

38. Desertion and aiding desertion.— (1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial, if he commits the offence on active service or when under orders for active service, be liable to suffer death or such less punishment as is in this Act mentioned; and if he commits the offence under any other circumstances, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(2) Any person subject to this Act who, knowingly harbours any such deserter shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned.

(3) Any person subject to this Act who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

NOTES

1. **General.**—(a) An offence under sub-section (1) of this section when on active service or under orders for active service should not be dealt with summarily under [AA.ss.80, 83 or 84](#).

(b) When a superior officer directs the case of an offender against whom a charge for desertion has been preferred to be summarily disposed of, he should order the offence to be disposed of as one of absence without leave. See [notes to AA.s.39](#). See generally [AA.ss.104 and 105](#) and [Regs Army paras 376 to 381](#).

(c) Under [AA.s.120\(3\)](#), a CO can try by SCM a NCO or sepoy under his command, for an offence under this section. As a rule a NCO or OR cannot be attached to another unit for purposes of his trial by SCM; but see [Regs Army para 381](#) for the circumstances when a CO other than the CO of the unit to which a NCO or OR properly belongs, can try him by SCM for an offence of desertion or absence without leave.

2 Sub sec.(1).—Desertion is distinguished from absence without leave under [AA.s.39](#); in that desertion or attempt to desert the service implies an intention on the part of

the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire piquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.

3. A person may be a deserter although he re-enrolls himself, or although in the first instance his absence was legal (e.g. authorised by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).

4. Intention to desert may be inferred from a long absence, wearing of disguise, distance from the duty station and the manner of termination of absence e.g., apprehension but such facts though relevant are only *prima facie*, and not conclusive, evidence of such intention. Similarly the fact that an accused has been declared an absentee under [AA.s.106](#) is not by itself a deciding factor if other evidence suggests the contrary.

5. A person subject to the AA charged with desertion may be found guilty of an attempt to desert or of absence without leave, and such a person charged with attempting to desert may be found guilty of being absent without leave provided evidence was available to prove the absence; see [AA.s.139\(1\) and \(2\)](#). When the absence began more than 3 years before the date of trial, the provisions of [AA.s.122](#) must be borne in mind and complied with. For instance where an accused person is charged with desertion commencing on a date more than three years before the date of trial, he cannot be found guilty under [AA. s. 139\(1\)](#) of absence without leave from that date but such absence must be restricted to a period not exceeding three years immediately prior to the commencement of trial; where such a finding and sentence has been wrongly confirmed, the competent authority under [AA.s.163](#) may substitute a valid finding and pass a sentence for the offence specified or involved in such finding.

6. When a person subject to AA has been absent from his duty without authority for a period of thirty days, a court of inquiry is mandatory under [AA.s.106](#) but even after such a court of inquiry has been held, the case can still be disposed of summarily under [AA.s.80, 83](#) or [84](#) but the charge should be laid for absence without leave under [AA.s.39](#). As to inquiring into absence see [AR183](#) also.

7. [AA.s.122](#) which prescribes the limitation of time for the trial of offences expressly excludes desertion; but where a person other than an officer has subsequently to the commission of the offence served continuously in an exemplary manner for not less than three years, he cannot be tried for such offence of desertion which was committed before the commencement of such three years other than desertion on active service. For 'exemplary service' see [Regs Army para 465](#).

8. Two or more persons cannot be tried jointly with committing the offence of desertion under this sub sec.

9. [AA.ss.90\(a\)](#) and [91\(a\)](#) read with P and A Regs provide for automatic forfeiture of pay and allowances for every day a person subject to AA is absent on desertion or without leave.

10. As to forfeiture of service for pension or gratuity, which follows upon desertion, and restoration of service so forfeited, see Regs pension (Part I) Reg 123. The period between desertion and apprehension/surrender does not, under the prescribed conditions of enrolment; reckon as service towards discharge. Service rendered previous to desertion, though forfeited for purposes of pension or gratuity, reckons as service towards discharge.

As to a person who absents himself from his corps or department and enrolls again, see [AA.s.43](#) and notes thereto.

11. (a) While framing charges of desertion or absence without leave care must be taken to ensure that the particulars allege and the prosecution prove, both the date when the absence began, and the date when it ended (by return, surrender, apprehension or re-enrolment). It is not sufficient to allege and prove absence "on or about" a certain date, or "from some date subsequent to.....".

(b) Commencement of absence under this section or [AA.s.39](#) may be proved in the following ways :

(i) orally by a witness who found the accused absent, or

(ii) by production by a witness on oath, who can identify the accused as the person named in

(aa) the declaration of a court of inquiry held under AAs.106 as entered in the court-martial book; or	Provided AA.s 106 and AR 183 have been compiled with
(bb) a certified true copy of the above declaration on IAFD-918; or	

(cc) an entry in a part II Order; provided the entry is one that is made in Regimental orders/books in pursuance of military duty and the orders purported to be signed by the CO or by the officer whose duty it is to make such record [AA.s.142\(3\)](#). Such an entry should only be used as evidence where no direct evidence and no declaration of a court of inquiry is available and even then it is only prima facie evidence and may be rebutted; or

(dd) a copy of such an order purporting to be certified to be a true copy by the officer having custody of such order; see [AA.s.142\(4\)](#).

(c) Termination of absence may be proved in the following ways : —

(i) by oral evidence of a witness who apprehended the accused or to whom the accused surrendered; or

(ii) by production by a witness on oath, who can identify the accused as the person named in :

(aa) a certificate on IAFD-910 stating the fact, date and place of surrender or apprehension and the manner in which the accused was dressed and signed by a police officer not below the rank of an officer in charge of a police station to whom the accused surrendered or by whom he was apprehended [AA.s.142\(6\)](#); or

(bb) where the surrender was made to an officer or other person subject to AA or any portion of the regular Army or where the accused was apprehended by an officer or other person subject to AA, a similar certificate signed by the 'proper' officer : [AA.s.142\(5\)](#) (Also see [Regs Army para 378](#)); or

(cc) a Part II Order showing the taking on strength properly signed in accordance with [AA.s.142\(3\)](#); or

(dd) a certified true copy of such order in accordance with [AA.s.142\(4\)](#); or

(ee) where the absence terminated by fraudulent enrolment in the regular Army, the enrolment paper or certified true copy thereof. [AA.s.141\(2\)](#).

12. The commencement of an absence cannot be proved by production of an absence report as this is not a regimental book under [Regs Army para 610](#).

13 **Attempt to desert.**— To establish an attempt to desert, some act which, if completed, would constitute desertion must be proved, e.g., a soldier is arrested in the act of leaving his unit lines without authority, dressed in plain clothes and carrying his personal kit, when the circumstances indicate that he intends to desert. The test is whether the act, or series of acts, in the course of which the offender is apprehended or surrenders, would, if completed, amount to desertion. A mere preparation to desert, if unaccompanied by any such act which if completed would amount to. Desertion does not constitute an offence of attempting to desert. But if there is evidence that the offender actually absented himself from the place where his duty required him to be and that he intended to desert, the offence is complete and a charge for desertion, not for an attempt to desert should be framed.

Attempt to desert is itself made a substantive offence, and a charge for the same should be preferred under this sub sec and not under [AA.s.65](#).

14. For definition of active service; see [AA.s.3\(i\)](#).

15. Abetment of desertion of a person subject to the AA can be charged under [AA.s.66](#).

16. Sub sec (2) : Knowingly.—see note [18 to AA.s.34](#).

17. Harbours: see [note 19 to AA.s.34](#).

18. Any such deserter.—A charge under this sub sec can lie when the offence of desertion has already been committed.

19. *Sub sec.(3).— To substantiate a charge the particulars must specify the precise steps which, it is alleged by the prosecution, were within the power of the accused to take to cause the deserter or intending deserter to be apprehended. The times at which the accused became aware of the desertion or attempt to desert and gave notice to a superior officer, are material and should be disclosed in the charge.*

20. *Superior officer means the 'Superior Officer' in relation to the offender, not to the deserter or intending deserter,*