

Preliminary Year
Sri Lanka Law College

Criminal Law



Empowers Independent Learning



Independent Law Student Movement

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Reviews, responses and criticism

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Culpable Homicide

Homicide is the killing of a human being by another human being.

Homicide in our Penal Code can be subcategories into:-

(A) Lawful Homicide, which is sub-categorized into:-

(i) Excusable Homicide; and (ii) Justifiable Homicide.

Excusable Homicide	Penal Code
(i) Where death is caused by accident or misfortune in the doing of a lawful act in a manner by lawful means with proper care and caution without any criminal intention or knowledge	<p>Section 73:-</p> <p>Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in doing of a lawful act in a lawful manner and with proper care and caution.</p> <p>Illustration:-</p> <p>A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.</p>
(ii) Where an act is done in good faith for a person's benefit:-	<p>Section 81:-</p> <p>Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk, of that harm.</p> <p>Illustration:-</p> <p>A, a surgeon knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending in good faith, Z's benefit, performs an operation on Z with Z's consent. A has committed no offence.</p>

(iii) Where it is done by a person with a deranged or immature mind	<p>Section 75:-</p> <p>Nothing is an offence when done by a child under eight years of age</p> <p>Section 76:-</p> <p>Nothing is an offence which is done by a child above the age of eight years and under twelve, who has not attained sufficient maturity and understanding to judge the nature and</p>
	<p>consequence of his conduct on that occasion.</p> <p>Section 77:-</p> <p>Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.</p> <p>Section 78:-</p> <p>Nothing is an offence which is done by a person, who at the time of doing it is, by reason of intoxication incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Provided that the thing which intoxicated him was administered to him without his knowledge or against his will.</p>

Justifiable Homicide	Penal Code
(i) Where death is caused by a person who is bound by law or by a mistake of fact in good faith believes himself bound by law	<p>Section 69:-</p> <p>Nothing is an offence which is done by a person who is, or by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it.</p> <p>Illustrations:-</p> <p>(a) A, a soldier, fires on a mob by order of his superior officer in conformity with the commands of the law. A has committed no offence.</p> <p>(b) A, an officer of a Court, being ordered by that court to arrest Y, and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.</p>

<p>(ii) Where death is caused by a person who is justified by law or by mistake of fact in good faith believed himself to be justified by law</p>	<p>Section 72:-</p> <p>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 in law in doing it.</p> <p>Illustrations:-</p> <p>A sees Z commit what appears to A to be a murder. A in the exercise, to the best of his judgement exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the act, seizes Z in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self defence.</p>
<p>(iii) Where death is caused by a judge acting judicially in the exercise of any power which he possesses or in good faith believes himself to possess under the law</p>	<p>Section 70:-</p> <p>Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be given to him by law.</p>
<p>(iv) Where death is caused by a person acting in good faith pursuant to the judgement or order of a Court</p>	<p>Section 71:-</p> <p>Nothing which is done in pursuance of, or which is warranted by the judgement or order of a Court, if done whilst such judgement or order remains in force, is an offence, notwithstanding the court may have had no jurisdiction to pass such a judgement or order, provided the person doing the act in good faith believes that the court had such jurisdiction.</p>

<p>(v) Where death is caused by a person acting without any criminal intention to cause harm and in good faith to avert other harm to a person or property</p>	<p>Section 74:-</p> <p>Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property.</p> <p>Explanation:-</p> <p>It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.</p> <p>Illustrations:-</p> <p>(a) A, the captain of a steam vessel, suddenly and without fault or negligence on his part, find himself in such a position that, before he can stop his vessel, he must inevitably run down a boat, B, with twenty or thirty passenger on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C, with only two passengers on board, which he may possibly clear. Here if he alters his course without any intention to run down the boat C, and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down boat C by doing an act which he knew was likely to cause that effect, if it be</p>
	<p>found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down boat C.</p> <p>(b) A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.</p>
<p>(vi) Where death is caused by a person exercising his right of private defence</p>	<p>Section 89:-</p> <p>Nothing is an offence which is done in the exercise of the right of private defence.</p>

(B) Unlawful Homicide

- (i) Culpable Homicide (Section 293)
- (ii) Causing death by any rash or negligent act not amounting to Culpable
 - Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may not extend to five years, or with a fine, or with both. (iii) Suicide (Section 299)
 - If any person commits suicide, whoever abets the commission of such suicide shall be punished with death.

Culpable Homicide

Penal Code, Section 293:-

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Actus Reus

- Causes death (of a human being)
- By doing an act (including illegal omissions or a series of acts but not an omission to do what one is not legally bound to do)

Mens Rea

- With the intention of
 - o Causing death; or
 - o Causing bodily injury, which is likely to cause death OR
- With the knowledge that by such act
 - o He is likely to cause death
 - CULPABLE HOMICIDE

Illustration A – A lays sticks and turf over a pit, with the intention of thereby causing death or with the knowledge that death is likely to be caused. Z believing the ground to be firm, treads on it, falls in, and is killed. A has committed the offence of culpable homicide.

Illustration B – A knows Z to be behind a bush. B does not know it. A intending to cause or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

Illustration C – A by shooting at a fowl with the intent to kill and steal it, kills B, who is behind a bush. A not knowing he was there. Here although A was doing an unlawful act, he is not guilty of culpable homicide, as he did not intend to kill B, or cause death by doing an act that he knew was likely to cause death.

Explanation 1 – person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of the other, shall be deemed to have caused his death.

Explanation 2 – where the death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused death, although resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3 – the causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Actus Reus:-

- The connection between the act and the death caused thereby must be direct and distinct and not too remote.
- Where the actus reus is a series of acts, the court should require that the chain of causation linking the conduct and the death, should not have been unbroken by a supervening circumstance which could not have been reasonably foreseen i.e. a man is only responsible for the foreseeable consequences of an act he initiated.
 - o Where the supervening factor is foreseeable by the offender, no break in the chain of causation could be said to have occurred:-
 - *R v Mendis* – where toxæmia supervened upon a compound fracture which resulted from a club blow inflicted by the accused and the injured dies of toxæmia, the court held that the prosecution must show that “in the ordinary course of nature” there was a very great probability (as opposed to a mere likelihood) that the supervening link causing the death would arise from the act of the accused – in this case toxæmia was a likely consequence
 - o There is no break in the chain of causation when the death is due to the negligence of the victim in not taking proper medical treatment for the injury he sustained (Explanation 2)
 - o In cases of medical negligence, it would require negligence of a very high degree to break the chain of causation:-
 - *R v Sumith* – “Only if the second cause is not overwhelming as to make the original wound a part of history can it be said that the death does not flow from the original wound”
 - *R v Jordan* – held that the chain of causation had been sufficiently interrupted by medical negligence and the conviction for murder was quashed. The test appears to be that if the aggregative factor independent of the act of the accused was so fundamental in its impact that the earlier conduct of the accused was relegated to a position of mere historical origin, then the act of the accused would

be an ineffective cause, so that the responsibility of the ultimate consequence cannot justifiably be imposed.

- If external circumstance contributed to the gravity of the results brought about but the initial action of the accused would have been sufficient to bring about a consequence that is not grossly incommensurate with the actual results, the conduct of the accused will continue to be causative in an adequate measure so that he would not be exonerated:-
 - *R v Motomane* – accused struck a woman who then developed a blood clot. Doctors decided to operate, and caused profuse bleeding leading to the woman's death. It was held that the acts of the doctors had produced a consequence other than what would have been and as such regarded to start a new cycle of events altogether.
- It is possible that where the aggravated consequence results from the acts of the victim, the chain of causation is not broken:-
 - As a reaction to threats from X, if Y in his fright jumped out of the train and is killed, the fact that the immediate act resulting in death was that of Y himself would make no difference to the criminal liability of X.
- On the other hand if the conduct of the victim cannot be reasonably be inherent to the situation created by the victim, the accused cannot be held liable for the death of the victim:-
 - As a reaction to X's rape, Y commits suicide – this death cannot be attributed to X
- Problem arises where there are two logically separate acts in the actus reus:-
 - *Thabomeli v Queen* – the accused struck the victim and believing him to be dead, threw the body over a cliff. Evidence showed that cause of death was falling off the cliff not the strike. It was argued that the actus reus causing death was not accompanied by the requisite mens rea. Lord Reid held that this was too refined a distinction in that both physical acts must be treated as parts of a single indivisible transaction, and the presence of mens rea during one stage of the transaction was sufficient to burden the accused with responsibility for the entire transaction.
 - Similar approach taken in *R v Lokunona*

Mens Rea:-

- Intention to cause death
 - 'Intention' is the expectation of the consequence in question
 - Lord Ellenborough C.J. there is an "universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious", the intention is inferred by the law "from the doing of the act". The presumption of the law is that a man intends the natural and probable consequences of his own acts.
 - The existence of intention is not inferred unless death flows as a natural and probable consequence from the act

- In order to form an intention, there must be capacity for reason ○ Intention of causing death does not mean intention of causing death of a particular person (Illustration A)
- Intention to cause a dangerous injury as is likely to cause death ○ *R v Santia Susai* – Clarence J: requirement in this clause was only that the consequence of death should be more likely than not to arise – it means more likely to cause death than not
- With the knowledge that he is likely by such act to cause death ○ Knowledge means the personal knowledge of the person who does the act ○ The court must consider the circumstances determine the existence of knowledge
 - *Ketabdi Munderl* – “To kick a girl of tender age with such force as to produce a rupture of the abdomen in a healthy subject, appears to us to be an act of such character that no reasonable man could be ignorant of the likelihood of its causing death”
 - *R v Salamon* – It is not justifiable to impute knowledge of the consequences of an act to a person merely because the consequences actually resulted from it
 - *R v Kolande* – “the guilt of the accused must be measured by his intention when he struck rather than by the after and possibly unforeseen effects of the blow”

Section 297 – Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for wither description for a term which may extend to twenty years, and shall also be liable to a fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment for a term which may extend to ten years, or with a fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

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Murder

Murder is a special offence falling under the general category of culpable homicide. Therefore, all murder must necessarily be culpable homicide but not vice versa.

Section 293 of the Penal Code defines the offences of culpable homicide and Section 294 indicates when culpable homicide amounts to murder.

Section 294:-

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

Illustration A – A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

Illustration B – A knowing that Z is labouring under such disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury, Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in sound state of health here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

K v Kolanda – victim was kicked by the accused and his diseased spleen ruptured causing death. Accused did not know of the disease. Moncrieff J “in order to make out a charge of murder it is necessary to prove that the accused knew that the deceased’s spleen was diseased”

Illustration C – A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder although he may not have intended to cause Z’s death.

Virsa Singh v State of Punjab – in this Indian case it was held that “once the intention to cause bodily harm was actually found to be present, the rest of the inquiry is purely objective”

Illustration D – 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 decisions of the Supreme Court of Sri Lanka have laid down the requirement of awareness of the creation of a substantive homicidal risk, and distinguishing between two degrees of such awareness. Where the offender has knowledge that he is likely to cause death, he would be liable for the lesser offence of culpable homicide not amounting to murder, but where he had knowledge that ‘his act was so imminently dangerous that it would in all possibility cause death, the he is liable for murder.

Somapala v Queen – “knowledge that an act is so imminently dangerous, that it must in all possibility, 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 higher possibility of causing death, or injury likely to cause death; so 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”

King v Wijeyeratnam – acts must be committed “without any excuse”

Section 296 – Whoever commits murder shall be punished with death

Distinguishing Culpable Homicide from Murder:-

The definition of an offence of Culpable Homicide not amounting to Murder is to be arrived at by subtracting the elements of Section 294 from the broader area envisaged by Section 293.

On an examination of the two Sections, it is clear that the first two elements of Section 293 and the first three elements of Section 294 are concerned with intention while the third clause of Section 293 and the fourth limb of section 294 contemplate knowledge only.

Culpable Homicide	Murder	Explanation
Intention to cause death	Intention to cause death	Here the offence of culpable homicide amounts to the offence of murder
Intention to cause an injury likely to cause death	<p>Intention to cause an injury which the offender knows is likely to cause the death of the victim</p> <p>OR</p> <p>Intention to cause an injury (subjective) which ‘in the ordinary course of nature’ (objective) is likely to cause death</p>	<p>Nature of the injury intended to inflict in Culpable Homicide is an injury likely to cause death.</p> <p>There are two types of injuries recognised under murder that are intended to be inflicted by the offender:-</p> <ul style="list-style-type: none"> - Offender ‘knows’ is likely to cause death to the ‘victim’ - ‘sufficient’ in the ordinary course of nature to cause death <p>The distinction is based on</p>

		whether death is more probable or less probably. A mere likelihood of death taking place would not be regarded as sufficient for murder.
With the knowledge that it is likely to cause death	With the knowledge that it is:- <ul style="list-style-type: none"> - "imminently dangerous" and - In all probability would cause death or bodily injury likely to cause death 	The distinction is the requirement in murder that the act be "imminently dangerous"

Case law:-

King v Kolanda – victim was kicked by the accused and his diseased spleen ruptured causing death. Accused did not know of the disease. Not murder because the kick would not bring about the death in the 'ordinary course of nature' and the offender did not know that the kick was likely to cause death to this particular victim. Accused charged with grievous hurt.

Mendis v Queen - where toxemia supervened upon a compound fracture which resulted from a club blow inflicted by the accused and the injured dies of toxemia, the court held that the prosecution must show that "in the ordinary course of nature" there was a very great probability (as opposed to a mere likelihood) that the supervening link causing the death would arise from the act of the accused – in this case toxemia was a likely consequence so therefore accused was charged with murder.

Somapala v Queen – there is no certainty that death will ensue in Culpable Homicide's "Intention to cause an injury likely to cause death"; however, in Murder's "Intention to cause an injury which 'in the ordinary course of nature' is likely to cause death" death is certain or nearly certain if no medical intervention.

King v Regasamy – Knowledge is not a conscious act, a man may know something and not have it in his mind where as intention is an act which must be present before the moment at which the act is done

Alo Singho v Attorney General – A man intends the natural and probable consequences of his act; this is not a presumption of law but rather a presumption of fact from which the jury may or may not draw; it is a rebuttable presumption; "Murderous intention may be proved by circumstantial evidence as opposed to direct evidence"

Prasad Perera v Attorney General – intention is the determination of the will and implies volition whereas knowledge implies cognition and consciousness.

Nuwan de Silva v Attorney General – accused killed a boy who he kidnapped to extort ransom money. He intended to commit the murder of the boy though his overriding consideration of extorting money.

King v Bellana Vitanage Edwin – Several injuries, some injuries inflicted as victim ran away, threat made that “I will kill you” – murder

King v Aldon – Where is a doubt whether there is murderous intention or mere knowledge that act was likely to cause death, benefit of the doubt should go to the accused

When Culpable Homicide is not Murder:-

Section 294 of the Penal Code, having set out the requisites for the offence of murder, recognises a series of mitigatory pleas which would have the effect of diminishing the responsibility of the accused from criminal liability for murder to culpable homicide not amounting to murder.

Exception 1 – Culpable homicide is not murder if the offender whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident, provided that:-

Firstly – the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly – the provocation is not given by anything done in obedience to the law, or by a public officer, in the lawful exercise of the powers of such public officer.

Thirdly – the provocation is not given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to prevent the offence from amounting to a murder is a question of fact.

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 provocation.

Illustration B – Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending or knowing himself to be

likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

Illustration C – A is lawfully arrested by Z, a Fiscal's officer. A is excited to sudden and violent passion by the arrest and kills Z. This is murder inasmuch as the provocation was given by a thing done by a public officer in the exercise of his powers.

Illustration D – 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. This is murder.

Illustration E – A attempts to pull Z's nose. Z, in the exercise of the right to 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 a right to private defence.

Illustration F – 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.

Case Law:-

K.D.J. Perera v King – "Provocation" is defined as anything that ruffles the temper of a man, incites passion or anger in him or causes a disturbance of the equanimity in his mind. Provocation may be caused by mere words which may not amount to abuse, abusive words, a physical blow, pelting of stones or other more serious methods of doing personal violence. "Sudden" means a close proximation in time between the acts of provocation and of retaliation – it is important to verify whether there had been a cooling of tempers.

Attorney General v K.J.D. Perera – the words "grave" and "sudden" are relative terms. The provocation must be compared to the retaliatory act. It is impossible to determine the graveness of the provocation without considering the retaliatory act. This position was followed in *Chandrasena vs. AG*

James v Queen – accused must inter alia prove such provocation as is likely to destroy the self-control of a man of the class of society to which he belongs.

Punchibanda vs. The Queen – 1. Mere verbal abuse may be enough provocation to reduce a charge of murder to a charge of culpable homicide.

2. When considering the question of provocation, it must be considered whether the provocation of the present case was grave to an average person person from the same social class and background as the accused.

E. Samithamby vs. The Queen – When there's an interval between the provocation taking place and the causing of death, a person is deemed to have lost self control due to grave and sudden provocation, if the evidence shows the accused to be suffering from loss of self control all the time during the said interval.

David Appuhamy v King – “Cumulative Provocation” a provocation which would not be treated as grave if it was offered on a single occasion may assume different complexion when considering the context of the ‘continuing and increasing strain’ to which the accused was subjected to.

Premal v Attorney General – the act of stabbing could not be taken in isolation. It was established that the accused had lost all self control at the point of stabbing by accounting for all factors including his love for the victim, his reputation, his career ambition and his haunting notion that she was going to leave him.

Jamis v Queen – the accepted view today is that both in determining whether provocation was grave, and the issue of loss of self control, the objective standard of the reasonable man (who belongs to the same class of society of the accused) must be adopted.

R v Mathubanda – self induced intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered.

Exception 2 – Culpable homicide is not murder, if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the persona against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration – Z attempts to 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 horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Case Law:-

Anura Shantha and another v Attorney General – when the accused restricts himself to the legitimate limits of the right to private defence, any harm caused to the aggressor including infliction of death, does not involve the accused in criminal liability at all. If the accused exceeds the right to private defence, not bona fide, with premeditation and intention of inflicting more harm than necessary, liability for murder may be brought about if the victim's death is caused.

R v Kirinelis – 'intention to cause more harm than necessary' is a special intention which connotes some element of ill will or vindictiveness. Accused actions should not be "maliciously excessive or vindictively unnecessary"

See also: *L. H. Soysa vs. The Queen*
The King vs. Muttu



Exception 3 – Culpable homicide is not murder if the offender, being a public officer or aiding a public officer acting for the advancement of public justice, exceeds the powers given to him by law, and causes the death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public officer and without ill-will towards the person whose death is caused.

See: Doole vs. Republic of Sri Lanka

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

Explanation – it is immaterial in such cases which party offers the provocation or commits the first assault.

King v Fernando – “premeditation” is not synonymous with “intention”

See also: Bandara vs. AG

Jinadasa vs. AG

Exception 5 – 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.

Hurt and Grievous Hurt

Hurt – Section 310: “Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt”.

Section 312 – Whoever does any act with the intention of thereby causing hurt to any person or with the knowledge that he is likely to thereby cause hurt to any person, and does thereby cause hurt to any person, is said “voluntarily to cause hurt”

Grievous Hurt – Section 311 enumerates nine kinds of hurt which are designated as Grievous Hurt:-

- (1) Emasculation
- (2) Permanent privation or impairment of the sight of either eye
- (3) Permanent privation or impairment of the hearing of either ear
- (4) Privation of any member or joint
- (5) Destruction or permanent impairment of the powers of any member or joint
- (6) Permanent disfiguration of the head or face
- (7) Cur or fracture, of bone, cartilage or tooth or dislocation or subluxation, of bone, joint or tooth
- (8) Any injury which endangers life or in consequence of which an operation involving the opening of the thoracic, abdominal or cranial cavities is performed

- (9) Any injury which causes the sufferer to be in severe bodily pain or unable to follow his ordinary pursuits, for a period of twenty days either because of the injury or any operation necessitated by the injury

Hurt which does not amount to Grievous Hurt is not described by any special term in the Penal Code, but the expression 'Simple Hurt' is used in practice.

Section 313 – Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, he is said “voluntarily to cause grievous hurt”

Explanation – A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends to 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.

Illustration – A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

Section 316 – Whoever, except in the case provided for by section 326, voluntarily causes grievous hurt shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the person to whom the grievous hurt is caused shall be a woman or a child, may in addition be punished with whipping.

Section 317 – Whoever, except in the case provided for by section 326, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which is 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 a 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 shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the person to whom the grievous hurt is caused shall be a woman or a child, may in addition be punished with whipping.

Section 320 - Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in the sufferer to do anything which is illegal, or which may facilitate the commission of an offence shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to whipping.

Section 322 – Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer to restore or to cause restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 324 – Whoever voluntarily causes grievous hurt to any person, being a public officer in the discharge of his duty as a public officer, or with the intent to prevent or deter that person or any other public officer from discharging his duty as such public officer, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public officer, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 326 – Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years or with a fine which may extend to two thousand rupees or with both.

Explanation – Section 326 is subject to the same provisos as exception 1 of Section 294

Case Law:-

Silva v French – There need not be visible marks to hold that hurt has been caused

Dissanayake v Bastian – Eye is not a ‘member’ within the meaning of section 311

Dingiri Banda v Aranayake – mere fact that injured was in hospital for 20 days does not prove he was unable to follow ordinary pursuits

Common Intention

Common intention is a basis of imposing criminal liability vicariously. Vicarious liability is imposing liability on a person other than the person who committed the main, physical act.

Section 32 – when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

Common intention is distinguishable from similar intention e.g. where several persons are watching a cricket match and two spectators are unhappy with the decision of the umpire, they come from different places and hit the umpire, the two spectators had similar intention. They did not meet and discuss their actions and so they did not have a common intention.

Queen v Asappu – for common intention there must be (i) evidence of sharing of mind; or (ii) there should be evidence of a pre-arranged plan; or (iii) there must be evidence of some circumstance that led to a common intention e.g. some words spoken

Queen v Vincent Fernando – participating presence is necessary to find the accused guilty on the basis of common intention. However, mere presence on the scene is not enough to find the accused guilty on the basis of common intention.

Unlawful Assembly

Section 138 – an assembly of **five or more persons** is designated an “unlawful assembly” if the **common object** of the persons composing that assembly –

Firstly – to overawe by criminal force, or show of criminal force, the State or Parliament or any public officer in the exercise of the lawful power of such public officer; or

Secondly – to resist the execution of any law or any legal process; or

Thirdly – to commit any mischief or criminal trespass or other offence; or

Fourthly – 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; or

Fifthly – 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; or

Sixthly – 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 President

Explanation – an assembly which becomes lawful when it is assembled may subsequently become an unlawful assembly

Section 139 – “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 essential ingredient of section 139 is that as soon as the person is aware of the fact that the assembly is unlawful, it is to be proved that he remained as the part of such assembly despite to knowing the fact that it is unlawful. The word ‘continues’ under section 139 signifies physical presence as a member of an unlawful assembly, that is, to be physically present in the crowd. This section cannot be attributed to a person who knows that the assembly is unlawful and is present as a just bystander. The test is whether the person knows the common object of the assembly and continues to keep its company due to his own free will.

Section 140 – Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Section 141 of PC can be said to be an extended version section 140. Section 141 aims to punish the persons armed with a weapon of offence in an unlawful assembly. It prescribes the punishment with imprisonment for a term which may extend to 2 years, or with fine, or with both. The intention of this section is to reduce the risk of hampering the public tranquility.

Section 146 – if an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence.

Essential ingredients of Unlawful Assembly:

There must necessarily be more than four persons sharing the common object. When there is no evidence to prove that the fifth individual shared the same object; it cannot be considered an unlawful assembly with the remaining four persons.

Existence of a common object among all the members which they should be aware of :

The second necessary ingredient is that the object of the assembly must be common to the persons composing the assembly. The object should be common to the persons who composed the assembly; that is to say they should all be aware of it and concur it. Mere presence of a person along with members of an unlawful is not sufficient to support a finding that he had the common object of the unlawful assembly. There must be other evidence direct or circumstantial to justify a finding that he had the common object. There must also be some present and immediate purpose of carrying into effect the common object.

The same object is not necessarily a common object, but it becomes so only when it is known to and shared by all having it. Explanation attached to section 138 says that an assembly which was not unlawful when it assembled, may subsequently become an

unlawful assembly. It is not possible to prove what was in the mind of persons assembled. That can only be inferred from the conduct of the assembly. The common object of the unlawful assembly can be collected from the nature of the assembly, arms used by them and the behavior of the assembly at or before the scene of occurrence.

➤ *Bandaranaike v. Jagathsena & Others* - SLR -1984 - Volume 2, Pg: - 397

To constitute an unlawful assembly there must be an assembly of five or more persons having a common object which is one of the six specified in section 138 of the Penal Code. The mere presence of a person in an assembly does not make him a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him such a member or unless being aware of facts which render any assembly an unlawful assembly he intentionally joins that assembly or continues in it.

➤ *Police Sergeant Kulatunga v. Mudalihamy* NLR Volume - 42- 33

➤ *The Queen v. H. Ekmon* -New Law Reports Volume - 67- 49

Unlawful assembly-Vicarious liability of the members-Difference between “common object” & “common intention” - Penal Code, ss. 32, 138.

Abetment

Section 100 – a person abets the doing of a thing who –

Firstly – instigates any person to do that thing; or

Secondly – engages in any conspiracy for the doing of that thing; or

Thirdly – intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 (Instigation) – A person who, by wilful misrepresentation or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration – A, a public officer, is authorised by a warrant from a Court to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2 (Conspiracy) – a conspiracy for the doing of a thing is when two or more persons agree to do that thing or cause or procure that thing to be done. A person within the jurisdiction of the court abets an offence by engaging with one or more other persons beyond the jurisdiction of the court in the conspiracy for the commission of an offence by the, or either of them, or by another person.

Explanation 3 (Intentional Aiding) – Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Section 101 – a person abets an offence who abets either the commission of an offence or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

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

Explanation 2 – to constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused

Illustration A – A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

Illustration B – A instigates B to murder D. B, in pursuance of the instigation, stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3 – it is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustration A – A, with a guilty intention, abets a child or a person of unsound mind to commit an act which would be an offence if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

Illustration B – A, with the intention of murdering Z, instigates B, a child under eight years of age, to do an act which causes Z's death. B, in consequence of the abetment does the act, and thereby causes Z's death. Here though B was not capable of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence and had committed murder and he is therefore subject to the punishment of death.

Illustration C – A instigates B to set fire to a dwelling house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to the law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire

to a dwelling house, and is liable to the punishment provided for that offence.

Illustration D – A, intending to cause a theft to be committed instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession in good faith believing it to be A's property. B acting under this misconception, does not take dishonestly and therefore does not commit theft. But A is guilty of abetting theft and is liable to the same punishment as if B had committed theft.

Explanation 4 – the abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration – A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z and commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for the murder; and as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5 – it is not necessary to the commission of the offence of abetment, by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engaged in the conspiracy in pursuance of which the offence is committed.

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

King v Marshal – aid given by an abettor must be intentional and where the offence abetted is murder, the aid must be "murderously intentional aid". Furthermore, the facility or aid afforded to the doer must be such as was essential for the commission of the crime abetted.

Section 102 – whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by the Penal Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Section 109 – whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made in the Penal Code for the punishment of such abetment, be punished with

imprisonment of any description for that offence for a term which may extend to one-fourth part of the longest term provided for that offence or with such fine as is provided for that offence or with both; and if the abettor or the person abetted is a public officer whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence or with both.

Section 108 – whoever abets the commission of an offence punishable with death shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description for a term which may extend to seven years, and also be liable to a fine; and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to a fine.

Section 103 – whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Section 104 – when an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it, provided that the act done was a probable consequence of the abetment and was committed under the influence of the instigation, or with the aid or in the pursuance of the conspiracy which constituted the abetment.

Section 105 – if the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Section 106 – when an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Section 107 – whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

Section 110 – whoever abets the commission of an offence by the public generally, or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description which may extend to three years, or with fine, or both.

Conspiracy

King v Silva – A (in concert with B) instructed Z on how to beat B at a game of cards. Z went to meet A and B after informing the police. Police arrested A and B before the game was played and B's suitcase did not have cash but pieces of paper. Held that A was guilty of abetment of cheating. However, as cheating was not actually committed, B could not be dealt with and B was acquitted.

In response to the above case, Ordinance No. 5 of 1924 was passed to amend the Penal Code by adding Chapter VA 'Of Conspiracy'.

Section 113A – 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. A person within Sri Lanka can be guilty of conspiracy by agreeing with another person who is beyond Sri Lanka for the commission or abetment of any offence to be committed by then or either of them, or by any other person, either within or beyond Sri Lanka, and for the purposes of this section as to an "offence" means any act which if done within Sri Lanka would be an offence under the Penal Code or any other law.

King vs. M.E.A. Cooray - Gratian J referring to the two limbs in section 113A held that: 'in either set of circumstances conspiracy consists in the agreement or confederacy to a criminal act whether it is done or not'

King v Dharmasena – at least two are required to commit conspiracy.

The King vs. Ponnusamy Sivapathasunderam - Section 113A penalises conspiracy to commit an offence as well as to abet the commission of the offence.

The King vs. M. E. A. Cooray et. al. - "...for the purpose of establishing the offence of criminal conspiracy, the only form of 'agreement' which needs to be proved is an 'agreement with a common design'..."

Pauline de Croose v Queen – it is the 'agreement' that is pivotal for this offence and NOT the 'overt acts' committed in consequence of the agreement.

Sundaram – three distinct acts of cheating committed in pursuance of one agreement would make the accused liable for a single conspiracy

Queen v Liyanage – essence of conspiracy is the agreement to do unlawful acts; but it is not necessary that any act should take place – it is the agreement and not the act which is penalised. Some conspirators may form the conspiracy and other may join later but they are all equally guilty.

Thilakeratne & Others v Attorney General – previous acquaintance between conspirators is unnecessary to establish conspiracy.



Dayanada Lokugalappatthi & Others v the State – In establishing detached acts of each of the accused related to the main design the prosecution can proceed to establish the conspiracy itself

Section 113B – if two or more persons are guilty of the offence of conspiracy for the commission of any offence, each of them shall be punished in the same manner as if he had abetted such offence.

Right of Private Defence

It is a universally accepted principle that a person may protect themselves from harm under appropriate circumstances, even when that behavior would normally constitute a crime.

The defence of self-defence operates in three spheres. It allows a person to use reasonable force to:

- (a) Defend himself from an attack.
- (b) Prevent an attack on another person, eg: *R v Rose* (1884) 15 Cox 540, where the defendant who had shot dead his father whilst the latter was launching a murderous attack on the defendant's mother, was acquitted of murder on the grounds of self-defence.
- (c) Defend his property.

“Infliction of harm, in the interests of preservation of oneself or another, is justified in contemplation of law, by the exigencies of the situation in which the accused is placed”
- G.L. Peiris

The classic pronouncement upon the law relating to self- defence is that of the Privy Council in *Palmer v. R* (1971) A.C 814

Lord Morris – “it is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous.

Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary.

Palmer was applied in *R v Clegg* (1995) 1 A.C, in which it was held that where a person kills another with the requisite intent for murder in circumstances in which he would have been entitled to an acquittal on the ground of self defence but for the use of excessive force, the defence fails altogether and he is guilty of murder , not of manslaughter; that there is no distinction to be drawn between the use of excessive force in self- defence and the use of excessive force in the prevention of crime or in arresting an offender; and that it makes no difference that the person using the force is a policeman or a soldier acting the course of his duty .

R v Deana 2 Cr. App. R 75 CCA - there is no rule of law that a man must wait until he is struck before striking in self-defence. If another strikes at him he is entitled to get his blow in first if it is reasonably necessary so to do in self defence;

The old rule of law a man attacked must retreat as far as he can, has disappeared. Whether the accused did retreat is only one element for the jury to consider on the question of whether the force was reasonably necessary. – Archbold

Section 89 – Nothing is an offence which is done in the exercise of the right of private defence

Section 90 – Every person has a right, subject to the restrictions contained in section 92, to defend –

Firstly – his own body, and the body of another person, against any offence affecting the human body

Secondly – the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass

Punichiappu v Mohideen – accused with armed men entered property with the intention to beat up occupants. Accused and men were severely beaten and accused used knife against occupants. Accuser's action was not covered by right to private defence. Right to private defence is not available to aggressor cannot be resorted to as a weapon.

Section 91 – When an act, which would have otherwise be a certain offence, is not that offence by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have of the act were that offence

Section 92 – There is no right of private defence –

- (1) against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public officer acting in good faith under the colour of his office, though that act may not be strictly justifiable by law

Explanation 1 – a person is not deprived of the right of private defence, against an act done, or attempted to be done by a public officer as such unless he knows or has reason to believe that the person doing the act is such public officer

King v Wannaku Tissahamy – accused found guilty of attempted murder for firing on police who were attempting to apprehend him (and who were also firing back at him)

- (2) against an act which does not reasonably cause the apprehension of grievous hurt, if done, or attempted to be done, by the direction of a public officer acting in good faith under the colour of his office, though that direction may not be strictly justifiable by law

Explanation 2 – A person is not deprived of the right of private defence against an act done, or attempted to be done by the direction of a public officer unless he knows or has reason to believe that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority if demanded

- (3) in cases in which there is time to have recourse to the protection of the public authorities

Queen v Rodrigo – the limit does not apply where the person is set upon by an assailant and there is imminent danger of death or grievous hurt. When the attack is known of beforehand and there is sufficient time to recourse, the limitation will apply.

- (4) extending to the inflicting of more harm than is necessary to inflict for the purpose of defence

Tissera v Edwin – the accuser had the right to cause hurt to prevent the injured from taking away the stolen item until he was arrested

Amaris v Muttucumaru – use of knuckle duster to fracture ribs of trespasser for forcibly eject trespasser was in excess of the right to private defence

Jansz v Appuhamy – right to private defence for watcher to open fire on thief does not arise when the thief does not show any intention to use the knife; however if he sees the thief descending with stolen property, he could act in right to private defence to prevent the thief from escaping with stolen property

Section 93 – the right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely –

Firstly – Such and assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault

Second – Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault

Thirdly – an assault with the intention of committing rape

Fourthly – an assault with the intention of gratifying unnatural lust

Fifthly – an assault with the intention of kidnapping or abducting

Sixthly – an assault with the intention of wrongfully confining a person, under the circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release

Section 94 – if the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 92, to the voluntary causing to the assailant of any harm other than death

Section 95 – the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues

Section 96 – the right of private defence of property extends, under the restrictions mentioned in section 92, to the voluntary causing of death or of any other harm to the wrong doer, if the offence, the committing of which, or attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely –

Firstly – Robbery

Secondly – House breaking by night

Thirdly – Mischief by fire, or explosives committed on any building, tent, or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property

Fourthly – mischief, or house-trespass under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised

Section 97 – If the offence the committing of which, or the attempting to commit which, occasions the exercise of the right to private defence, be theft, mischief or criminal trespass not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the

restrictions mentioned in section 92, to the voluntary causing to the wrong-doer of any harm other than death

Section 98 –

Firstly – the right of private defence of property commences when a reasonable apprehension of danger to the property commences

Secondly – the right of private defence of property against theft continues till the offender has effected his retreat with the property or the assistance of the public authorities is obtained, or the property has been recovered

Thirdly – the right of private defence of property against robbery crimes continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint; or as long as the fear of instant death or of instant hurt or in instant personal restrain continues

Fourthly – the right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief

Fifthly – the right of private defence of property against house-breaking by night continues as long as the house-trespass which has begun by such house breaking continues

Section 99 – If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk

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

Insanity

Sri Lankan law of insanity is founded on series of rules which evolved in the English legal system.

M'Naghten – M'Naghten was suffering from acute insomnia, pains in the head and he believed he was being persecuted by the Police, the Church and the Tories. He shot and killed the Prime Minister's Secretary. Court held that "if he was capable of distinguishing between right and wrong, then he was a responsible agent and liable to the entire penalty the law imposes" and the verdict was "guilty but insane"

There was a debate in the House of Lords due to the public outcry and their lordships addressed questions to the judges to which the following answers were provided:-

- (1) The responsibility of the accused – the accused is punishable “if he knew at the time of committing such a crime that he was acting contrary to law”
- (2) When defence of insanity is invoked – “it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing what was one which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable”
- (3) When a person has acted on under an insane delusion on the facts – “he must be considered in the same situation as of the facts with respect to which the delusion exists were real. For example, if under the influence of delusions, he supposes another man to be in the act of attempting to take away his life and he kills that man as he supposes, in self defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, he killed him in revenge for such supposed injury; he would be liable to punishment”
- (4) Opinion of medical experts who had never seen the accused before but were present during the trial

Section 77 – Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Abraham Appu – burden rests on the accused to show that he did not know the nature of the act or that it was contrary to law

Don Nikulas Buiya – the burden of proving ‘insanity’ could be discharged in the standard ‘preponderance or balance of evidence’

King v Jayawardane – Father, brother and sister of the accused were insane. Accused had epileptic fits as a child and his mental condition was deteriorated at the time of arrest. However during his thirty year service as a public servant he displayed no signs of mental aberration and as such evidence was insufficient to discharge the burden which lay on the accused to show that he was insane

Nimalaratne v Republic of Sri Lanka – accepted the principle in *Don Nikulas Buiya*. Accused charged with the murder of his wife. Evidence showed a history of insanity in the family and that he acted queerly in his childhood and was prone to epileptic fits.

Intoxication

Involuntary intoxication:-

Section 78 – Nothing is an offence which is done by a person who at the time of doing it is by reason of intoxication incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Voluntary intoxication:-

Section 79 – in cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Section 79 is intended to deal with two classes of cases :-

- (a) Cases in which knowledge is an essential element of the crime.
- (b) Cases in which intention is an essential element of the crime.

There is a constructive imputation of knowledge and the accused is denied the plea that he lacked awareness. If intention is required to be proved, the surrounding facts should be considered to ascertain if the accused entertained such intoxication.

Marikkar v Queen – intoxication caused by opium and all other forms of drugs and narcotics are within the scope of section 78 and 79

King v Velaiden – burden of proof lies with the accused. Merely establishing that the mind of the accused was affected by drink so that he more readily gave way to violent passion does not rebut the presumption that a man intends the natural consequence of his actions

Rathnayake v Queen – it is for the person who raises the plea of drunkenness to establish on a balance of probability that he had reached that state of intoxication in which he could not have formed a murderous intention

Dayaratne v Republic of Sri Lanka – “due to the state of intoxication he did not have the capacity to form a murderous intention”

Necessity

Section 74 – Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it be done without criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property.

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

Illustrations:-

- (a) A, the captain of a steam vessel, suddenly and without fault or negligence on his part, find himself in such a position that, before he can stop his vessel, he must inevitably run down a boat, B, with twenty or thirty passenger on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C, with only two passengers on board, which he may possibly clear. Here if he alters his course without any intention to run down the boat C, and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down boat C.
- (b) A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

Kidnapping and Abduction

Kidnapping:-

Section 350 – Kidnapping is of two kinds (i) kidnapping from Sri Lanka; and (ii) kidnapping from lawful guardianship

Section 351 – whoever conveys any person beyond the limits of Sri Lanka without the consent of that person or of some person legally authorised to consent on behalf of that person is said to “kidnap that person from Sri Lanka”

Section 352 – 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 guardianship, is said to “kidnap such minor or person from lawful guardianship”

Explanation – the words “lawful guardianship” in this section include any person lawfully entrusted with the care or custody of such minor or other person

Explanation – 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

Nalliah v Herath – victim was a 13 ½ year old girl who was asked by the accused to join him for the cinema. “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 chooses 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”. The offence of kidnapping would have been complete if she had been forced or enticed away for an improper purpose.

King v de Croos – the removal of two girls, under the age of 16, by their court appointed lawful guardian from the custody of mother superior at a convent school who was refusing to release them for Christmas holidays was not kidnapping.

Murugesu and another v Weerakoon – child appears to be of an age near to the marginal age. No birth certificate provided. Father’s claim was insufficient to prove the age of the child.

Sirisena and two others v Sub Inspector of Police - even if the accused believed in good faith that the girl who he took, without the knowledge of parents, for the purpose of marriage was of age, the liability of the accused was intact. It was immaterial that the minor went willingly – this does not substitute the guardians consent.

Section 354 – whoever kidnaps a person from Sri Lanka or from lawful guardianship shall be punished with imprisonment for either description for a term which may extend to seven years, and shall also be liable to fine

Abduction:-

Section 353 – whoever by force compels, or by any deceitful means, or by abuse of authority or any other means of compulsion, induces any person to go from any place, is said to “abduct” that person.

Section 355 – whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with rigorous imprisonment for a term which may extend to twenty years and shall also be liable to a fine

Illustration A – A kidnaps Z from Sri Lanka, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

Illustration B – A forcibly carries or entices B away from his home on order that B may be murdered. A has committed the offence defined in this section.

Section 356 – whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined shall be punished with imprisonment for either description for a term which may extend to seven years and shall also be liable to a fine.

Section 357 – whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to a fine.

Queen v Murugesu and others – the offence of abduction with the necessary intention is complete whether or not rape was committed subsequent to the abduction or even if the girl had intercourse willingly with the accused.

King v Wegodapola – natural presumption when a young man abducts a girl of marriageable age is that he abducted her with the intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her

Section 358 – Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be subjected to fine.

Section 360 – whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly, any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine.

Sexual Offences

Sexual Harassment:-

Section 345 – whoever by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other persons commits the offence of sexual harassment and shall on conviction be punished with imprisonment of either description for a term which may extend to five years or with a fine or with both and may also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person

Explanation 1 – unwelcome sexual advance by words or actions used by a person in authority, in a working place or any other place shall constitute sexual harassment

Explanation 2 – for the purposes of this section an assault may include any act that does not amount to rape under section 363

Grave Sexual Abuse:-

Section 365B – grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any instrument or on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions that is to say –

- (a) Without the consent of the other person
- (b) With or without the consent of the other person when the other person is under sixteen years of age
- (c) With the consent of the other person while on such other person was in lawful or unlawful detention or where that consent has been obtained, by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt
- (d) With the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a state of intoxication by alcohol or drugs

Whoever –

- (a) Commits grave sexual abuse shall be punished with rigorous for a term not less than seven years and not exceeding twenty years and with a fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person

- (b) Commits grave sexual abuse on any person under eighteen years of age shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with a fine and shall also be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed and the injuries caused to such person

Rape:-

Section 363 – a man is said to commit “rape” who has sexual intercourse with a woman under the circumstances falling under any of the following descriptions –

- (a) Without her consent even where such a woman is his wife and she is judicially separated from the man
- (b) With her consent while she is in lawful or unlawful detention or when her consent has been obtained by use of force or intimidation or by threat of detention or by putting her in fear of death or hurt
- (c) With her consent when her consent has been obtained at a time when she was of unsound mind or in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person, that he is another husband or judicially separated from the man (statutory rape) over fifteen years of age and is not a married woman.

Explanation –

- i. Penetration is sufficient to constitute the sexual intercourse necessary for the offence of rape
- ii. Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent

See: AG vs. Ranasinghe and others – Statutory Rape

Consent:-

Inoka Gallage v Kamal Addaraarachchi & another – a mere act of submission does not involve consent. Every consent involves submission but the converse does not follow. Consent may be express or implied. Girl left home without compulsion and went from place to place with the accused, never complaining about ill treatment. Only her evidence was available to support the alleged sexual intercourse without consent and so it was held that if there was any sexual act, it was with her consent.

Kamal Addaraarachchi v State – the view that “tacit consent has no place in law” is a legal misdirection – the notion of tacit consent in this case was too glaring in this case to be disregarded

Section 364 –

(2) (1) Whoever commits rape shall, except in the cases provided for in subsections (2) and (3), be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by court, to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Whoever –

- a. Being a public officer or person in position of authority, takes advantage of his official position and commits rape on a woman in his official custody or wrongfully restrain and commits rape on a woman;
- b. Being on the management, or on the staff of a remand home or other place of custody, established under law, or of a women’s or children’s institution, takes advantage of his position and commits rape on any woman inmate of such remand home, place of custody or institution;
- c. Being on the management or staff of a hospital, takes advantage of his position and commits rape on a woman in that hospital;
- d. Commits rape on a woman knowing her to be pregnant
- e. Commits rape on a woman under eighteen years of age
- f. Commits rape on a woman who is mentally or physically disabled
- g. Commits gang rape (where the offence of rape is committed by one or more persons in a group of persons, each person in such group committing or abetting the commission of such offence is deemed to have committed gang rape)

Shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with a fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person; provided however where the offence is committed in respect of a person under sixteen years of age, the court may, where the offender is a person under eighteen years of age and the intercourse has been with the consent of the person, impose a sentence of imprisonment for a term less than ten years.

See: Ram Kumar vs. State of Himachal Pradesh - Custodial Rape
 Pramod Mahto and Others vs. The State of Bihar – Gang Rape
 Sajeewa alias Ukkuwa and Others vs. AG - Gang Rape

Corroboration:

If the evidence of the victim does not suffer from basic infirmity and the probability factor does not render it unworthy or credence as a general rule, there is no reason to insist on corroboration.

As a rule of prudence however, it has been emphasised that courts should normally look for some corroboration of her testimony in order to satisfy

itself that the prosecutrix is telling the truth and the person accused of abduction or rape has not been falsely implicated.

Corroborative evidence should “show or tend to show” that the story that the accused committed the crime is true not merely that the crime was committed but that it was committed by the accused – *Rex v Baskerville*

King v Marthelis – corroborative evidence that the girl entered his house during the time the offence was committed, blood on his sarong that day an false denial that he was not in the house corroborates the girl’s story to show that he must have been the culprit

Karunasena v Republic of Sri Lanka – corroborative evidence renders the story of the prosecution to be probable. One can hardly expect direct evidence of corroboration in such cases – it is circumstances which can support the prosecution.

King v Burke – accused was suffering from gonorrhoea and the fact that the victim contracted this a week after the assault was corroborative evidence

King v Atukorale – corroboration of the victim’s story should come from an independent source

Incest:-

Section 364A – Empowers Independent Learning

- (1) whoever has sexual intercourse with another, who stands towards him in any of the following enumerated degrees of relationship, that is to say –
 - (a) Either party is directly descended from the other or is the adoptive parent, adoptive grandparent, adopted child or adopted grandchild of the other; or
 - (b) The female is the sister of the male either by the full or half blood or by adoption, or is the daughter of his brother or of his sister, by the full or half blood or by adoption, or is a descendant from either of them, or is the daughter of his wife by another father, or is the son’s or grandson’s or father’s or grandfather’s widow; or
 - (c) The male is the brother of the female either by the full or half blood or by adoption, or is the son of her brother or of his sister, by the full or half blood or by adoption, or is a descendant from either of them, or is the son of her husband by another mother, or is her deceased daughter’s or granddaughter’s or mother’s or grandmother’s husband Commits the offence of ‘incest’
- (2) The offence of incest shall not be affected or negated by reason of the existence of any defect in the legality of any relationship given in this section such as the absence of a valid marriage or adoption

- (3) Whoever –
- (a) Commits incest, shall be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with a fine
 - (b) Attempts to commit incest shall be punished with imprisonment of either description for a term which may extend to two years
- (4) No prosecution shall be commenced for an offence under this section except with the written sanction of the Attorney-General

Theft

Section 366 – whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property on order to such taking, is said to commit "theft"

Explanation 1 – 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

Explanation 2 – a moving effected by the same act which effects the severance may be a theft

Explanation 3 – 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

Explanation 4 – 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

Explanation 5 – the consent mentioned in the definition may be express or implied and may be given by either person in possession, or by any person having for that purpose authority either express or implied

Packer Ali v Savarimuttu – intention of the accused is the predominant feature rather than the consent of the person. Appearance of consent by the person who has the possession with the view to entrap the offender

Illustrations –

- (a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here as soon as A has severed the tree, in order to such taking, he has committed theft
- (b) A puts bait for dogs in his pocket and thus induced Z's dog to follow it. Here if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A

- (c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed the theft of the treasure
- (d) A being Z's servant entrusted by Z with the care of Z's plate, dishonestly runs away with the plate without Z's consent. A has committed theft
- (e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession and A has not committed theft, though he may have committed criminal breach of trust.
- (f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession and if A dishonestly removes it, A commits theft.
- (g) A finds a ring lying on the high road not in the possession of any person. A by taking it commits no theft though he may commit criminal misappropriation of the property
- (h) 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
- (i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A not owing to the jeweller any debt for which the jeweller might lawfully detain his watch as security enters the shop openly takes his watch by force out of Z's hand and carries it away. Here A though he may have committed criminal trespass and assault, has not committed theft inasmuch as what he did was not done dishonestly
- (j) If A owes money to Z for repairing the watch and if Z retains the watch lawfully as a security for the debt and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt he commits theft, inasmuch as he takes it dishonestly
- (k) Again if A having pawned his watch to Z takes it out of Z's possession without Z's consent not having paid what he borrowed on the watch, he commits theft though the watch is his own property inasmuch as he takes it dishonestly
- (l) A takes an article belonging to Z out of Z's possession without Z's consent with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.
- (m) A being on friendly terms with Z goes into Z's library in Z's absence and takes away a book without Z's express consent for the purpose of merely reading it and with the intention of returning it. Here it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.
- (n) A asks charity from Z's wife. She gives A money, food and clothes which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. if this was A's impression, A has not committed theft.

- (o) A is the paramour of Z's wife. She gives a valuable property which A knows to belong to her husband Z and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.
- (p) A in good faith, believing property to belong to Z to be A's own property, takes property out of B's possession. Here as A does not take dishonestly, he does not commit theft.

Section 22 – 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 21 –

- (1) “wrongful gain” is the gain by unlawful means of property to which the person gaining is not legally entitled to
- (2) “wrongful loss” is the loss by unlawful means of property to which the person losing it is legally entitled
- (3) A person is said to gain wrongfully when such a person retains wrongfully, as well as when such a person acquires wrongfully
- (4) 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

Ramalingam v Nair – removal of Rs. 25 as a penalty was held to have done with “dishonest intention” even though the accused did not intend to personally benefit

Abdul v Dias – accused acted with dishonest intention where he untied a bull from complainant's garden and took it to the police station claiming it to be lost thus incurring a fine for the complainant

Leon – moving property with the intention to cause annoyance is not intention which is dishonest and would not amount to theft

Wijesinghe v de Saram – Possession is not ownership. Legal right to ownership has no bearing in deciding the liability for theft

Section 114 of the Evidence Ordinance provides 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”

See: Banda vs. Andre Appu (NLR vol. 25, page 218)

Sumanasena vs. The King (NLR vol 52, page 400)

Extortion

Section 372 – 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"

Illustrations –

- (a) A threatens to publish defamatory libel cornering Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.
- (b) A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay certain moneys to A. Z signs and delivers the note. A has committed extortion.
- (c) A by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here as the paper so signed may be converted into a valuable security, A has committed extortion.

Section 43 – the word "injury" denotes any harm whatever illegally caused to any person in body, mind, reputation or property.

Section 373 – whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Robbery

Section 379 – In all robbery there is either theft or extortion.

Theft is "robbery" if, in order to commit the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by theft, the offender, for that end, voluntarily causes or attempts 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

Extortion is "robbery" if the offender at the time of committing extortion is in the presence of the person put in fear and commits 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 by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted

Explanation – 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

Illustrations –

- (a) A holds Z down and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. A has committed theft

and in order to commit that theft, he has voluntarily caused the wrongful restraint of Z. A has therefore committed robbery.

- (b) A meets Z on the high road, shows a pistol and demands Z's purse. In consequence Z surrenders his purse. Here A has extracted the purse from Z by putting him in fear of instant hurt and being at the time of committing extortion in his presence, A has therefore committed robbery
- (c) A meets Z and Z's child on the high road. A takes the child and threatens to fling it down a precipice unless Z delivers his purse. Z in consequence, delivers his purse. Here A has extorted the purse from Z by causing Z to fear the instant hurt of the child who is there present. A has therefore committed robbery on Z.
- (d) A obtains property from Z by saying "your child is in the hands of my gang and will be put to death unless you send us ten thousand rupees" – this is extortion and is punishable as such but it is not robbery unless Z is put in fear of the instant death of his child

Alwis Appu et. al. vs. Bansagayah (1947)

The accused-appellants were convicted of committing robbery of a bicycle worth Rs. 150/= from the victim and causing hurt to him by hands. In the appeal, the counsel for the accused-appellants raised the question whether the learned Magistrate was acting within his powers when he convicted the two accused on the second charge of causing hurt.

Held: The learned Magistrate had no power to convict the accuseds on the second charge as 'Hurt' is an essential element of 'Robbery'. Section 67 of the Penal Code reads as follows;

"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 his offences, unless it be so expressly provided."

As such, a sentence on a charge of causing hurt cannot be given to an accused who is sentenced on a charge of robbery.

Also see; Seenitamby vs. Inspector of Police, Batticaloa (NLR vol 46 page 551)
The King vs. Podi Sinno (NLR vol 11 page 235)

Section 380 – whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine and if the robbery be committed on the highway between sunset and sunrise the imprisonment may be extended to fourteen years.

Aggravated forms of Robbery:-

Section 382 – if any person in committing or in attempting to commit robbery, voluntarily causes hurt, such person and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with rigorous imprisonment for a term which may extend to twenty years and shall also be liable to fine or to whipping

Section 383 – if, at the time of committing robbery, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offenders shall be punished may be extended to twenty years

Section 384 – If, at the time of attempting to commit a robbery, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished may be extended to twenty years

Criminal Misappropriation

Section 386 - Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

See: Barber vs. Abdulla (1920)

AG vs. Menthis

Criminal Breach of Trust

Section 388 - Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

See: Basnayake v. Inspector of police P.I.B.

Cheating

Section 398 – 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 to do 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”

Explanation – a dishonest concealment of facts is a deception within the meaning of this section

Illustrations –

- (a) A, by falsely pretending to be in the Sri Lanka Administrative Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit, goods for which he does not mean to pay. A cheats.
- (b) A, by putting a counterfeit mark on an article intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer and thus dishonestly induces Z to buy and pay for the article. A cheats.
- (c) A by exhibiting to Z a false sample of an article intentionally deceives Z into believing that the article corresponds with the sample and thereby dishonestly induces Z to buy and pay for the article. A cheats.
- (d) A, by tendering in payment for an article a cheque on a bank with which A keeps no money and by which expects that the cheque will be dishonoured, intentionally deceives Z and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.
- (e) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z and thereby dishonestly induces Z to lend money. A cheats.
- (f) A intentionally deceives Z into 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. A cheats.
- (g) 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
- (h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z which he has not performed and thereby dishonestly induces Z to pay money. A cheats.
- (i) A sells and conveys an estate to B. A knowing that in consequence of such sale he has no right to the property sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B and receives the purchase or mortgage money from Z. A cheats.

Abeywardene v Muttunayagam – “no conviction is possible unless it is shown that the mind of the victim was misled by the false pretence and that he was thereby induced to part with his money or goods” – however in such circumstances there is no bar to find the accused guilty of attempt.

Zahir vs. Cooray - "Where in a charge of cheating, the manner of cheating set out in the charge did not in law constitute the offence, the charge would be insufficient to sustain a conviction although a sufficient manner of cheating has been proved."

The King vs. Chandrasekara - "To constitute cheating it is not necessary that the deception should be by express words or visible representation. It may be equally practised by conduct employed in the transaction itself."

Section 399 - 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.

Explanation - the offence is committed whether the individual personated is a real or imaginary person

Illustrations -

- (a) A cheats by pretending to be a certain rich merchant of the same name. A cheats by personation.
- (b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Section 400 - whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Section 402 - whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Forgery

Section 452 - whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to the Government, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Section 454 - whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to five years, or with a fine, or with both.

Section 458 - a false document made wholly or in part by forger is designated "a false document".

Section 459 - whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document shall be punished in the same manner as if he had forged such document.