 345. 491. See note 485, *supra*.
492. (1911) 1 Bal. N. 2. 493. (1958) 60 N.L.R. 90. 494. At p. 91.
495. (1916) 19 N.L.R. 262. cf. *Emanis Singho* v. *Inspector of Police, Dompe* (1961) 64 N.L.R. 158
496. (1951) 52 N.L.R. 449. 497. (1958) 60 N.L.R. 90 at p. 91.
498. (1908) 1 Weerakoon's Rep. 13.

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The view expressed in *Silva* v. *Silva*,[499] that 'occupation' does not necessarily imply actual physical possession by the complainant or his agent, is inconsistent with the Privy Council's opinion in *Selvanayagam*'s case and may now be considered unsound. Actual physical possession or control is an integral element of 'occupation' and may be established by reference to such factors as the possession of a key.[500] In *Randoris* v. *Inspector of Police, Warakapola*[501] Samarawickreme J. following the decision in *Silva* v. *Silva* held that in a prosecution for criminal trespass occupation of property within the meaning of section 433 of the Penal Code does not mean actual physical possession.

(b) *Unlawful Entry*

It is a primary requirement of liability for criminal trespass that the accused's act in entering or remaining on the property occupied by the complainant, should be unlawful. In *Nallan Chetty* v. *Mustapha*[502] de Sampayo J. said: "In order to constitute the offence of criminal trespass, there must in the first instance be a trespass. Lawful entry is not trespass, whatever ulterior motive may partly actuate the party in exercising the right of entry."[503]

The element of occupation by the complainant need be established only after the unlawful character of the accused's entry is demonstrated. Thus, notwithstanding that the accused's entry was unlawful, he may yet be relieved of liability for criminal trespass if the prosecution fails to show that the land was occupied by someone. *Speldewinde* v. *Ward*[504] was a case where the accused had been ejected by the process of a civil court from a certain land but, at a subsequent date, when no one was in actual occupation of the property, re-entered upon the premises. Liability for criminal trespass was imposed in this case.

However, this ruling is to be accounted for by the fact that the definition of criminal trespass, in its original form, penalized entry by one person upon property in the 'possession' or 'occupation' of another person. The amending Ordinance, No. 16 of 1898, had the effect of deleting the word 'possession', so that 'occupation' thereafter became the sole operative notion in this context. Although *Speldewinde*'s case was decided after the enactment of the amending statute, there is no indication in the judgment that the significance of the amendment had been taken into account. By contrast, the proper line of reasoning was

499. (1929) 10 C.L. Rec. 107.
500. *Ukku Sinno* v. *Andiris Silva* (1934) 11 Times of Cey. 143.
501. (1969) 77 N.L.R. 304.
502. (1916) 19 N.L.R. 262.
503. At p. 264.
504. (1903) 6 N.L.R. 317.

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adopted in *Pitche Bawa* v. *Abdul Cader*.[505] In this case a recent purchaser prosecuted a person who had forcibly entered the premises. Acquitting the accused, Hutchinson C. J. observed: "All that I need say is that a mere statement by a purchaser—'I entered into possession'—would not satisfy me that he was ever in occupation."

(c) *Legal Title in the Accused*

There is no doubt that a lawful owner may be found guilty of criminal trespass in respect of his own property. In *Rodrigo* v. *Fernando*[506] a landlord, having let his house to a tenant, entered his garden with intent to annoy the tenant. He was held guilty of criminal trespass. This conclusion is inevitable, since criminal trespass is conceived of as an offence not against ownership but against occupation, so that infringement of the latter interest warrants imposition of liability.

Similarly, a co-owner may be liable for criminal trespass in respect of the land subject to co-ownership.[507]

(II) *The Mens Rea*

The *mens rea* of criminal trespass consists of (i) intent to commit an offence, or (ii) intent to intimidate, insult or annoy any person in occupation of property.[508]

It has been emphasized in a long line of decisions by the courts of Ceylon that proof of the mental element, in either of these forms, is indispensable to a conviction of criminal trespass.[509] The *mens rea* must be averred specifically in the indictment and established beyond a reasonable doubt by affirmative evidence.[510]

Intent to commit an offence embodies a criterion which is relatively easy to apply. The word "offence", in this context, refers to a thing made punishable under the Penal Code or under any law other than the Penal Code, provided that the thing punishable under any law other than the Penal Code is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.[511] Thus,

505. (1909) 3 S.C.R. 47.
506. (1899) 5 N.L.R. 176.
507. *de Silva* v. *James* (1910) 4 Leader L.R. 26; *Cooke* v. *Amaris* (1922) 1 Time of Cey. 62.
508. Penal Code, section 427.
509. *Soysa* v. *Soysa* (1911) 7 C.L. Rev. Appeal Cases 65; *Davithhamy* v. *Poranchihamy* (1909) 4 Leader L.R. 2; *Jayewickrema* v. *Teris Appu* (1911.) 5 Leader L.R. 108; *Essanhamy* (1918) 5 C.W.R. 196; *Samel Appu* v. *Jägginas* (1923) 1 Times of Cey. 181; *de Silva* v. *de Silva* (1924) 2 Times of Cey. 134; *Henaya* v. *Bandiya* (1929) 30 N.L.R. 353; *Hanifa* v. *Deheragoda* (1930) 32 N.L.R. 249. See also *Dingiri Banda* v. *Vander Poorten* (1927) 9 C.L. Rec. 40.
510. ibid.
511. Penal Code, section 38(3).

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this provision encompasses all offences constituted by the Penal Code, but only some offences recognized by other statutes. The governing consideration in the latter context is the gravity of the offence intended to be committed.

Where the prosecution alleges that the accused, when entering or remaining on the property had the intention of committing an offence, it is incumbent on the prosecution to name the offence which the accused intended to commit.[512]

If no intention on the accused's part to commit an offence can be proved, he must be shown to have had the intention to intimidate, insult or annoy any person in occupation of property.[513] In regard to the first of these elements, de Sampayo J. said in *Sinnappu* v. *Vallipuram*[514] that "The essence of intimidation is the holding out of some threat directly to the person concerned or with the intention of its being communicated to him."

Whether the accused can be held to have had the intention of intimidating, insulting or annoying any person in occupation of property is a question of fact which has to be determined according to the circumstances of each case. Some recent decisions shed light on the scope of this requirement and its interpretation.

In *Rengasamy* v. *McIntyre*[515] the accused who had been employed as a labourer on an estate, was dismissed after an incident in which he intimidated and threatened to kill the superintendent. The accused made an application to a Labour Tribunal for reinstatement but, after dismissal of this application by the Tribunal, the superintendent gave the accused notice to quit the estate. The superintendent of the estate stated in evidence that he refrained from taking action earlier out of deference to the Magistrate's Court and the Labour Tribunal in which proceedings were pending. In appeal, Samarawickrema J., upholding the conviction of criminal trespass, observed: "The learned Magistrate's finding is that the accused is defying the complainant and his intention is clearly to annoy the complainant. ...In fact the accused appears to be bent on causing to the complaint as much trouble and vexation as possible."[516]

A similar conclusion was reached in *Angamuttu* v. *Superintendent of Tangakele Estate*.[517] The accused's dismissal from service was

512. *Andree* v. *Cooray* (1893) 2 S.C.R. 49; *Appuhamy* v. *Veronica Fernando* (1909) 2 Weerakoon's Reports 55; *Mendis* v. *Silva* (1915) 1 C.W.R. 124, *Korala* v. *Ukkuwa* (1916) 2 C.W.R. 66; *Mediwake* v. *de Silva* (1940) 42 N.L.R. 190.
513. Penal Code, Section 427. 514. (1917) 4 C.W.R. 231
515. (1969) 72 N.L.R. 286.
516. At p. 288
517. (1956) 58 N.L.R. 190

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apparently occasioned by misconduct. The accused refused to accept his discharge certificate or the balance of his wages and refused to leave the estate when given notice to quit. Referring to the accused's evidence, T. S. Fernando J. said. "I am of opinion that the learned Magistrate was clearly right in convicting the accused on a charge of criminal trespass because the answers reproduced above given in evidence by the accused are as clear an indication as possible that he is remaining on the estate contumaciously in circumstances which cannot but annoy the superintendent".[518]

These decisions may be usefully contrasted with others in which intent to annoy was held not to have been established.

In *Abdul Azeez*[519] the prosecution alleged that criminal trespass was committed by the accused persons by entering a tea estate with the intention of annoying the superintendent who had refused them permission to enter. The defence was that the purpose of the accused, who were trade union officials, in entering the estate was to persuade certain labourers who had been on strike, to give up their 'satyagraha'. The Magistrate who heard the case did not believe that the purpose of the accused in trespassing on the estate was to get the strikers to return to work. He found that the natural consequence of the trespass was to cause annoyance to the superintendent.

The Supreme Court upheld the conviction. Basnayake C. J. (with whom Abeyesundere and G. P. A. Silva JJ. agreed) said: "The intent of the accused is one that has to be inferred from the circumstances of the case. In the instant case the first accused asked for permission to enter the estate and was not granted permission. Despite that he and the others entered the estate clearly in defiance of the superintendent whose permission they had sought."[520]

This finding was reversed by the Privy Council. Their Lordships held that the evidence in the case did not suffice to establish either directly or by inference beyond reasonable doubt that the object of trespassing on the estate was to annoy the superintendent. The Privy Council, although accepting the Magistrate's conclusion that the expressed intention to prevail on the strikers to abandon 'satyagraha' was merely a pretext for entry, held that this finding by the Magistrate did not exclude the possibility that the real object of the trade union officials in making the trespass was to meet the strikers, as stated by a witness, and to discuss the strike with them. Viscount Dilhorne observed: "Although a natural consequence of the trespass might be to cause annoyance to (the superintendent), in the circumstances of this case it is, notwithstanding the learned Magistrate's

518. At p. 191 519. See note 552, *infra*
520. (1963) 65 N.L.R. 553 at p. 554.

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finding, not established with the degree of certainty required to justify conviction, that the trespass was effected with intent to annoy (the superintendent)".[521]

An important principle which emerges from the opinion of the Judicial Committee is that entry in defiance of the superintendent does not necessarily warrant the inference that the trespass was committed with intent to annoy him. Their Lordships said: "If that was the case, then every trespass committed after the occupier of the property had refused permission to enter would constitute the offence of criminal trespass".[582] A previous refusal of permission to enter, then, is inconclusive in this regard.

In view of the Privy Council's opinion in *Abdul Azeez*'s case the submission may perhaps be made that some passages of the judgment of the Supreme Court in the earlier case of *Angamuttu* v. *Superintendent of Tangakele Estate*[523] require reconsideration. T. S. Fernando J. said: "It should be noted that in the case before me the accused, though not entitled thereto, has had one month's time to quit the estate. If the accused is advised that he has been wrongfully dismissed, it is open to him to pursue any civil remedy he may have. He cannot be heard to say that he is entitled to remain on the estate defying the Superintendent".[524] Genuine belief entertained by the accused on reasonable grounds that he was entitled to remain in occupation of the property while pursuing civil remedies available to him, may be inconsistent with intent to annoy the superintendent.

In *Namanathan* v. *McIntyre*[525] the accused, who was unmarried and twenty-three years old, was employed as a labourer on an estate. He occupied a line-room which was allotted to his father, also a labourer on the same estate. After his services were terminated, the accused continued to remain in his father's line-room although he had been given notice to quit the estate. The question was whether intent to annoy the superintendent had been proved. Answering this question in the negative, Manicavasagar J. said: "I think the accused's intention to remain in the line-room is because he is dependent on his parents and has no place to live in. That appears to be the dominant purpose in his remaining there, and in the absence of any other circumstance which points to an intention to annoy, the verdict of conviction must be set aside".[526] This conclusion was facilitated by the fact that the accused's occupancy of the room was referable to his being the son of the allottee and did not derive from a term of his contract of employment.[527]

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521. (1964) 67 N.L.R. 73 at p. 78
522. (1964) 67 N.L.R. 73 at p. 79.
523. (1956) 58 N.L.R. 190.
524. At p. 192.
525. (1967) 69 N.L.R. 401
526. At p. 403
527. At p. 402.

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In *Moulin Nona* v. *Routhledge*[528] the accused was a married woman working on an estate. She continued in occupation of her line-room after she had been given notice to quit. It was held in appeal that a conviction of criminal trespass could not be sustained. Samerawickrema J. declared: "This is not a case where one can say with confidence that the continued occupation of the line-room by the accused is attributable to defiance of the superintendent and the intent to annoy him. It is a matter for consideration whether the accused's dominant intention was not to remain with her husband and her family in the line-room of which her husband continued to remain in occupation".[529]

Similarly, absence of intent to annoy the person in occupation of the property formed the basis of the decision by the Supreme Court in *Veeriah* v. *Selvarajah*.[530] In this case the accused after termination of his services and receipt of notice to quit the line-room, made an application to a Labour Tribunal for reinstatement. This application was still pending when a prosecution was instituted against the accused for criminal trespass. The superintendent did not state in evidence that the notice to quit the line-room was independent of the notice of termination of the accused's services or of the offer made by him to reinstate the accused on certain conditions. Nor did the superintendent state that the notice to quit was intended to take effect irrespective of the result of the inquiry pending before the Labour Tribunal or of any action that might be taken by the Labour Department on behalf of the accused. The position taken up by the accused was that he had no intention of annoying the superintendent and that he was prepared to leave the estate if the decision of the Labour Tribunal was unfavourable to him.

In these circumstances G. P. A. Silva J. held that the requisite mental element had not been established in the accused. His Lordship stated: "Can it be said that the accused was acting *mala fide* and indulging in the unrewarding pastime of causing annoyance to the superintendent or bona fide in an endeavour to secure reinstatement by recourse to a Tribunal set up by law for redress of his grievances although, without doubt, his conduct would have had considerable nuisance value and resulted in annoyance to the superintendent? It seems to me that the answer to this question does not merely remain in the field of a reasonable doubt, which would have been sufficient for an acquittal of the accused, but ascends to the level of high probability on the side of his bona fides and necessarily negatives a dominant intention to annoy the superintendent by his conduct."[531]

28. (1967) 70 N.L.R. 568. 529. At p. 570
30. (1967) 73 N.L.R. 12 531. At p. 17

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The cases of *Namanathan* v. *McIntyre*, *Moulin Nona* v. *Routhledge* and *Veeriah* v. *Selvarajah* all have in common the feature that continued occupation by the accused was imputable to an intent other than that of annoying the superintendent. In these circumstances the mental element of the offence was held not to have been established.

The facts of these cases may be contrasted with those of *Selliah* v. *de Kretser*.[532] The accused in this case was found to be erecting without permission a cattle shed twenty feet away from the line-rooms. The rule designed to safeguard the health of the occupants of the line-rooms was that sheds should be at least seventy-five yards away. The superintendent's order to demolish the shed was disobeyed by the accused. The superintendent then terminated the accused's services and gave him one month's notice to leave the estate. The accused declined to accept the notice and in an arrogant manner asked the superintendent to do what he wished. Upholding the conviction in appeal, Samarawickrema J. said: "Upon the facts stated it appears to me that the accused has remained on the estate unlawfully, contumaciously and in defiance of the complainant, and an intention to annoy is to be inferred".[533]

A question which arises in this connection is whether a person who is asked to leave an estate after his services are terminated, may be charged with criminal trespass while he remains in occupation of his quarters pending the decision of a Labour Tribunal whose assistance the accused has invoked. This point has been considered in two recent decisions of the Supreme Court.

In *Veeriah* v. *Selvarajah*[534] G. P. A. Silva J. said: "Having made the application (for reinstatement to the Labour Tribunal), it is but natural that the accused would have expected a favourable decision in which event the superintendent would have been compelled by law to reinstate the accused and, in the absence of any evidence to the contrary, there is no reason to think that the superintendent would, despite the reinstatement, have insisted on the accused quitting the line-room which he occupied".[535] The learned judge added: "(The accused) also stated that he was prepared to leave the estate if the Labour Tribunal decided that his dismissal was justified and no suggestion was made in cross-examination that the application was a frivolous one or that he had already secured employment elsewhere, having abandoned any hope of success before the Labour Tribunal."[536]

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532. (1967) 70 N.L.R. 263
533 At p. 264
534. (1967) 73 N.L.R. 12
535 At p. 16
536. ibid

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The underlying principle is that the accused cannot be convicted of criminal trespass in these circumstances if he continued in occupation, expecting in good faith to obtain redress of his grievance at the hands of a Labour Tribunal. The crucial consideration in such a case is not the actual condition of the accused's legal rights, as they are objectively held to exist, but genuine anticipation on his part that they would ultimately be determined in a particular manner. However, a plea of this nature invoked by the accused has to be cautiously examined with a view to excluding simulated pretexts from the ambit of protection.

This statement of the law is not contradicted by the decision in *Selliah* v. *de Krester*[537] where Samarawickrema J. said: "It is true that upon (the accused's) application to the Labour Tribunal that body has the power to order his reinstatement and, in the event of the Tribunal making such an order, he may be provided with a line-room for his occupation. This fact does not, however, justify his remaining on the estate pending the proceedings".[538] This dictum has to be read in the light of the facts of the case. *Selliah* v. *de Krester* is distinguishable from a case like *Veeriah* v. *Selvarajah* in two respects: (i) In the former case, the accused did not assert his belief that he was entitled to remain in occupation until the termination of proceedings before the Labour Tribunal; and (ii) In *Selliah*'s case the accused's excuse for remaining on the estate was held to be specious, in view of evidence that his continued defiance of the superintendent by a trespass had already lasted four years before the commencement of proceedings in the Labour Tribunal.

The conclusion is inescapable that the presence or absence of an intent to annoy the party in occupation has to be determined on an empirical basis, untrammelled by rigid general rules. However, it may be useful, as a rough guide, to indicate the kind of situation in which this intent may be held to have been proved.

An estate labourer who refused to attend work because of a strike called by a political association and, although his services were properly dispensed with, continued to remain on the estate in defiance of the superintendent, was held to have the intention of annoying the superintendent.[539] In *Forbes* v. *Rengasamy*[540] the accused was an estate labourer whose contract of service had been terminated. The free housing facilities which he had been allowed, were thereupon withdrawn and the accused was repeatedly warned that he must leave the estate on expiration of

537. (1967) 70 N.L.R. 263.
538. At p. 264.
539. *Marimuttu* v. *Wright* (1947) 48 N.L.R. 253.
540. (1940) 41 N.L.R. 294.

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the notice. Nevertheless, he refused to comply with this order or to accept his ticket of discharge. His conviction of criminal trespass was sustained. Intent to insult, intimidate or annoy has been attributed to a person who climbed up about midnight into the sleeping apartment of a young lady with the object of accomplishing some immoral purpose.[541] In *Samuel* v. *Senathirajah*[542] it was held that a person who entered upon land with the sole object of inducing the occupier to embark on legal proceedings, was guilty of criminal trespass, but this decision is probably open to criticism. In *Wilson* v. *Gault*[543] Lawrie A.C.J. held that a prostitute who entered a barrack square with the object of committing fornication in view of non-commissioned officers and soldiers, could be held to have intended annoyance to them.[544] Where the land has been subject to peaceful occupation by the complainant for a very long period, like fifty years, and the accused enters upon the land without reason, intent to annoy may be held to have existed.[545] If the accused believed in good faith that his occupation of a line-room was not affected by termination of the contract of service, an intent to annoy is not properly attributable to the accused.[546] Inclination on the accused's part to disregard repeated warnings to keep off the property may be considered indicative of an intent to annoy.[547]

With this line of decisions may be contrasted other cases where convictions of criminal trespass were vitiated on the ground that the required intent had not been established. In *Malhami Muhandiram* v. *Juanisa*[548] the accused was alleged to have carried out gemming without a licence on the bank of a river flowing along the property of a private owner. He was held not guilty of criminal trespass on the ground that intention to intimidate, insult or annoy could not be inferred legitimately in these circumstances. The object of evading payment of a private toll imposed by the owners of an estate does not suffice to establish the mental element required for conviction of criminal trespass.[549] In *Drieberg* v. *de Saram*[550] the accused had remained on an estate, of which the complainant was the superintendent, as the mistress of the complainant's brother, despite the complainant's order to her to quit the premises. It is difficult to assert in a situation of this nature that the accused's predominant intention was to cause annoyance

541. *de Vas* v. *Ernst* (1912) 15 N.L.R. 213.
542. (1913) 17 N.L.R. 83. 543. (1898) 3 N.L.R. 211.
544. cf. *Karthelis Hami* v. *Francis* (1920) 7 C.W.R. 184.
545. *Suwaris* v. *Soysa* (1915) 1 C.W.R. 20.
546. *Ebels* v. *Periannan* (1939) 16 C.L.W. 15.
547. *Attuakusala Terunanse* v. *Wimalasara Terunanse* (1905) 1 Leem Rep. 94
548. (1895) 1 N.L.R. 86.
549. *Elikewela* v. *Haramanis* (1909) 5 A.C.R. 98
550. (1910) 2 Current L.R. 218

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to the complainant. In *Moss* v. *Jayewardene*[551] the accused's object was to compel the party claiming adversely to him to bring an action to determine the question of title. A conviction of criminal trespass was held not to be proper. Where the evidence establishes that the complainant was not in fact intimidated, insulted or annoyed, an acquittal is inevitable.[552] In *de Silva* v. *de Silva*[553] it was held that a person who enters on premises in the guise of an evil spirit, does not have the required intent.[554]

The following principles in regard to the required mental element may be extracted from the case law:

(i) The mere fact that the person in occupation was actually intimidated, insulted or annoyed is not sufficient to establish the necessary intent. In *Abdul Azeez*[555] Viscount Dilhorne, speaking for the Privy Council, stated: "It may well be the case that the commission of civil trespass does cause annoyance in the majority of cases to the occupiers of the property trespassed upon, but to constitute the offence of criminal trespass, it must in their Lordships' view be established beyond reasonable doubt that the intent or object with which the trespass was committed was one of those specified in section 427 of the Penal Code—namely, to commit an offence or to intimidate, insult or annoy any person in occupation of the property".[556] A similar view had been expressed by the Supreme Court in a previous case.[557]

(ii) The question has been considered in the cases whether the requisite intent is capable of being inferred from the accused's state of knowledge. In *Sinnaturai* v. *Mailvaganam*[558] it was held that mere knowledge of the possibility of annoyance resulting from the act of trespass is not adequate to warrant liability. But where the circumstances are such that the accused was well aware that the complainant could not but feel annoyance at the trespass, and the act was committed without proper reason or cause, liability for criminal trespass may be imposed justifiably. It was stated in *Abdul Azeez*'s case: "Their Lordships agree ... that the intent of the accused has in most cases to be inferred from the circumstances of the case".[559] In *Suppaiya* v. *Ponniah*[560] Wood Renton J. quoted with approval

551. (1909) 2 Leader L. R. 109.
552. *Veronica* v. *Pedro Santia* (1885) 7 S.C.C. 35.
553. (1924) 3 Times of Cey. 134. cf. *Arlis Silva* v. *Simon Silva* (1930) 8 Times of Cey. 4.
554. ibid.
555. (1964) 67 N.L.R. 73.
556. At p. 78.
557. *Kanthappu* v. *Arumugam* (1913) 17 N.L.R. 152.
558. (1911) 6 Weerakoon's Rep. 23.
559. (1964) 67 N.L.R. 73 at p. 79.
560. (1909) 14 N.L.R. 475.

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the following passage in an Indian judgment:[561] "There may be no wish to annoy, but if annoyance is the natural consequence of the act, and if it is known to the person who does the act that such is the natural consequence, then there is an intent to annoy. . .It seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result".[562] This approach is acceptable, subject to the caution that the inference of intent cannot be based on any inflexible rule but must be made in the light of the circumstances of each case.

(iii) Where the accused's trespass is referable to more than one motive, the Ceylon courts have adopted the approach that the "primary motive"[563] or the "dominant intent"[564] must be taken into account. The applicable principle, then, is that, in cases involving a multiplicity of motives, the motive which is predominant or uppermost in the accused's mind determines his liability.

(iv) A *cursus curiae* has the effect of establishing for the law of Ceylon the principle that belief in a legal right, entertained in good faith by the accused, excludes the intent required for conviction of criminal trespass.[565] Some early cases[566] have taken a contrary view, but these may now be regarded as unsound. In *Selvanayagam*'s case[567] Sir John Beaumont, delivering the opinion of the Privy Council, said that "Entry upon land, made under a bona fide claim of right, however ill-founded in law the claim may be, does not become criminal trespass merely because a foreseen consequence of the entry is annoyance to the occupant."[568] It was further stated that "To establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to intimidate insult or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent or, at any rate, constituted no more than a subsidiary intent".[569] In this regard, their Lordships preferred the view of Dalton A.C.J. in *Wijeymanne* v. *Kandiah*[570] to that expressed by Wood Renton J. in *Suppaiya* v.

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561. *Emperor* v. *Lakkshman Raghunath* (1902) I.L.R. 26 Bom. 558.
562. (1909) 14 N.L.R. 475 at p. 479.
563. *Wijeymanne* v. *Kandiah* (1933) 35 N.L.R. 244.
564. *Selvanayagam* (1950) 51 N.L.R. 470.
565. *Medduma Appu* v. *Wegundahamy* (1914) 18 N.L.R. 78; *Muttaiya* v. *Asiath Umma* (1925) 27 N.L.R. 443; *Balappu* v. *Perera* (1907) 2 A.C.R. Supp. xxii; *Pulle* v. *Gunasekera* (1886) 1 S.C.R. 76; *Sourjah* v. *Fernando* (1908) 4 A.C.R. Suppl. xviii *Pitche Bawa* v. *Abdul Cader* (1909) 3 Leader L.R. Part II, p. 7; *Jandoris* v. *Karawadi Pulle* (1905) 1 Leem. Rep. 94.
566. *Obeyesekere Hamine* v. *Gunasekera* (1916) 3 C.W.R. 42; *Wickramasinghe* v. *Perera* (1930) 3 C.A.R. of Cey. 67.
567. (1950) 51 N.L.R. 470.
568. At p. 475.
569. ibid.
570. (1933) 35 N.L.R. 244.

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Ponniah.[571] The Privy Council distinguished *Fobes* v. *Rengasamy*[572] on the ground that the accused in this case had not given evidence as to his real intention and that the court considered his conduct defiant.[573]

Although the plea relating to bona fide belief in a legal right has been clearly recognized as an exculpatory circumstance in the Ceylon cases, it has nevertheless been insisted that a bona fide claim does not entitle the accused forcibly to enter property in the occupation of another. Poyser J. explicitly referred to this qualification in *Nanayakkara* v. *Appuhamy.*[574] In *Fonseka* v. *Sardial*[575] it was pointed out that, where a person who finds himself out of occupation of property desires to enforce a supposed claim of right to the property, his proper remedy is by civil action and not by commission of a breach of the peace. Resort to violence in these circumstances may well entail liability for criminal trespass.

(v) In *Selvanayagam*'s case[576] the Privy Council declared: "Section 427 does not make every trespass a criminal offence. If is confined to cases in which the trespass is committed with a particular intention, and the intention specified indicates that the class of trespass to be brought within the criminal law is one calculated to cause a breach of the peace. Their Lordships are satisfied that the section was not intended to provide a cheap and expeditious method for enforcing a civil right".[577] This imposes a fundamental limitation on the scope of the offence of criminal trespass.

A comparable view was expressed by the Supreme Court in *Nandohamy* v. *Walloopillai.*[578] H. N. G. Fernando J. said: "This case is one, in my opinion, which falls within the principle recognized by the Privy Council and by this court that the provisions of the Penal Code as to criminal trespass cannot be availed of as a means of obtaining a determination upon what is purely a civil dispute."[579]

Similar dicta are to be found in earlier judgments of the Supreme Court. In *Thegis* v. *Agonis*[580] de Sampayo J. said: "The Magistrate rightly came to the conclusion that the case involved a civil dispute and should be settled in a civil court. But at the same time he examined a Vidane Arachchi, and thought that the complainant had had possession previously and, after discharging the accused, ordered that the accused should bring a civil action".[581] This order was thought to be improper and

571. (1909) 14 N.L.R. 475. 572. (1940) 41 N.L.R. 294.
573. (1950) 51 N.L.R. 470 at p. 475.
574. (1933) 11 Times of Cey. 83. 575. (1916) 3 C.W.R. 292.
576. (1950) 51 N.L.R. 470.
577. At pp. 473-474
578. (1957) 61 N.L.R. 429 579. At p. 431
580. (1920) 22 N.L.R. 376 581. At p. 376

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was set aside in revision. The rationale of the decision was that issues pertaining to the civil action were outside the ambit of the prosecution for criminal trespass. In consequence of the Magistrate's order the complainant was to be restored to possession and the accused was compelled to resort to adjudication before a civil court.

In *Sheriff* v. *Pitche Umma*[582] Jayewardene A.J. accepted as valid the proposition laid down in an Indian case[583] that "Re-entry into or remaining upon land from which a person has been ejected by civil process or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with others is not criminal trespass unless the intent to commit an offence or to intimidate, insult or annoy is conclusively proved".[584]

(vi) Intent to use force does not, *per se*, render a trespass criminal. In *Dharmaratne Thero* v. *Officer-in-Charge, Nittambuwa Police*[585] the accused was charged with committing criminal trespass with intent to commit an offence—namely, "forcible occupation" of a temple. In appeal, Sri Skanda Rajah J. set aside the conviction on the ground that no such offence was recognized by the law of Ceylon.

(A) *Allied and Aggravated Offences*

Criminal trespass forms the base of several other offences which, however, contain additional elements having the effect of aggravating liability. Examples are provided by the offences of house-trespass,[586] lurking house-trespass,[587] lurking house-trespass by night,[588] house-breaking[589] and house-breaking by night.[590]

(a) *House-Trespass*

This offence requires proof of all the elements of criminal trespass. In addition, it must be proved that the accused entered or remained in "any building tent, or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property".[591] As for "entry", the explanation is made that "The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass".[592]

In several Ceylon cases convictions of house-trespass have been set aside on the ground that the constituent elements of the

582. (1924) 26 N.L.R. 353
583. *In Re Govind Prassad* (1879) 2 All. 465
584. (1924) 26 N.L.R. at p. 357.
585. (1964) 66 N.L.R. 167.
586. Penal Code, section 428.
587. Section 429.
588. Section 430.
589. Section 431.
590. Section 432.
591. Section 428.
592. ibid.

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basic offence of criminal trespass had not been established. Thus, in *Kiribandu* v. *Kumarasinghe*,[593] the accused was acquitted on the basis that the property was not in anyone's occupation. In *Suppiah Pillai* v. *James Dias*[594] the requisite intention was held not to have been proved.

It is a further requirement for conviction of this offence that the premises entered were a "house", within the meaning of the section. In *Don Gordianu* v. *Pedro Appu*[595] the accused entered a building which, according to the complainant, was used as a kitchen to his house. It was held that the offence of house-trespass had not been committed, since the buiding was not a "house", in the relevant sense.

(b) *Lurking House-Trespass*

This offence requires proof of all the elements of house-trespass and, in addition, that the accused "had taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass".[596] The adoption of such precautions to conceal the trespasser's presence from the chief occupant of the house may be sufficient, although the consent of some other member of the household has been obtained.[597]

Liability for the distinct offence of "lurking house-trespass by night" is imposed in circumstances where the house-trespass takes place between the hours of sunset and sunrise.[598]

(c) *House-Breaking*

A person commits "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any one of the six ways set out below, or if, being in the house or any part of it for the purpose of commiting an offence therein, he quits the house or any part of it in any of such six ways:

(i) if he enters of quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

(ii) if he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

(iii) if he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the com-

593. (1938) 12 C.L.W. 160.
594. (1937) 1 C.L.J.N. 53.
595. (1900) 1 Browne 111.
596. Penal Code, section 429
597. *William* (1915) 1 C.W.R. 38
598. Penal Code, section 430

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mitting of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened.

(iv) if he opens or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

(v) if he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

(vi) if he enters or quits by any passage which he knows to have been fastened against such entrance or departure and to have been unfastened by himself or by an abettor of the house-trespass.[599]

The statutory explanation is made that "Any outhouse or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section".[600]

The offence of house-breaking then, consists of house-trespass effected by one of the six modes of entry or exit specified in the section.[601]

House-breaking committed during the hours between sunset and sunrise establishes liability for the distinct offence of "house-breaking by night".[602]

(d) *Aggravated Forms of House-Trespass, Lurking House-Trespass and House-Breaking*

House-trespass in order to the commission of an offence punishable with death,[603] house-trespass in order to the commission of an offence punishable with imprisonment for ten years or more,[604] house-trespass in order to the commission of an offence punishable with imprisonment for less than ten years,[605] house-trespass after preparation made for causing hurt or wrongful restraint to any person,[606] lurking house-trespass or

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599. Section 431.
600. ibid.
601. Evidentiary and procedural problems connected with house-breaking are considered in *Thegis* (1896) 2 N.L.R. 196; *Mudiyanselage Hami* v. *Appuhamy* (1898) 3 N.L.R. 101; *Murukan Sinnatamby* (1901) 3 Browne's Rep. 36; *Nagappa Chetty* v. *Silva* (1901) 5 N.L.R. 295; *Siyaris* (1928) 30 N.L.R. 92; *Smith* v. *Peleck Singho* (1942) 23 C.L.W. 76; *Masilamany* v. *Rodrigo* (1946) 23 C.L.W. 66; *Horana Police* v. *Abraham Singho* (1947) 35 C.L.W. 59; *Kirimudiyanse* v. *Pothuhera Police* (1948) 36 C.L.W. 88; *Vadivelu* v. *Inspector of Police Badulla* (1949) 40 C.L.W. 22. See also *Cara* (1895) 4 N.L.R. 55; *Ranis* (1897) 5 N.L.R. 297; *Arnolis Appu* (1904) 2 Bal. Rep. 81; *Pancha* v. *Veloo* (1946) 47 N.L.R. 567.
602. Section 432.
603. Section 435.
604. Section 436.
605. Section 437.
606. Section 438.

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house-breaking in order to the commission of an offence punishable with imprisonment,[607] lurking house-trespass or house-breaking after preparation made for causing hurt, assault or wrongful restraint to any person,[608] lurking house-trespass by night or house-breaking by night in order to the commission of an offence punishable with imprisonment,[609] lurking house-trespass by night or house-breaking by night after preparation made for causing hurt, assault or wrongful restraint to any person[610] and grievous hurt caused whilst engaged in committing lurking house-trespass or house-breaking[611] are treated as distinct offences on which separate penalties are attendant. The aggravating circumstance inheres in the purpose underlying the house-trespass, lurking house-trespass or house-breaking and the preparations which had been made prior to the offence.

Dishonestly breaking open any closed receptacle containing or supposed to contain property[612] is recognized as a distinct offence. The principle is explicitly formulated that all persons jointly concerned in lurking house-trespass by night or house-breaking by night are punishable for death or grievous hurt inflicted by one of their number.[613]

The penalties for these allied or aggravated offences are distinct from those laid down for the simple offences of criminal trespass,[614] house-trespass[615] and house-breaking.[616]

(e) *Unlawful Possession of House-Breaking Instruments*

"Whoever is found having in his custody or possession without lawful execuse, the proof of which lies on him, any instrument of house-breaking, or being armed with any dangerous or offensive weapon with intent to commit any unlawful act"[617] is said to commit this offence.

A distinctive feature of this offence is the placing of the burden on the accused to establish that the instrument was possessed with lawful excuse.

Where the implement of which the accused is found in possession is ordinarily used for a lawful purpose but is also capable of being used for house-breaking, the onus is on the prosecution to establish that the accused had the intention of using the implement for the purpose of house-breaking.[618] It is

607. Section 440.
608. Section 441.
609. Section 443.
610. Section 444.
611. Section 445.
612. Section 447.
613. Section 446.
614. Section 433.
615. Section 434.
616. Section 439.
617. Penal Code, section 449.
618. *Police Sergeant* v. *Abeyhamy* (1921) 23 N.L.R. 156, *Inspector of Police Dandegamuwa* v. *Fernando* (1923) 1 Times of Cey. 210; *Sangaram* v. *Police* (1946) 47 N.L.R. 357.

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only when ambiguity in this respect is eliminated by the prosecution that the accused need prove the presence of a lawful excuse.[619] In cases characterized by ambiguity, in the sense that the instrument *prima facie* may have been possessed for a lawful or an unlawful purpose, the whole of the surrounding circumstances must be investigated in order to resolve the doubt.[620] However, where the instrument is one which ordinarily has no lawful use but is often used for house-breaking, the prosecution need only prove the *factum* of possession, by the accused, and the existence of a lawful excuse has to be averred and established by the accused.[621] If the charge relates exclusively to possession of a dangerous or offensive weapon, it is incumbent on the prosecution to prove that the accused was armed with the weapon with the intention of committing an unlawful act.[622]

(f) *Being Found in a Building for an Unlawful Purpose*

"Whoever is found in or upon any building or enclosure for any unlawful purpose, and whoever is found in or upon any building or enclosure and fails to give a satisfactory account of himself"[623] is declared to commit an offence.

It has been held that this provision embodies two distinct offences which warrant separate charges.[624]

An "unlawful purpose", adverted to in the first part of the offence, does not include an "immoral purpose". Thus, where the accused was in X's room for the purpose of having illicit intercourse with her at her invitation or with her consent, this offence is not committed.[625]

In regard to the second offence embodied in this provision the burden is on the prosecution to prove that the accused failed to give a satisfactory account of himself.[626] As to the meaning of the words "fails to give a satisfactory account of himself", the case law reveals a conflict of opinion. In *Don Martin*[627] Jayewardene A.J. said: "What the accused has to prove on a charge of this kind is who he is, and what he is, where he resides and such other facts personal to himself".[628] However, the better view is that information of this nature is not sufficient to secure exoneration from liability. In *Kuruppu* v. *Banda*[629] Bertram C.J. declared: "An account of himself, under these circumstances,

619. *Burah* v. *Subaya* (1931) 34 N.L.R. 30.
620. *Punchirala Korala* v. *John* (1909) 12 N.L.R. 198.
621. *Fernando* v. *Fernando* (1923) 25 N.L.R. 33.
622. *Perera* (1913) 16 N.L.R. 456; *Rajendram* v. *Enoris Hamy* (1926) 4 Times of Cey. 114.
623. Penal Code, section 450.
624. *Thiedeman* v. *Charles* (1937) 16 C.L. Rec. 260.
625. *Meedin* v. *Iynan* (1935) 14 C.L. Rec. 190.
626. Penal Code, section 450.
627. (1923) 25 N.L.R. 169.
628. At p. 170.
629. (1923) 25 N.L.R. 402.

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in order to be a satisfactory account, should include some account of his presence at such a spot".[630]

To establish liability for either of these offences, it is not necessary that the accused should have been actually apprehended on the premises. It is sufficient that the accused, although discovered on the premises, was apprehended after he had left them.[631]

(g) *Loitering About by a Reputed Thief*

"Whoever, being a reputed thief, loiters or lurks about any public place or any wharf or warehouse or any vessel in any harbour or other water with intent to commit theft or any other unlawful act[632] is declared guilty of an offence.

In *Nair* v. *Velupillai*[633] Soertsz A.J. said: "To establish this charge the prosecution must prove (1) that the accused was a thief or was reputed a thief, (2) that he was loitering about any public place, (3) that his intention was to commit theft or other unlawful act. The burden on all these points is on the prosecution".[634]

In regard to element (1), it was held in *Mansoor* v. *Jayatilleke*[635] that the burden is on the prosecution to show that, at the time the accused loitered or lurked about a public place, he had the reputation of being a thief. Dias J. held that this condition "is not satisfied by first arresting the accused on suspicion and then *ex post facto* establishing that he was a thief, a fact which was unknown at the time the alleged offence was committed". In *Perera* v. *Police*[636] it was said that evidence of previous convictions could not be led to establish that the accused was a reputed thief.

However, the views expressed in both these cases have been dissented from in subsequent decisions. In *Samson* v. *Inspector of Police, Maradana*[637] Tennekoon J. observed: "It seems to me that 'repute' does not mean only false repute but also includes a reputation for what one actually is. Reputation is the estimate or belief that other people have of the nature of a man's character. Nothing could be a better foundation for forming an estimate of another's character than actual instances in which that character is displayed. Such instances of thievery, it is true, may establish that a man is a thief but may not establish his reputation as a thief. But where the person is caught out, publicly prosecuted and convicted on numerous occasions, it can hardly be said that those convictions have not given him a reputation for being a

630. At p. 404.
631. *Don Martin* (1923) 25 N.L.R. 169.
632. Penal Code, section 451.
633. (1935) 37 N.L.R. 248.
634. At p. 249.
635. (1947) 48 N.L.R. 308.
636. (1946) 32 C.L.W. 108.
637. (1967) 72 N.L.R. 330.

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thief among those people who are likely to form any opinion or estimate of his character".[638] In *Joseph* v. *Sivasubramaniam*[639] G. P. A. Silva S.P.J. following Tennekoon J's judgment in *Samson v. Inspector of Police Maradana* held that it is quite sufficient for the prosecution to prove a series of previous convictions of theft in order to establish the ingredient that the accused was a reputed thief.

Moreover, the accepted view today is that the knowledge of the arresting officer at the time of the offence is irrelevant. In *Samson*'s case Tennekoon J. said: "The proposition that the reputation of being a thief must exist at the time of loitering is unexceptionable but, with respect, it seems to me that it is irrelevant that the arresting officer did not know that the accused had such a reputation at the time of arrest. The absence of such knowledge on the part of the arresting officer may affect lawfulness or otherwise of the arrest, but I cannot see why the fact of the accused being a reputed thief at the time of loitering . . . cannot be established independently of the arresting officer's knowledge of the accused's reputation".[640]

A similar view has been expressed in other decisions. In *Perera* v. *Inspector of Police, Balangoda*[641] Pandita-Gunawardene J. stated: "Speaking for myself I would, with respect, disagree with the views expressed in the (earlier) judgments: that at the time an accused is arrested for committing the offence of loitering, the officer arresting him should be aware that the accused was a reputed thief. A reading of section 451 does not warrant such a view. If that were to be a condition precedent, the section would have been cast in a manner to give effect to that prerequisite. Looking at the matter from a realistic angle, it cannot be expected that all police officers would know at sight each and every reputed thief in the Island. The dicta of Dias J. and de Silva J. do not, in my view, accord with common sense. It would only result in placing an impossible burden on the prosecution and render section 451 of the Penal Code inoperative".[642]

To the same effect is the judgment of the Supreme Court in *Pabilis* v. *Sub-inspector of Police, Kahatuduwa.*[643] De Kretser J. observed: "It appears to me that the error in the order of Dias J. (in *Mansoor* v. *Jayatilleke*)[644] is that Dias J. has lost sight of the fact that the reputation of the accused at the time he loitered is not dependent on the fact that the police officer was aware of it, for example, if it is an offence for a Boy Scout to loiter in a

638. At p. 332.
639 (1971) 77 N.L.R. 177.
640. ibid.
641. (1968) 73 N.L.R. 94.
642. At pp. 95-96.
643. (1969) 73 N.L.R. 501.
644. See note 632, *supra*.

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public place the fact that a police officer who observed him loitering is unaware that he is a Boy Scout, does not make him any less a Boy Scout while he was so loitering.[645]

The better view, then, is that previous convictions can be availed of to establish that the accused was a reputed thief at the time he loitered and also that the arresting officer's knowledge has no bearing on proof of this element.

As for element (ii), the word "loiter" was defined in *air v. Velupillai*[646] to mean "to linger on the way, hang about, or to travel indolently and with frequent pauses". This definition was endorsed by de Kretser J. in *Pabilis'* case.[647] Moreover, the place where the accused loitered should have been a "public place." In *Tillekeratne v. Inspector of Police Pettah*[648] it is as held that evidence of previous convictions of theft must be led by the prosecution before and not after conviction. The mere statement of the complainant in the absence of any evidence of previous convictions, is insufficient to prove that the accused was a reputed thief.

The final requirement is that the accused should have intended to commit theft or some other unlawful act. The phrase "unlawful act" has a wide meaning, in that it applies not only to offences but to acts giving rise to civil liability.[649]

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645. (1969) 73 N.L.R. 501 at p. 503.
646. (1935) 37 N.L.R. 248.
647. (1969) 73 N.L.R. 501 at p. 503 *ad fin.*
648. (1974) 77 N.L.R. 371. 649. Penal Code, section 41.

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